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THE

Weekly Reporter,

APPELLATE HIGH COURT,

CONTAINING

CISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDER'S COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF H. M.'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND.

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In the Index to the Civil Rulings, all cases which involve poi relating to the Rent Law (Act X. of 1859), even though no Section the Law is expressly alluded to, are distinguished by an asterisk be the number of the page where they may be found. The Editor tr that this simple expedient will meet the wishes of those Subscribers have advocated a separate head for Act X. Rulings.

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Per Norman, J.—Where the Court added a third party as a plaintiff, and, in the absence of the original plaintiff, improperly dismissed the suit, it was held that the suit was still pending, and undisposed of by the Lower Court as regards the original plaintiff, and the Lower Court was ordered under the High Court's powers of superintendence vested in it by the 24 and 25 Vic., cap. 204, Section 15, to take up and try the case accordingly ... 277

(16) A decision by a Court that a Hindoo family is joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in any particular family, or upon any other question of the same nature in a suit *inter partes*, is not a judgment *in rem* or binding upon strangers (*i.e.*, persons neither parties to the suit nor privies); and a decree in such a case is not admissible as evidence at all against strangers.

No judgment of a Mofussil Court can be a judgment *in rem*.

Per Peacock, C. J., and *L. S. Jackson, J.*—By a decree brought by *A* against a widow as heiress of her husband to set aside alienations by her, and establish *A's* right as reversioner, it was declared that *A* was reversioner. Subsequently *B* (who was not a party to the former suit) sued to have it declared that he, and not *A*, was the person legally entitled to succeed on the widow's death. Held that the judgment in the former suit was not (upon the ground of its having been made in a suit brought against the widow when holding the estate as heiress) admissible as evidence against the plaintiff *B* in the second suit.

The suits to which the Privy Council intended to refer in the Shiva Gunga case (2 W. R. 31, P. C.) are suits in which the title of the settler or the validity of the estate-tail has been in issue, and not to suits against the tenant-in-tail in which a question has incidentally arisen, and been determined as to who was the remainderman entitled to succeed upon the termination of the estate-tail ... 338

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DIWAN BAHADUR KALLE NARAHARAO
12 APR. 1914
HIGH COURT V. XII.

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The Weekly Reporter,

APPELLATE HIGH COURT.

The 3rd January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Estoppel—Hindoo Law of Inheritance—Decrees against Sisters.

Case No. 2123 of 1866.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 29th May 1866, affirming a decision passed by Syud Emdad Ali, Principal Sudder Ameen of that District, dated the 18th April 1865.

Joygobind Sohoy (Defendant), *Appellant*,

versus

Mahtab Koonwar (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

No one for Respondent.

The survivor of several Hindoo sisters is not bound by decrees obtained against her sisters during their lives whose interest was only a life-interest in their father's property which, on their death, passed to the survivor as heir of her father.

Peacock, C.J.—The plaintiff in this case claims as heir of her father. She does not claim as heir of her sisters; and, although she and her sisters took the estate as heirs of the father, still her sisters had merely the right which a female takes by inheritance, namely, a right which continues only during her life. The sisters could not transmit the estate to their heirs, but the estate upon their death passed to the plaintiff as the heir of her father. Therefore, the plaintiff is not bound by the decrees which were obtained against the sisters during their lives.

The decree of the Lower Appellate Court is affirmed, but without costs, no one appearing for the respondents.

The 3rd January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

User.

Case No. 2189 of 1866.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 4th June 1866, reversing a decision passed by Baboo Kedaressur Roy, Moonsiff of Gopalpore, dated the 23rd February 1866.

Mooktaram Bhuttacharjee (Plaintiff), *Appellant*,

versus

Hurro Chunder Roy and another (Defendants), *Respondents.*

Baboo Roopnath Bannerjee for Appellant.

No one for Respondents.

A user *all along* or *from before* does not necessarily prove a right. Its existence must be proved from a time from which the right would be gained or presumed to have been gained.

Peacock, C.J.—We think that what the Judge means to say is that, looking at the evidence, it does not prove a right. He says "a prescriptive right," but he means a right which the plaintiff has acquired by usage. Then the question is, was it proved that he had got a right by usage? The 1st issue was whether the lands have been all along irrigated. But the expression "all along" is very indefinite. The Ameen, who was sent to make the local enquiry, says that the right was exercised *from before* which is equally indefinite. It does not show how long before. Probably, it means from before the occasion when the defendant admits it to have been exercised. A user *all along* or *from before* does not necessarily prove a

right. It must be proved to have existed from a time from which the right would be gained or presumed to have been gained. The Judge says that this has not been proved. We think that the Judge was right. It has not been shown that the right has been used from such a length of time as would cause a right, or from which such a right might be presumed.

The case does not come within the precedent cited (Sheikh Goburdhun *vs.* Sheikh Sadhoo, 1 Weekly Reporter, p. 244). We do not mean to say that we concur in that decision. If it were necessary for us to decide that point, we should probably have referred the question to a Full Bench. But, without expressing any opinion as to that decision, it appears to us that what the Judge in this case means to say is that, assuming the evidence to be true, the plaintiff has not proved a right to take the water out of the defendant's land.

The decision of the Lower Appellate Court is affirmed, but without costs, no one appearing for the respondent.

The 3rd January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Suit for kubooleut—Relation of landlord and tenant.

Case No. 2193 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. E. W. Molony, Officiating Judge of Moorshedabad, dated the 31st May 1866, affirming a decision passed by Baboo Poorno Chunder Ghose, Deputy Collector of that District, dated the 26th February 1866.

Ramessur Audhikaree (Defendant), *Appellant*,

versus

Messrs. R. Watson & Co. (Plaintiffs), *Respondents*.

Baboo Kishen Dyal Roy for Appellant.

Mr. J. S. Rochfort and *Baboo Onookool Chunder Mookerjee* for Respondents.

In order to maintain a suit for a kubooleut, the plaintiff must show that the relation of landlord and tenant existed between him and the defendant.

Peacock, C.J.—In order to maintain his suit for a kubooleut, it was necessary for the plaintiff to show that the relation of landlord and tenant subsisted between him and the defendant. No such relationship has been proved. The plaintiffs may have a right (we cannot say whether they have or not) to the land, and the defendant may be a trespasser. It has been frequently determined by this Court that a mere trespasser cannot be sued for a kubooleut.

The decree of the Lower Appellate Court is reversed with costs, and a decree given for the defendants with costs in all the Courts.

The 3rd January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Section 13, Act X. of 1859—Notice of Enhancement—Decrees.

Case No. 2121 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. G. G. Morris, Additional Judge of Jessore, dated the 31st May 1866, reversing a decision of Baboo Kisto Behary Mookerjee, Deputy Collector of Khoolna, dated the 27th November 1865.

Chunder Monee Dossee (Defendant), *Appellant*,

versus

Dhuroneedhur Lahory and others (Plaintiffs), *Respondents*.

Mr. J. S. Rochfort and *Baboo Nuleel Chunder Sein* for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

According to Section 13, Act X. of 1859, a notice of enhancement must be served, not upon the under-tenant or ryot or his agent, but personally upon the under-tenant or ryot himself, in or before the month of Cheyt. If it cannot be so personally served, it must be affixed at his usual place of residence in the district in which the land is situated, or if he have no such place of residence, at the mál kutcherry, &c.

The decrees of the Lower Courts should be explicit in their terms, as well as in accordance with their judgments.

Peacock, C.J.—The law (Section 13, Act X. of 1859) is very express. It says that no under-tenant or ryot shall be liable to pay any higher rent for the land held or cultivated by him than the rent payable for the previous year, unless a written notice shall have been served on such under-tenant or ryot in or before the month of Cheyt. The Section goes on to say that the notice

shall, if practicable, be served personally on the under-tenant or ryot, or that, if for any reason it cannot be so served, it shall be affixed at his usual place of residence in the district in which the land is situated, or, if he have no such place of residence, at the mâl kutcherry, &c.

The question to be determined now is, whether there was personal service within the meaning of this Section. It is not found expressly that the person upon whom the notice was served was the general agent of the defendant who is a purdah lady managing all her affairs. Even if that had been found, I do not think it would have been sufficient. It is found merely that the defendant had charged this tenure with a certain amount to the father of the person upon whom the notice was served; that the person upon whom the notice was served was collecting the surplus rent for this lady; and that he is called a gomastah. It was served upon him, not at the premises the subject of the action, but at some factory.

It appears to me that that was not personal service on the ryot. The act does not say that the notice shall be served personally upon the under-tenant or ryot or his agent, but upon the under-tenant or ryot. The notice in this case was not served personally on the under-tenant or ryot, and if, for any reason, it was shown that it could not be served personally upon her, then it ought to have been served by being affixed at her usual place of residence in the district, or, if she had no such residence, in the manner prescribed by the Act. That not having been done, I do not think that the notice can render the tenant liable to be enhanced.

It is not for us to determine what the law ought to be. We have only to administer the law as we find it. If the law says that, if the notice cannot be served personally, it shall be served in some other manner, we must see if the notice has been served in that particular manner.

Under the circumstances, I think that the decision of the first Court was right that the notice was not served, and, consequently, that the defendant was not liable. The decision of the Judge will be reversed with costs.

Jackson, J.—I am of the same opinion. I would only add this, that there are words in the judgment of the Lower Appellate Court which might seem to amount to a finding on his part that personal service had been effected. He says, "I cannot think that appellant was unaware of the notice." These words may be taken to mean that notice was served personally in some way or other. But a vague finding of that sort is not sufficient. The Judge must find that the notice was served in or before the month of Cheyt. It cannot be presumed that the supposed agent, the witness Shustee Bhur Deb, gave a receipt on the very last day of the month of Cheyt; and it certainly cannot be supposed, and the Judge cannot be supposed to have found that that notice was served within that month.

I also desire to observe that the decree of the Lower Appellate Court is by no means drawn up with that degree of precision and regularity with which it ought to have been under the Civil Procedure Code. Section 360 prescribes that the decree must specify "clearly the relief granted or other determination of the appeal." In this case the Judge merely says, "I reverse the order of the Lower Court in the matter of non-service of notice, and give a decree with costs in favor of plaintiff, respondent." The decree should always be properly drawn up in such terms as to leave no doubt of what the Appellate Court intended to award.

In the present case the Judge says, "I give a decree with costs." Does he mean a decree for the whole thing claimed in the plaint, or for the amount which the Lower Court had, in the first instance, found the plaintiff entitled to (that decree having been altogether set aside), or for what?

I think it important that the Lower Courts should take care that their decrees are explicit in their effect, as well as in accordance with their judgments.

Peacock, C.J.—I entirely agree in the remarks of my Hon'ble colleague in regard to the decree, and think that, if we had to decide the case upon that ground, we should have been obliged to remand it in consequence of the vague terms in which the decree has been drawn up.

The 3rd January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Limitation—Minor.

Case No. 2360 of 1866.

Special Appeal from a decision passed by Baboo Kadernath Banerjee, Officiating Additional Principal Sudder Ameen of

East Burdwan, dated the 9th August 1866, affirming a decision passed by Baboo Bhooputty Roy, Officiating Sudder Ameen of that District, dated the 13th November 1865.

Radhamohun Gowee (Defendant), *Appellant*,

versus

Mohesh Chunder Kotwal and others (Plaintiffs), *Respondents*.

Baboo Nil Madhub Sein for Appellant.

Baboos Nobo Kishen Mookerjee and *Umbica Churn Banerjee* for Respondents.

The mere fact of a plaintiff not suing within 3 years of his attaining majority will not, in cases where Act XIV. of 1859 allows a general limitation of 12 years, bar his suit if brought within 12 years of the time when the cause of action accrued.

Peacock, C.J.—THE Principal Sudder Ameen seems to have misunderstood the case which he has cited from the 5th Vol. of the Weekly Reporter, p. 219. In that case it was held that the mere fact of a plaintiff not suing within 3 years of his attaining majority will not, in cases where Act XIV. of 1859 allows a general limitation of 12 years, bar his suit if brought within 12 years of the time when the cause of action accrued. That is to say, he may bring it either within 3 years from the time of his attaining majority, or within 12 years from the time when his cause of action accrued, whichever ended last.

In this case it is not found that the plaintiff brought his suit within 3 years after attaining majority, and, therefore, it was necessary for him to show that he brought his suit within 12 years from the time of his dispossession. The Principal Sudder Ameen has not entered into the question as to when he was dispossessed, and when the cause of action actually accrued, because he thought it unnecessary to do so; he having misapprehended the decision above quoted, and thought that, whenever the cause of action accrued, the plaintiff would be entitled to sue within 12 years from the time of attaining his majority.

The case must be remanded in order that the Principal Sudder Ameen may try whether the suit was brought within 3 years after attaining majority, or within 12 years from the time when the cause of action accrued.

The 3rd January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges*.

Sale in execution—Bona fide purchaser.

Case No. 520 of 1866.

Special Appeal from a decision passed by Mr. H. Richardson, Additional Judge of Jessore, dated the 15th December 1865, affirming a decision passed by Baboo Modoosoodun Ghose, Sudder Ameen of that District, dated the 21st December 1864.

Baboo Huronath Roy and others (Defendants), *Appellants*,

versus

Mothooranath Acharjee (Plaintiff), *Respondent*.

Baboo Bungsheedhur Sein for Appellants.

Mr. R. E. Twidale and *Baboo Nilmoney Sein* for Respondent.

A, in satisfaction of a decree against *B*, caused the sale of a tenure styling it a *jote jumma*. *C*, the superior zemindar, purchased the tenure as such for 900 Rs., but, failing to pay the balance of the purchase-money, the tenure with the same description was resold and purchased by *C* for 1 rupee. *A*, on discovering his mistake in having advertized the property as a *jote jumma* when in fact it was a *Shamilat talook* (a more permanent and valuable holding), caused a sale of *B's* rights and interests in the *Shamilat* talook, and, having purchased them himself, was put into possession. *A* then sued for rent under Act X. of 1859 when *C* intervened as in enjoyment of the rent, and *A's* suit was dismissed. *A* now sues to establish his right to the *Shamilat* talook. HELD that *A* was entitled to succeed as he had acted *bonâ fide*, and that *C* could not be considered an innocent purchaser for a valuable consideration, but a purely speculative purchaser, as he must know that no such tenure as that which he purchased under the denomination of *jote jumma* had any real existence.

Kemp, J.—THIS was a suit to recover possession of a tenure called a shamilat talook, from which it was alleged that the plaintiff had been ejected by the defendant.

The plaintiff, in satisfaction of a decree held by him against one Gopeenath Roy, judgment-debtor, caused the sale of the tenure, the subject of this suit, styling it a "jote jumma." The defendant, who is also the superior zemindar, purchased the tenure under the above description for Rupees 900; but, failing to pay the balance of the purchase-money, the tenure with the same description was re-sold and purchased by the defendant for the nominal price of 1 rupee.

The plaintiff, the decree-holder, finding that he had made a mistake in advertizing the property as a jote jumma when in fact it was a shamilat talook, a holding of a

much more permanent character and consequently of far greater value, caused a sale of the rights and interests of the judgment-debtor in the said shamilat talook to be put up for sale and purchased them himself, and was put into possession. Subsequently, on the plaintiff suing for the rents under the provisions of Act X. of 1859, the defendant intervened and claimed to be in the enjoyment of the rents in virtue of his purchase of the rights and interests of the judgment-debtor in the jote jumma. The rent-suit of the plaintiff was dismissed—hence this suit to establish his right to the shamilat talook purchased by him in satisfaction of his decree.

The Court of first instance gave the plaintiff a decree, holding that he had proved the existence of the shamilat talook, and the non-existence of any jote jumma. The Judge confirmed this decree, observing that "the plaintiff had not, in his opinion, caused "the re-sale with any intent to defraud the "malik (in this case the defendant), but "simply under a mistake of the character "and grade of the tenure." The Judge was satisfied that no such tenure as a jote jumma answering to the description of that purchased by the defendant existed; and that the defendant, who, from his position as owner of the parent zemindaree, ought to have known that no such jote jumma existed, purchased on speculation.

In special appeal it is contended that, the defendant having previously purchased the rights and interests of the judgment-debtor at a sale in execution of a decree held at the instance of the plaintiff, the re-sale and purchase of the same property by the plaintiff under a different denomination can neither avail the plaintiff, nor affect the title of the defendant.

We think that substantial justice has been done in this case. It is very clear that there is no such tenure as that purchased by the defendant for a nominal sum under the denomination of a jote jumma. The plaintiff, it is true, advertized the tenure under the above description; but of the fact of its non-existence, independently of the evidence adduced by the plaintiff, which has been found by both the Lower Courts to be satisfactory, we have the significant fact that the defendant, who is the zemindar, and who must have well known that no such tenure was recorded in his zemindaree serishtah, allowed his first purchase to fall through, and then purchased at a subsequent sale for a nominal sum.

The rights and interests of the judgment-debtor were alone sold, and nothing was guaranteed to the purchaser. The plaintiff acted "*bond fide*," and the defendant cannot be called an innocent purchaser for a valuable consideration, as he was in a position to know, and must have known, that no such tenure as that which he purchased under the denomination of a jote jumma had any real existence. His purchase was a purely speculative one.

The appeal is dismissed with costs and interest payable by the appellant.

The 3rd January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Lunatics (Suits for)—Hindoo Law of Inheritance—Sale—Arbitration—Alienation by managing owner.

Regular Appeals from a decision passed by Baboo Nurottum Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 19th March 1866.

Case No. 195 of 1866.

Goureenath and another (Defendants), *Appellants,*

versus

The Collector of Monghyr and another (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Kishen Succa Mookerjee* for Appellants.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondents.

Suit laid at Rupees 14,638-13-2-12.

Case No. 209 of 1866.

The Court of Wards of Monghyr, on behalf of Manick Ram and Salgram, the lunatics (Plaintiff), *Appellant,*

versus

Rughoobur Dyal and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Kishen Succa Mookerjee* for Respondents.

Case No. 211 of 1866.

Koer Sheopershad Narain (one of the Defendants), *Appellant,*

versus

The Collector of Monghyr and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondents.

A Collector, appointed under Section 11, Act XXXV. of 1858, to take charge of the estate of a lunatic, cannot sue himself on behalf of the lunatic, but must appoint a manager for the purpose.

Although, according to Hindoo Law, a lunatic has no rights of inheritance, he is not debarred from taking an estate duly conveyed to him.

If a person was in a fit condition to manage his affairs down to the time when the proceedings before an arbitrator in which he was interested were substantially concluded, the award will not be invalidated by reason of the person having become insane before the final publication of the award.

The incapacity of joint owners confers powers of alienation in certain cases of necessity upon the managing owner.

Markby, J.—THESE are three appeals in one suit brought on behalf of two persons, Manick Ram and Salgram, who are now lunatics, to recover various portions of landed property. The appeals have been argued together.

There is some confusion about the nature of these proceedings. Sometimes, the Collector of Monghyr is spoken of as plaintiff, and, at other times, the Court of Wards. But we conclude the fact to be that an application was made to the Civil Court under Section 3 of Act XXXV. of 1858 by some relation of the lunatics; and that, under Section 11, the Collector was appointed to take charge of the estate. The duty of the Collecter, however, is not himself to manage the estate, but to appoint a manager, who is to exercise the same powers in the management of the estate as might have been exercised by "the proprietor if not a lunatic." This would, of course, include the bringing of such actions as the present, and strictly, therefore, this action has not been properly brought. But, as this objection has never been taken, and, if taken, it might have been amended under Section 32 of the Civil Procedure Code, it does not appear to us to be necessary for this Court to consider it as fatal. We only notice it in order that it may not be supposed that the Court sanctions such an irregularity.

The following pedigree shews the state of the family of the lunatics :—

Rutton Chand Sahoo Kullia.

Mussamut Bibee.

Gopal Lal, married Musst. Kumla Bibee, Jussodha Bibee Bundhoo Koonwaree

Aujoodhia Bibee. Manickram, Roghoobur Dyal. Salgram.

It appears that Mussamut Bibee was entitled to a 12-annas share in a talook called Gudee Sumria and to the entire interest in a garden called Kunkur.

After the death of Mussamut Bibee, her son Gopal Lal claimed this property, and, after his death, his wife Bundhoo Koonwaree and her daughter Aujoodhia appear to have been in possession of it. In consequence, however, of a suit between Bundhoo Koonwaree and one Gopeenath, in which an opinion was expressed that the sons of Jussodha Bibee were the true heirs-at-law of Mussamut Bibee, a summary proceeding to obtain possession of the property was taken by or on behalf of these persons against Bundhoo Koonwaree and Aujoodhia, and was successful. These two ladies then brought a suit to establish their title, which suit was in the year 1852 referred to arbitration, and the decision of the arbitrator was given in December 1855. By the award the two properties were divided equally between Aujoodhia Bibee and the three sons of Jussodha Bibee respectively.

Bissessur Dyal Singh, the father of Manick Ram, Roghoobur, and Salgram, and his three sons were defendants in the suit brought by Bundhoo Koonwaree and her daughter, and were parties to the reference to arbitration.

The 3-annas share of the talook of Gudee Sumria awarded to Aujoodhia Bibee was sold by her to one Judoonath Sadye in the year 1860, and by him again sold to Koonwar Sheopershad Narain Singh. The first claim in the suit now brought on behalf of the lunatics is against the latter to recover this 3-annas share in the talook, on the ground that, by the Mitakshara Law, the lunatics and their brother Roghoobur were the sole heirs of Mussamut Bibee: that, at the time when their rights were disposed of in the suit which ended in an arbitration, they were either lunatics or minors; and, consequently, that the award of the arbitrator is not binding as to them. The Principal Sudder Ameen has decided upon this claim in favor of the plaintiff, and this decision is the subject of appeal No. 211.

This being the history of the property and the contention of the parties, we proceed to state our opinion on the facts of this case.

1. We find that Manick Ram has been an idiot from his birth. The father asserts this, and it is but feebly denied by the witnesses who gave testimony on behalf of the defendant. Moreover, it does not appear

that Manick Ram ever took any personal share whatever in the proceedings relating to the property.

2. We find that Salgram was 18 years of age in December 1851. The evidence is contradictory on this point, but the majority of the witnesses on both sides fix his age at the present time sufficiently high to bring him up to 18 years of age at the date mentioned.

3. We find that Salgram became a lunatic at some time subsequent to December 1852, but prior to December 1855. The father says that "for twelve years he has been utterly "insane," and that he was insane at that time; that "previously he used to be sense-"less, sometimes he used to get over the "disease now and then;" and it is admitted that he is insane now. Another witness says he has been insane 13 or 14 years. On the other hand, though several witnesses speak as to his sanity in December 1852, no one says anything of his being so subsequently.

The result of the *first* finding of fact as regards Manick Ram is peculiar. It, of course, renders all proceedings, so far as they depend on his consent for their validity, void. But it also follows from it, as is admitted on all hands, that, according to the Hindoo Law of Inheritance, which excludes born idiots, Manick Ram has, by inheritance, no rights at all. But, though he could not, as a lunatic, deprive himself of any right, this does not prevent his taking an estate duly conveyed to him, so that the 3-annas share in the property awarded to him by the arbitrator in 1855 was, we think, effectually vested in him.

The result of the *second* and *third* findings is that Salgram was of age, and fully competent at the time the suit brought by Jussodha and Aujoodhia was referred to arbitration. But, on the other hand, he became a lunatic before the final decision of the arbitrator was published. A difficult question, therefore, arises whether or no he was bound by the award. We think that this would depend on the exact time when Salgram finally lost his intellects. If he was in a condition to manage his affairs down to the time when the proceedings before the arbitrator were substantially concluded, we think it will not necessarily invalidate the award that he became insane before the time when it was finally published. We think that, the decision of the arbitrator (against which no suggestion of fraud is raised) having been subsequently affirmed by a Court of law and embodied in a decree, a strong presumption arises in its favor; and that the *onus* of proving with minuteness the state of Salgram's mind at this time lies upon the parties who seek to impeach the award. But the evidence on this point is far from satisfactory. It is extremely meagre and indefinite, and does not satisfy us that, throughout the proceedings before the arbitrator, Salgram was not in a condition of mind which would render him responsible for what was done in his name and with his sanction.

It appears to us, therefore, that we ought to give effect to the award of 1855; that the title of Aujoodhia to a 3-annas share of the talook founded thereon, and which is now vested in the defendant Koonwur Sheopershad Narain Singh, was a good and valid title; and that the decision of the Principal Sudder Ameen on this claim ought to be reversed.

The next appeal (No. 209) arises on a claim to set aside a sale which took place in the year 1859 of an 8-annas share in the Talook Gudee Sumria to the defendant Shumboonath Suhaye. At this time it is admitted that both Manick Ram and Salgram were lunatics, and on the face of the deed of sale Roghoobur avowedly acts as their "guardian." It is asserted, and we agree with the Principal Sudder Ameen in believing, that the sale was made to satisfy a decree for an ancestral debt which the decree-holder was about to execute against the property; and that the sale was one which a prudent person having management of the property would have sanctioned. The result of the award which we have upheld was to vest in Roghoobur and his brothers a joint estate in a certain share of the ancestral property, and of this property Roghoobur was the manager. It is true that he describes himself as "guardian," which he could have no pretence in a legal sense to be. But we think this misdescription is immaterial; and that the question is whether, as manager, Roghoobur had power to dispose of the property for the purposes above stated. Baboo Dwarkanath Mitter, who argued in support of the purchase, could quote no direct authority in his favour; but he relied on a passage in Colebrooke's translation of the Mitakshara, where it is said (page 257, para. 28): "Even a single "individual may conclude a donation, mort-"gage, or sale of immoveable property "during a season of distress for the sake "of the family, and specially for pious pur-"poses." In para. 29, it is said, "the

"meaning of the text is this: while the "sons and grandsons are minors and in- "capable of giving their consent to a gift "and the like; or while brothers are so "and continue unseparated; even one "person, who is capable, may conclude a "gift, hypothecation, or sale of immoveable "property, if a calamity affecting the "whole family require it, or the support of "the family render it necessary, or indis- "pensable duties, such as the obsequies "of the father or the like, make it unavoid- "able." It is true that no express mention is here made of lunatics; but it may be argued with considerable force that the *text* of the law is general, and relates to every kind of incapacity; and that the mention of minors in the *gloss* is merely by way of illustration. Moreover, it was admitted on the argument that a manager of a joint estate would have a power of alienation in such a case, if his joint owners, though capable, were absent—a power which can hardly be supported upon general principles of agency. There is a good deal, therefore, to show that the principle that the incapacity of joint owners confers powers of alienation in certain cases of necessity upon the managing owner is general, and in the absence, therefore, of any distinct authority upon the matter, we ought to affirm the validity of the alienation in this case. In this appeal, therefore, the decision of the Principal Sudder Ameen will be affirmed.

The next appeal (No. 195) arises on a claim to set aside a mortgage, made in the name of the father Bissessur Nath, and his three sons, Manick Ram, Roghoobur, and Salgram, of the garden Kunkur to Gobind Pershad and Juggernath Pershad, of whom the defendant Gobind Pershad is the survivor. As already stated, we have come to the conclusion that Manick Ram is an idiot from birth, and had, therefore, no rights by inheritance in this property, so that his concurrence in the sale is immaterial, and his incapacity is no ground for setting it aside. Salgram, on the other hand, was at this time sane and of sufficient age to render the transaction binding as against him. In our opinion, therefore, the decision of the Principal Sudder Ameen in favor of the plaintiff on this part of the case ought to be reversed.

The result is that our judgment in the appeal No. 195 will be for the appellant, the decision of the Principal Sudder Ameen as against him will be reversed, and the appellant will be entitled to his costs in this Court and in the Court below.

Our judgment in appeal No. 209 will be for the respondent, the decision of the Principal Sudder Ameen in his favor will be affirmed, and the appellant will have to pay to the respondent the costs of this appeal.

Our judgment in appeal No. 211 will be for the appellant, the decision of the Principal Sudder Ameen will be reversed, and the appellant will be entitled to his costs in this Court and the Court below.

The 3rd January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Ejectment.

Case No. 1863 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 1st May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 26th January 1866.

Kalee Churn Banerjee (Plaintiff), *Appellant,*

versus

Mahomed Hashem and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

No one for Respondents.

Where a decree under Sections 22 and 78, Act X. of 1859, for the ejectment of a ryot from three plots of land was executed against two of the plots—HELD that the pottah was not in force as regards the third plot also.

Seton-Karr, J.—THE decisions of both the Courts are erroneous. The plaintiff sued previously under Sections 22 and 78 of Act X. of 1859 for ejectment of the defendant from three plots. As to two of the plots, the decree was executed, and the plaintiff now sues for a kubooleut from the defendant for the third plot from which he did not eject the defendant. The Courts are quite wrong to hold that, because the former decree was not executed against the third plot of ground, therefore the old pottah is still in force. That pottah was expressly set aside by the former decision, and the defendant cannot be considered to be still holding under the said pottah.

The plaintiff, in law, has a perfect right to bring his present suit for a kubooleut; and setting aside the decisions of both the Courts on this head, we hereby declare him to have such a right, and we remand the case to the first Court to find under what terms the kubooleut should be granted.

The 3rd January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation—Execution—Sections 20 and 21, Act XIV. of 1859.

Case No. 666 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 31st August 1866.

Kalee Pershad Singh (Decree-holder), *Appellant,*

versus

Jankee Deo Narain (Judgment-debtor), *Respondent.*

Mr. R. T. Allan and *Baboos Dwarkanath Mitter* and *Kishen Succa Mookerjee* for Appellant.

Baboos Jugodanund Mookerjee, Onookool Chunder Mookerjee, and *Mohesh Chunder Chowdhry* for Respondent.

The attachment of property in execution of a decree, although attachment is afterwards set aside, is a sufficient issuing of process of execution within the meaning of Section 21, Act XIV. of 1859.

An appeal from an order setting aside an attachment is a *bond-fide* proceeding to keep alive the decree under Section 20.

Macpherson, J.—THE mother of two minors, of whom the petitioner Kalee Pershad is one, obtained a decree in 1841 as guardian of her minor sons, for a sum of money due to the estate of her deceased husband. The guardian never put the decree in force. The elder minor attained his majority in 1845, but no steps were taken by him either to enforce the decree. The younger son, Kalee Pershad, came of age in 1849. In 1860 he applied for execution; his application was granted, process issued, and certain property was attached under it in April 1861. On the 13th July 1861, the attachment was set aside by the Court, and the order setting it aside was confirmed on appeal on the 26th of March 1862. On the 18th of March 1865, the present application was made.

We think the Lower Appellate Court is wrong in holding that the application of Kalee Pershad in 1860 was barred by lapse of time. The same rules as to limitation have always been applied in the execution of decrees under the procedure which prevailed prior to the enactment of Act VIII. of 1859 as were applied in ordinary suits under that procedure. In the present case, the Court of first instance rightly held that Kalee Pershad might apply for execution at any time within 12 years from the date on which he came of age—there being no doubt that, at any time within 12 years of his attaining his majority, he might have instituted a suit in respect of a cause of action which had accrued during his minority.

The application, then, being in time, we have next to consider whether, under the circumstances which have occurred, there was any issue of "process of execution" within the meaning of Section 21 of Act XIV. of 1859, such as to keep the decree alive. We are of opinion that, however limited may be the construction put upon the words of Section 21, the issuing the attachment and attaching property under the warwant in April 1861 was certainly a sufficient issuing of process of execution within the meaning of the Section referred to. It seems to us that the process was none the less issued, because it was afterwards set aside.

Process of execution having been issued so as to keep the decree alive under Section 21, it remains for us to determine whether, within the meaning of Section 20 of Act XIV. of 1859, any proceeding to enforce the decree, or to keep it in force, was taken within three years next preceding the application, out of which the present appeal arises. The answer to this question depends on whether the proceedings in appeal from the order of July 13th, 1861, are "proceedings to enforce" the decree, or to keep it alive; for, unless the three years are to be calculated from the date of the dismissal of the appeal on the 26th of March 1862, there is no doubt that the present application is barred as having been made more than three years subsequently to that date. In our opinion, the applicant is entitled to the benefit of these proceedings, and is within time. There is nothing in Section 20 which limits the proceedings therein mentioned to *original* proceedings, and it appears to us that the appeal from the order setting aside the attachment cannot be regarded as other than a proceeding, the *bond-fide* object of which was (as its effect would have been if the appeal had been successful) to enforce the decree.

While we hold that Kalee Pershad is entitled to enforce this decree, we think that he is entitled to do so only as regards his own interest in it, that is to say, as regards a one-half share in it. The rights of the elder brother are barred, he having taken no steps to enforce the decree. It has been contended

that, inasmuch as Kalee Pershad has applied in time, his brother, who must be taken to have had a joint interest in the decree, gets the benefit of Kalee Pershad's application. But, although the guardian originally sued on behalf of both the minors, their position now is not that of two persons who have jointly obtained a decree. Kalee Pershad rests his application to execute the decree so far as it relates to his brother's share, on an assignment of that share to him by his brother. But that assignment was made by the brother after his right was barred, and could pass to Kalee Pershad no right which the assignor did not himself have. Moreover, there is a certain discretion vested in the Courts as regards the issue of execution on the application of only one of several decree-holders or on the application of the assignee of the original decree-holders (*see* Sections 207, 208, and 221 of Act VIII. of 1859); and, in the present case, considering the very great length of time which has elapsed since the decree was passed, and the very great laches of all those (including Kalee Pershad) interested in the decree, we think that the execution issued should be limited in amount to one-half of the whole sum due under the decree.

The 3rd January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation—Execution—Section 20, Act XIV. of 1859.

Case No. 636 of 1866.

Micellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 22nd June 1866, affirming an order passed by the Sudder Moonsiff of that District, dated the 7th April 1866.

Shoo Chand Chunder (Decree-holder), *Appellant,*

versus

Mr. D. Grant (Judgment-debtor), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

No one for Respondent.

Where an application for execution was made, and notice was issued thereupon to the judgment-debtor, the proceeding, being apparently *bonâ fide*, was held sufficient to keep the decree alive under Section 20, Act XIV. of 1859.

Macpherson, J.—We think that the Lower Court is wrong, and that the appellant's right to issue execution is not barred. The decree is dated the 23rd August 1862. On the 19th August 1865, an application for execution was made, and notice was issued thereupon to the judgment-debtor. It is true that nothing more was then done, and that the application was struck off eventually for want of prosecution. Still there is nothing to lead to the conclusion that the proceeding was not *bonâ fide*. Such a proceeding is sufficient to keep the decree alive under Section 20 of Act XIV. of 1859. Then the present application (for attachment of the person of the debtor) was made on the 7th March 1866, within three years of previous proceedings.

We reverse the order of the Lower Appellate Court, and direct that execution do issue.

The 3rd January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Attachment of debts—Notice—Execution of joint decree—Sections 207 and 236, Act VIII. of 1859.

Case No. 613 of 1866.

Miscellaneous Appeal from an order passed by the Officiating Judge of Moorshedabad, dated the 11th June 1866, reversing an order passed by the Sudder Ameen of that District, dated the 26th February 1866.

Thakoor Dass Sing (Judgment-debtor), *Appellant,*

versus

Luchmeeput Doogur (Decree-holder), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Onookool Chunder Mookerjee and *Bungshee Buddun Mitter* for Respondent.

When the property to be attached consists of debts, a written notice of attachment is necessary under Section 236, Act VIII. of 1859. Until the debtor receives such notice, he is bound to pay the amount of his debt to the creditor, whose right to receive it has been declared by a decree of Court; and it is no part of the duty of the debtor to make enquiries whether his creditor is or is not entitled to receive the money.

Though one of two or more decree-holders may, with the permission of the Court, take out execution of a joint decree under Section 207, the execution must be for the whole decree, and not for any fractional share to which the decree-holder may consider himself entitled, the Court making such order as may be necessary for protecting the interests of other decree-holders.

Loch, J.—The facts stated to us are as follows: Shumboonath Roy and two others

obtained a decree against Thakoor Dass Sing. Luchmeeput held a decree against Shumboonath and another, and in execution of his decree attached their shares in the decree they held against Thakoor Dass. No notice of this attachment was given to the parties, and before the sale in execution of Luchmeeput's decree took place, Thakoor Dass paid the sum due by him to his creditors, who filed a petition in Court, certifying that they had received the money, and the decree was struck off as fully satisfied.

Luchmeeput then applied to the Court to have the rights and interests of his debtors in the decree they held against Thakoor Doss sold in satisfaction of his decree. This was done, and Luchmeeput became the purchaser, and took out execution against Thakoor Doss who pleaded payment. The first Court has treated the decree as a negotiable instrument, and thinks that no notice to the debtor was necessary. The Judge in appeal thinks that it is open to question whether a notice to the debtor is necessary, and whether Sections 236, 237, and 238, are applicable, but he adds that the practice of his Court has been not to issue a separate notice to the parties. He considers also that it was the duty of the debtor Thakoor Dass to have satisfied himself that his creditors were entitled to receive the money before he made any payment to them.

We must first point out to the Judge that no practice of his Court can override the law, and that the sooner any practice in force, which either omits to do what the law requires to be done, or does what the law forbids, be abolished the better. The law, Section 236, Act VIII. of 1859, is perfectly clear, and points out what is the duty of the Court in execution of a decree, when the property sought to be attached consists of debts. The Judge has not fallen into the error of the Sudder Ameen who considered the decree to be a negotiable instrument, and he should therefore have proceeded under the provisions of Section 236 which requires that attachment is to be "made by a written order prohibiting "the creditor from receiving the debts, and "the debtor from making payment thereof to "any person whomsoever, until the further "order of the Court." This has not been done, and till the debtor received this notice, he was bound to pay the amount of his debt to the creditor whose right to receive it had been declared by a decree of Court, and it was no part of the duty of the debtor to make enquiries whether his creditor was or was not entitled to receive the money.

It is urged that the Lower Courts have found payment made by Thakoor Dass to be collusive. There is no distinct finding of collusion, and we certainly see no sufficient grounds for such a conclusion from the conduct of the parties, for we find that one of the decree-holders, whose right in the decree against Thakoor Dass was not attached, joined in the certificate to the Court that the decree had been satisfied.

Objection has also been taken to the order of the Judge permitting the auction-purchaser to take out execution of his share in the decree. It has been ruled by this Court that, though one of two or more decree-holders may, with the permission of the Court, take out execution of a joint decree under Section 207, Act VIII. of 1859, the execution must be for the whole decree, and not for any fractional share to which the decree-holder may consider himself entitled, the Court making such order as may be necessary for protecting the interests of other decree-holders. For the reasons given above, we think the orders passed by the Lower Courts are erroneous, and must be reversed. We, therefore, set them aside, and decree this appeal with all costs.

The 3rd January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Jurisdiction (of Civil Court)—Reversal of order of Criminal Court.

Case No. 1794 of 1866.

Special Appeal from a decision passed by the Deputy Commissioner of Hazareebagh, dated the 23rd April 1866, reversing a decision passed by the Moonsiff of Chupra, dated the 25th January 1866.

Bakas Ram Sahoo (Plaintiff), *Appellant,*

versus

Chummun Ram (Defendant), *Respondent.*

Baboo Roopnath Banerjee for Appellant.

Baboo Tarucknath Sein for Respondent.

Where a Magistrate made an order for the removal of a shed as being an obstruction to a thoroughfare under Section 308 of the Code of Criminal Procedure, and the owner of the shed, on disobeying that order, was fined under Section 291 of the Penal Code—HELD that no suit would lie in the Civil Court to establish the owner's right to keep up the shed.

Seton-Karr, J.—WE are of opinion that the decison of the Lower Appellate Court is substantially correct. The plaintiff had

been declared liable to fine under Section 291, Penal Code, for continuing a nuisance after injunction to discontinue it; and there is no doubt that, under Section 308 of the Code of Criminal Procedure, the Magistrate had full power to order an obstruction such as that complained of to be removed.

The plaintiff, having been fined, then brought a suit against the defendant, the original complainant, to try his right to keep up the obstruction, and the Moonsiff decreed the claim, saying that there was no public thoroughfare, but a private one used by the residents of the spot. It is tolerably clear from this, that the road on which the obstruction was raised is a public pathway for the use of the neighbourhood, in the ordinary sense of the term. In our opinion, then, the Moonsiff, as the case was brought, had really no right to entertain the suit at all. Whether, if the suit had been instituted against the Magisterial authorities, and if it had raised the question of a private right to the pathway as vested in the plaintiff, and as distinct from a public right, the suit might not have been cognizable, is another question. But, as the suit was brought, it was liable to dismissal at once.

Seeing, then, no legal grounds to disturb the conclusion at which the Deputy Commissioner has arrived, we dismiss the appeal with costs.

Norman, J.—Bakas Ram Sahoo having erected a thatched shed against a wall of his dwelling-house, one Chummun Ram obtained an order from the Magistrate for its removal, as interfering with and being a nuisance to a thoroughfare under Section 308 of the Code of Criminal Procedure.

Bakas Ram, disobeying the order of the Magistrate, continued the nuisance, and was, consequently, on the complaint of Chummun Ram, convicted under Section 291 of the Penal Code and fined.

Bakas Ram then brought a civil suit against Chummun Ram in the Court of the Moonsiff of Chupra to establish his right to keep up the thatched shed.

The Moonsiff gave the plaintiff a decree, as he says by reversal of the order of the Criminal Court, dated the 10th of October 1865.

His decision was reversed on appeal by the Deputy Commissioner, who held that the Moonsiff had no power to entertain the suit.

The plaintiff now, on special appeal, contends before us that the judgment of the first Court was correct.

We think it clear that no action lies against the defendant Chummun Ram. On his information, the Magistrate made an order for the removal of the shed as an obstruction to the thoroughfare under Section 308, and on the plaintiff disobeying that order, on his information again, the Magistrate fined the now plaintiff for disobedience under Section 291 of the Penal Code.

In making his complaints before the Magistrate, the defendant was simply exercising the right which every subject of Her Majesty possesses of seeking redress for a grievance which he believed himself to have sustained by legal proceedings before a competent tribunal.

As against the plaintiff and in favor of the defendant, the order and conviction are probably conclusive evidence as to the existence of the thoroughfare, and the obligations of the plaintiff in respect thereof. (*See* Rex *versus* St. Pancras, Peake's Cases, 220, 221; The Queen *versus* The Inhabitants of Haughton, 1 Ellis and Blackburn 501.)

Whether, in this particular case, the plaintiff could have appealed from the order and conviction of the Magistrate, appears to me wholly immaterial. If the Legislature has not thought fit to provide an appeal in criminal cases, when the amount of a fine imposed is less than 50 rupees, the absence of a right of appeal does not give the Civil Courts a power to examine the sentence.

It is not necessary to say whether any suit would lie in the Civil Courts by the plaintiff for a declaration that the place in question, though treated by the Magistrate as a thoroughfare, is not so. If any such suit could be maintained, it is clear that the Government, as representing the rights of the public, would be a necessary party.

The case referred to by the Moonsiff, Anund Mohun Khan *versus* Roy Shumbhoonath Chuckerbutty, S. D. A. Rep., 4th May 1858, shews that such an action cannot be sustained against a party in the position of the defendant.

The Moonsiff has not confined himself to trying the case as if the question was one simply as to whether the road was a public or private one, but by going into all sorts of other questions which were disposed of by the proceedings before, the Magistrate has laid himself open to the severe animadversions of the Deputy Commissioner.

We dismiss the appeal, and affirm the decision of the Deputy Commissioner, with costs.

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The 4th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Onus probandi—Limitation—Survey-award.

Case No. 1926 of 1866.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 7th May 1866, reversing a decision passed by the Moonsiff of Russoolgunge, dated the 26th October 1865.

Kumola Dassee and others (Defendants), *Appellants,*

versus

Syud Azmur Ali (Plaintiff), *Respondent.*

Baboo Rajendurnath Bose for Appellants.

Mr. C. Gregory for Respondent.

Where a plaintiff sued to reverse a survey-award more than 3 years after it was passed, and the defendant specially alleged that the suit was not in time, the *onus* was held to be on the plaintiff to remove the bar to his suit.

Seton-Karr, J.—THERE is no force in the plea that the Judge was wrong in receiving a certain document in appeal. The Judge might and did exercise his discretion in such a matter.

The plea that the Judge has not correctly decided the issue as to limitation has weight. On the plaintiff's own case, as started by him, he sued to reverse an award of the survey department more than three years after it was passed. The defendant specially urged that the suit was not in time. It was for the plaintiff to remove the bar to his suit, and to explain how or why he was not bound to sue within three years under the provisions of Clause 6, Section 1 of Act XIV. of 1859, and the last Section of Act XIII. of 1848.

We set aside the decision of the Judge, and remand the case to him for a correct finding on the point of limitation, and for a decision on the merits if he thinks it necessary.

The 4th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Arbitration—Section 314, Act VIII. of 1859.

Case No. 1907 of 1866.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 2nd May 1866, reversing a decision passed by the Moonsiff of Russoolgunge, dated the 20th September 1865.

Suroop Ram Deb (one of the Defendants), *Appellant,*

versus

Gobind Ram Deb (Plaintiff), *Respondent.*

Baboo Rajendurnath Bose for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where both parties could not agree in nominating an arbitrator, and the Judge nominated one under Section 314, Act VIII. of 1859, and one of the parties, six weeks after the nomination, objected to the Judge's nominee, but could not show on appeal that he did not request the Judge to nominate some one, the appointment was held good and binding upon both parties.

Norman, J.—IN this case it appears that an appeal from the order of the Moonsiff was presented to the Judge of Sylhet. Pending the appeal, the parties agreed to refer the matter to arbitration. The parties not being able to agree in naming anybody, the Judge nominated an arbitrator under Section 314 of Act VIII. of 1859.

The defendant, six weeks after the nomination, appears to have objected to the Judge's nominee upon the ground that he (defendant) did not nominate him. He now appeals to this Court, and alleges that, inasmuch as he refused to accede to the nomination made by the Judge, he is not bound by the award which has been made, but he does not show that he did not request the Judge to nominate some one.

Looking at the order passed by the Judge in nominating the arbitrator, there is nothing which leads us to any inference other than that both parties were desirous, and did then desire the Judge, to nominate an arbitrator. If so, the appointment is good and binding upon both parties, and we therefore dismiss the appeal with costs and interest.

The 4th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Evidence—Copy of Quinquennial Register.

Case No. 1442 of 1866.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 12th May 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th July 1864.

Sreemutty Oodoy Monee Debee and others (Plaintiffs), *Appellants,*

versus

Bishonath Dutt and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Dwarkanath Mitter* for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

An examined copy of a quinquennial register is evidence without the production of the original.

Norman, J.—This case must be remanded to the Judge for trial.

The plaintiffs on appeal have objected that the Judge has improperly rejected certain evidence. *First*, a copy of a quinquennial register dated in 1201.

The Judge says that "there is no evidence to show that any attempt was made to produce the original register, or that it was beyond the power of the plaintiffs to procure its production," and he therefore rejected the copy. Now, the quinquennial register is a document of a public nature; and it is a rule of law that, whenever a document is of a public nature and admissible in evidence as such, an examined copy is, on grounds of public convenience, admissible. On this principle we think an examined copy of a quinquennial register is evidence without the production of the original.

No doubt, the Judge would have acted wisely and prudently in sending for the original from the Collector's office in order to see whether there was any reason to doubt the antiquity and authenticity of the original. But the plaintiffs, in producing an authenticated copy of it, did all that they were bound to do.

Secondly.—The Judge has rejected copies of a Nikas Latbundee of 1202, and some Mouzabundee papers of 1200, which were prepared and deposited in the Collectorate under the provisions of Section 10 of Regulation I. of 1793.

It appears that a petition was presented by the plaintiff in the first Court, praying that the originals should be sent for; and we think that that petition should have been acceded to.

Thirdly.—It is objected that the Judge rejected the proceedings before the Moonsiff in which the Maharajah of Bunwarabagh claimed certain property now in dispute in a suit in which Pearee Dossee was the plaintiff and judgment-creditor, and the defendant's predecessors in title were the defendants and judgment-debtors.

It appears that in that suit the Maharajah claimed the land now in dispute, asserting his title openly in Court, and successfully against the judgment-creditors of the defendant's predecessors in title, and Sreenath Haldar, who was that predecessor, appears to have taken no steps to resist the claim in any way.

We think that such an assertion of title so made, and so submitted to, is a strong fact to show that all the parties then acquiesced in the claim of the Maharajah.

Fourthly.—It was objected that the depositions of certain witnesses taken in a former suit were not admitted. It appears, however, from the judgment of the Judge, that no proof was given that those witnessess were dead, and therefore the necessary preliminary evidence that would have given rise to the question, whether such evidence was admissible or not, was not adduced. On the facts then before him, the Judge rightly rejected those depositions.

Fifthly.—It was objected that an authenticated copy of a certain ekrar purporting to have been executed by one Bishumbar Dutt, the father of the defendant No. 8, was improperly rejected by the Judge, upon the ground that it was not filed at the first hearing. We find, however, that it was received by the Principal Sudder Ameen at a subsequent period under Section 128 of Act VIII. of 1859. We see no reason for supposing that the Principal Sudder Ameen was not perfectly right in receiving it when he did, and we think that the Judge should have looked at the documents independently of that objection. Of course, we do not say what weight he ought to have attached to it, or whether that document, as a copy, should have been admitted without the production of the original, or whether it should now be admitted as legal evidence on the remand.

On cross-appeal it is objected that the plea of limitation has not been decided. We think that this objection on cross-appeal is well-founded, and on remand the Judge must take up and try the issue of limitation.

The 4th January 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Evidence — Receipts of rent by former owners.

Case No. 1871 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 23rd April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 15th September 1865.

Woomesh Chunder Mookerjee and others (Plaintiffs), *Appellants,*

versus

Sreemutty Bama Dossee (Defendant), *Respondent.*

Baboo Greesh Chunder Ghose for Appellants.

Baboo Romanath Bose for Respondent.

Receipts of rent purporting to have been given by the former owners of a jote are not admissible in evidence without proof as to the handwriting of the parties who gave them, or some satisfactory account of the custody from which they came.

Norman, J.—This is an appeal from the decision of the Judge of Hooghly reversing that of the Deputy Collector, Mr. Ryland.

The *first* point made before us is that the Judge says that *ex-parte* decrees for rent of plots *A* and *B* are not valid proof that defendant had possession, and that there is no other evidence of possession.

The Lower Appellate Court has apparently quite overlooked very important evidence on this subject, which is alluded to by the Deputy Collector who made a local investigation.

The Lower Appellate Court assumes that the sums decreed in the *ex-parte* suits for the rent of the plots in question were actually paid. The first Court records that this payment was not denied. If that is so, the fact that the defendant submitted to pay rent for plots *A* and *B* under those decrees appears very strong proof indeed that he was in possession of these lands when the rents accrued due.

The *second* point is that the Judge appears to have supposed that the notice of enhancement did not apply to the tank. This appears to be a mistake. The notice is said to apply to the entire jote within which the tank is comprised, and it appears not to be denied that, if the tank is not lakheraj but within this jote, the notice applies to it.

Thirdly.—The Judge appears to have admitted a quantity of dakhilahs said to have been received from former owners of the jote in question as evidence without any proof whatever as to the handwriting of the parties who gave them, or any satisfactory account of the custody from which they came.

No doubt, if a ryot says, "For twenty years I have paid rent at a certain rate, and here are the receipts which from year to year I have obtained," that may be sufficient *primâ facie* evidence as to the genuineness of the receipts without specific evidence as to the handwriting of and particulars of the circumstances under which each was obtained. Other cases might be suggested in which general evidence as to documents of this character might be sufficient. But no landholder would be safe, if the mere hearsay, which has been allowed in this case as to the receipts, were to be admitted as evidence.

We remand the case to the Judge for a new decision.

The 4th January 1867.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Tenure—Ryot—Middleman — Civil Suit by unsuccessful claimant under Section 106, Act X. of 1859.

Case No. 1428 of 1866.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 15th February 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 10th July 1865.

Karoo Lal Thakoor (Plaintiff), *Appellant,*

versus

Luchmeeputy Doogur (Defendant), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Tarucknath Sein* for Appellant.

Messrs. R. V. Doyne and *R. T. Allan* and *Baboo Sreenath Doss* for Respondent.

The sub-letting of a tenure does not necessarily make a ryot a middleman. A ryot, who holds land under cultivation by himself or by others taking under him, is not a middleman. His holding, therefore, is not one the transfer of which requires registration under Section 17, Act X. of 1859, and a suit will lie in the Civil Court in such a case to an unsuccessful claimant under Section 106 of that Act.

Macpherson, J.—THE respondent Luchmeeput Singh, as zemindar, obtained a decree in the Court of the Deputy Collector for arrears of rent of the tenure which is the subject of the present suit. In execution of that decree, the tenure was sold on the 27th of July 1864, and Luchmeeput Singh himself became the purchaser.

On the 19th of April 1865 the plaintiff instituted the present suit in order to have the sale in the Deputy Collector's Court set aside. The plaintiff claims as having, on the 9th of May 1861, bought the tenure by private purchase from the former owners. He contends that the sale by the Deputy Collector is irregular and bad, inasmuch as the decree then obtained was against the former owners only, the plaintiff not having been made a defendant. It is admitted on all hands that, after the decree had been passed, the plaintiff intervened in the suit, and applied for a review of judgment, when his application was rejected. Subsequently, when the tenure was about to be sold under Section 105 of Act X. of 1859, the plaintiff appeared before the Deputy Collector under Section 100, alleging that he, and not the persons against whom the decree had been obtained, was the proprietor of the tenure and in lawful possession of the same when the decree was obtained. Time was then given him to deposit in Court the amount of the decree, and the sale was postponed on more than one occasion, but was finally carried out, as the plaintiff failed to make any deposit.

The case for the respondent, Luchmeeput Singh, is, *firstly*, that the tenure which was sold was an under-tenure, any transfer of which required to be registered in the serishtah of the zemindar; that the transfer to the plaintiff was not so registered, and therefore could not (under Section 106) be recognized by the Court; and, *secondly*, that, even if it be otherwise, the remedy was that provided in Section 106 of Act X. of 1859, and a civil suit to establish the right of the plaintiff will not lie.

On the first point the judgment of the Principal Sudder Ameen is clear, and, in our opinion, substantially sound. It is as follows: "I hold without any doubt that "the tenure of the vendor was that of a "cultivator or ryot, and, therefore, as such, "did not require registration when plaintiff "purchased it; the provisions of Section 27, "Act X., being expressly applicable only to "persons holding a permanent transferable "interest *between the zemindar and the* "*cultivator*.

"The nature of the disputed tenure as "ryotty is proved by the pottah of the "defendant's vendor's ancestors granted by "the zemindars in 1205 M., and which (it "appears from the copy of the decree filed, "dated 22nd November 1815) was pleaded "and filed in a suit disposed of by the "Judge in 1815, regarding an illegal dis-"traint based in respect of the rent of "some of the lands covered by the pottah.

"Domun Jha, one of the vendors in this "suit, was one of the successors to one "of the original tenants under the pottah, "as appears from the decree just referred "to, and by this and the agreement of the "tenancy under the pottah which includes "all lands held in Talooka Bajdhur, Per-"gunnah Sreepore, with the disputed "tenancy which lies in the above talooka, "is the fact that the pottah refers to the "tenure in dispute rendered undoubted.

"It appears from its context to have been "granted to the tenants who had been old "cultivators in definition of a 'durbundee' "rate on all lands held by them in the "Pergunnah: it describes them and assigns "to them the pottah, as '*abadkars*,' "'*malgoozars*,' and '*mokurruree joteders*,' "all of which words characterize the ten-"ancy as that of '*cultivators*:' it continues "to them the cultivation as such, and then "winds up by adding that *you will sow or* "*cause to be sown the lands so held by you,* "*and pay the rents, &c.*, which again is "definite in that the tenure was ryotty, and "was continued such. It is argued that the "words 'cause to be sown' are indicative of "the tenure having been made 'inter-"mediate' when the above pottah was given, "whatever it may have been before it, as "the tenants were permitted to have culti-"vators under them. But this is an in-"correct interpretation of the words quoted, "which are quite consistent with the word-"ing of a ryotty pottah.

"The tenants were by the pottah con-"tinued as ryots, and a ryot created as "such by the zemindar need not be a "*khoodkashta*, or self-cultivating tenant "to maintain his right as such. If he

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"sub-let his tenancy, the nature of it will "not be altered thereby; as in respect of "the zemindar, he will still continue its "tenant, and will be responsible to the ze-"mindar for the rent as such."

The Lower Appellate Court, however, took a different view of the question, holding that the tenure was not that of a ryot, but that of a middleman, and therefore ought to have been registered.

The Judge says: "In my opinion the "pottah itself shews that the vendors were "something more than mere ryots. They "gave the lands in putnee to Mahomed "Khaleel prior to the sale to the respond-"ent under Regulation VIII. of 1819: they "reserved to themselves the right to sell, "&c. They, therefore, created an inter-"mediate tenure between themselves and "the zemindar, and its transfer should have "been registered." The Judge, accordingly, reversed the decision of the Principal Sudder Ameen.

We agree with the Principal Sudder Ameen in thinking, for the reasons given by him in his judgment, that this tenure is merely a ryottee tenure, and therefore not one the transfer of which required registration in the serishtah of the zemindar. Everything points to this conclusion, except the fact of the so-called putnee which the original tenants granted. No doubt, their treating this lease as a putnee goes to shew that they themselves deemed their position to be something more than that of mere ryots. Still, we do not think that the course thus adopted can alter the nature of the tenure if it in its inception was, as we have no doubt it was, merely ryottee.

It is frequently difficult to say what tenures are ryottee, and what are those of middlemen. In the case of Ram Mungul Ghose *versus* Luckhee Narain Shaha (1 Weekly Reporter 70) a Division Court held that the mere fact that one who holds land sub-lets it does not make him a middleman, and that the real question to be tried was "whether the defendant was or was not "a ryot, or one who *held land* under culti-"vation by himself or others who took for him "under his supervision as a superior culti-"vator, or whether he was a middleman, be-"cause he really did not cultivate in the "sense of Section 6 (of Act X.), but was a "general lease-holder or a speculator in "land-rent." Applying this rule, it appears to us that those under whom the plaintiffs claim were not middlemen, but that they held the lands in question under cultivation by themselves, or by others taking under them. In our opinion, therefore, it was unnecessary to register in the zemindar's serishtah transfers of this tenure.

Registration of the transfer being unnecessary, we have no doubt that a suit will lie in the Civil Court to establish the plaintiff's right. It is true that a certain course is provided by Section 106 of Act X. which parties may follow, and whereby they may get a summary adjudication on their claim, and possibly prevent a sale from taking place; but there is nothing in Act X. which debars a civil suit in such cases, or says that the rights of persons who fail to proceed under Section 106 are lost, and can no longer be enforced.

The order of the Lower Appellate Court is reversed, and the case is remanded to that Court, in order that it may dispose of it after hearing the parties on any other grounds of appeal not already dealt with by the Lower Appellate Court.

The 5th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Jurisdiction (of Small Cause Court)—Suit by co-sharer for contribution of Government Revenue.

Reference to the High Court by Mr. W. W. Linton, Judge of the Small Cause Court at Kooshtea.

Brommoroop Goswamee

versus

Prannath Chowdry and others.

A suit by a co-sharer for contribution in respect of arrears of revenue paid by him in excess of his quota to save the entire estate from sale is not cognizable by a Small Cause Court.

Case.—THE plaintiff, describing himself as 4 annas 5 gundahs sharer of Potahattee, Sadoohattee, and Magoorah in the District of Nuddea, sues the defendants, alleging them to be sharers of 11 annas and 15 gundahs of the above estate, for contribution in respect of arrears of revenue due from 1270 to 1272 B. S. paid by him in excess of his quota to save the entire estate from sale.

In the case of Modhoosoodun Mozoomdar *vs.* Bindoobashinee Dossee and others, 6 Weekly Reporter, Civil References, p. 15, it was held that the Small Cause Court has no jurisdiction to try a case of this nature.

The ground of that decision is thus stated in the judgment :—

"It is not alleged that there was, in fact, "any contract between these parties. They "are simply joint sharers apparently with "a great number of other persons in an es- "tate. If one of such parties, to protect his "own interest, pays Government revenue, "whereby the share of another is exoner- "ated, he has a remedy, not only under "Section 9 of Act XI. of 1859, but by action "independently of that enactment. Instances "of such suits are to be found (S. D. A. "Rep, 1850, p. 583; 1856, p. 635; 1858, "pp. 524-531). The liability is not founded "on any contract, for the several parties may "be strangers to each other, but on a duty "arising from the legal relations of the par- "ties."

I am of opinion that there is an implied contract on the part of the defendants that they will indemnify the plaintiff, and repay him whatever he has been compelled to pay, in order to save the estate from being sold. If the plaintiff has paid the whole of the Government revenue in order to protect the estate from sale, there is an implied promise on the part of his co-sharers to pay him their several proportions of the joint liability. The action would *now* lie in the Small Cause Court for money paid by the plaintiff for the use of the defendants at their request. If the defendants, neglecting to pay their respective proportions of the Government revenue, which they were bound to do, have cast that obligation on the plaintiff, and the latter has paid their respective shares, not voluntarily, but by compulsion of law, the compulsion so brought upon the plaintiff by the defendants is equivalent to an express request. It is sufficient if the party paying the money shows that the legal obligation was cast upon him by the default of the defendants, and that the law compelled him to do what he has done without abiding the result of a suit in order to establish the fact of the compulsion. The suits and the Act alluded to in the judgment were decided and passed before the institution of Small Cause Courts in the Mofussil.

The judgment of the High Court was delivered as follows by—

Peacock, C.J.—We are of opinion that the suit was not cognizable by a Small Cause Court. We concur entirely in the decision referred to, which is reported in 6 Weekly Reporter, Civil References, p. 15.

The argument of the Small Cause Court Judge, that the suits and the act alluded to in the judgment in the case above referred were decided and passed before the institution of Small Cause Courts in the Mofussil, was as applicable to that case as it is to the present. It is only an argument of the Small Cause Court Judge to show that the ruling of the High Court was wrong.

The 5th January 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt*, *Chief Justice*, and L. S. Jackson, *Judge*.

Evidence—Lost record.

Case No. 1653 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. R. Madocks, Judge of Bhaugulpore, dated the 18th May 1866, reversing a decision passed by Mr. H. Metcalfe, Deputy Collector of that District, dated the 13th September 1865.

Baboo Gooroo Dyal Singh (Plaintiff), *Appellant*,

versus

Durbaree Lal Tewaree (Defendant), *Respondent*.

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Dwarkanath Mitter* for Respondent.

Where a party obtained a decree which was appealed from, and in transit from the first to the second Court the record was irrecoverably lost, the High Court directed the Lower Appellate Court to receive secondary evidence from both parties of the papers which made up the entire record, or, failing this, additional evidence under Section 355, Act VIII. of 1859.

Jackson, J.—The special appellant in this case, who was plaintiff in a suit under Act X. of 1859, sued the special respondent "for arrears of rent at an enhanced rate," and obtained a decree from the Deputy Collector. Defendant appealed to the Court of the Zillah Judge, and it is stated that, in transit from the first Court to the second, the record was lost, and that there is no hope of its being recovered.

The judgment of the Lower Appellate Court contains these words: "There are, "however, sundry documents in Appeal 137, "which is closely connected with this case, "and which enable the Court to dispose of "the appeal without remand for secondary "evidence."

Those documents are not particularly specified, nor does it appear how they could

properly be used as evidence in the present case.

The plaintiff, respondent, in the Lower Appellate Court, put in, we are told, certain papers which purported to be office copies of some of those which made up the missing record, and asked the Judge by petition to take them into his consideration; and the Judge records his judgment referring to various papers, but not distinctly specifying in each case whether the document referred to was a certified copy of some part of the lost record, or a document belonging to the record of a different case. But manifestly his judgment has, to no small extent, proceeded upon papers which were not properly evidence in this case, not having been regularly proved or admitted by the parties. And it does not appear that he had before him, or that there is now in existence, sufficient evidence to support his decision independently of the evidence thus improperly admitted.

It follows, of course, that the decision cannot be affirmed, but the question then arises, what further order this Court ought to make.

In such a state of things, the Court has to choose between two orders, *viz.*, either to direct the Court below to receive such secondary evidence of the contents of the original record as may be forthcoming, or to order an entirely new trial.

To the latter of these two courses, there is this obvious objection that the plaintiff, who ordinarily has to prove his case, and who had, in this instance, obtained the decree of the Court of first instance, is obliged again to go through the same ordeal—having lost the evidence on which he relied—or else that the defendant, having failed once to make out a defence, will now have the opportunity of setting up a new and possibly a different case.

It appears to me that the plaintiff, being in possession of a decree which, unless lawfully reversed on appeal, is final, ought not, in consequence of an accident for which he is not to blame, to be placed in a worse position than he was before the trial of his case. And, therefore, while I would permit either party to do what he could to enable the Appellate Court to deal lawfully with the appeal, I would not go farther, nor deprive the plaintiff absolutely of the fruit of his decree.

If it become the practice of the Courts to order a new trial on the loss of a record in transit to the Court of Appeal, I apprehend that such losses would become not unfrequent, and that much consequent hardship might ensue.

For these reasons I would, in the present case, direct the Lower Appellate Court to replace the appeal upon its file, and receive such secondary evidence as the parties may be able to produce of the papers which made up the record: and, if the parties should not be able in this way to show what were the contents of the whole record, each party should be at liberty to produce additional evidence under Section 355 of the Civil Procedure Code, and, after considering the whole of the evidence, the Judge should proceed to pass such judgment as the case may require.

Peacock, C. J.—I concur in thinking that the above directions ought to be given. The case will be accordingly remanded to the Lower Appellate Court.

The 7th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Jurisdiction (of Court to whom decree is referred for execution)—Limitation.

Case No. 713 of 1866.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Hooghly, dated the 21st July 1866.

Bykuntnath Mullick (Judgment-debtor), *Appellant,*

versus

Joygopal Chatterjee (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboo Ashoolosh Dhur* for Appellant.

Baboos Kishen Kishore Ghose, Juggodanund Mookerjee, Romesh Chunder Mitter, and *Nil Madhub Sein* for Respondent.

A Court to whom a decree is referred for execution has jurisdiction to decide that the decree-holder's right to execute his decree has lapsed by limitation.

Loch, J.—We think this case must go back to the Principal Sudder Ameen to determine whether execution is or is not barred by limitation. He is in error in supposing that he has not jurisdiction in the matter. The precedent of this Court reported at page 14, Volume V., Weekly Reporter, Miscellaneous, *Bugur Bibee, appellant, clearly lays down the law on the subject. The case is remanded accordingly.

The 7th January 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Ejectment and Cancelment of lease—Section 22, Act X. of 1859.

Case No. 2106 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 14th May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 11th November 1865.

Womesh Chunder Chatterjee and others (Plaintiffs), *Appellants,*

versus

Shaikh Kumurooddeen Lushkur (Defendant), *Respondent.*

Baboo Mohendro Lall Seal for Appellants.

No one for Respondent.

A landlord cannot sue for cancelment of lease and ejectment under Section 22, Act X. of 1859, after he has sued for and realized the arrears of rent due.

Shumbhoonath Pundit, J.—We hold that no terms in the pottah authorize the special appellant to sue for arrears due, to realize them, and then to ask in another suit for the lease being cancelled and the ryot ejected, because the rents decreed and since realized were not paid in due time.

The terms of the pottah, if they authorize the plaintiff to eject for non-payment of arrears, do no more; they do not at the same time authorize the landlord to sue for and realize the same rents and then eject. To sue for and realize rents is within the power of the landlord, if he does not want to eject; but neither the law nor the terms of the pottah give both powers.

Section 22 of Act X. of 1859 allows a landlord to obtain a decree for ejectment irrespective of any condition in the contract, but this is only on the ground of non-payment. It does not contemplate a suit for ejectment after the landlord has realized the balance of rent due.

In this view we see no reason to interfere, and reject the application without costs, as nobody appears for the respondent.

The 7th January 1867.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Part satisfaction—Interest—Execution.

Case No. 690 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 3rd August 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 1st May 1866.

Kunhya Singh and others (Decree-holders), *Appellants,*

versus

Tooydun Singh (Judgment-debtor), *Respondent.*

Baboo Poorno Chunder Shome for Appellants.

Baboo Mohendro Lall Shome for Respondent.

A decree-holder is not bound to accept a sum tendered to him in part satisfaction of his decree. He is entitled to require payment of the principal and interest in full; and the refusal to receive a part of what is due to him will not deprive him of his right to interest.

Macpherson, J.—We are of opinion that a judgment-creditor, like any other creditor, is not bound to accept a tender of a sum admittedly less than what is due to him, and that he has a right to insist on being paid the principal with interest in full. If he refuses to receive a sum in part of what is due to him, his refusal will not deprive him of his right to interest; in other words, the debtor can derive no benefit from a rejected offer of part payment.

It is impossible from the materials before us to say how the account in this case has been made up. But if, on the 17th September 1865, the 387 rupees then paid into Court was the whole balance then due for principal and interest (including interest on the sum of Rupees 1,228-10-8 up to that date), then nothing more was due under the decree, and the decree was satisfied on that date. If, on the other hand, the 387 rupees was *not* the full balance of principal and interest (including interest on the Rupees 1,228-10-8 subsequent to their transfer to the decree-holder's credit), the decree was not then satisfied, and the decree-holder was not bound to take the money out of Court, and interest will continue to run on the total amount of principal.

A fresh account must be made up on the above principle. The decree-holder is entitled to interest up to the date on which

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both principal and interest were paid or shall be paid in full.

The case is remanded that the account may be taken again, and the matter may be disposed of with reference to the directions now given. The case is to be taken up out of its turn, and disposed of *at once*.

The 8th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman, F. B. Kemp, L. S. Jackson, and W. Markby, *Judges*.

Limitation—Suit upon Instalment-bond.

Reference to the High Court by Mr. W. W. Linton, Judge of the Small Cause Court at Kooshtea.

Hurronauth Roy and others

versus

Maheroollah Moollah.

Where a suit was brought upon an instalment-bond, and not upon any fresh agreement between the parties, the period of limitation was held to run from the time when default was made in payment of the first instalment, in consequence of which the whole amount became due.

Case.—THE plaintiff in this action sues on an instalment-bond (kisteebundee) executed by the defendant on the 10th day of Srabun 1269 B. S. for the payment of Rupees 160-8-9 payable by instalments in the months of Bhadro and Pous of each year, the first of such instalments being payable in the month of Bhadro 1269, and the last in the month of Pous 1274. The bond provides that, on the non-payment of any one instalment, the full amount secured thereby shall become payable. The defendant made a payment of Rs. 25 on the 12th Cheyt 1271. This suit was instituted on the 15th September last (corresponding with the third day of Bhadro 1273 B. S.), to recover Rupees 140-9-9 as principal, and Rupees 19-15 as interest, making a total of Rupees 160-8-9, the defendant being credited with the sum of twenty-five rupees paid by him on the 12th Cheyt 1271. The plaintiff's pleader urges that limitation ought to be computed from the 12th Cheyt 1271, and not from Bhadro 1269, the date on which the first instalment became due. I have taken a preliminary objection to the plaintiff's proceeding with the trial of this suit, as I hold that the plaintiff's suit is barred by the Statute of Limitation, more than three years having elapsed since the cause of action accrued, and from the time at which the bond became payable. I am of opinion that the cause of action arose on the first default, that is, in the month of Bhadro 1269, and the plaintiffs ought to have instituted their action then, unless they were subject to any of the disabilities specified in Section 11 of Act XIV. of 1859.

The plaintiff's acceptance of instalments subsequent to the first default was quite an optional forbearance and indulgence on his part, which could in no way prevent the operation of the Law of Limitation; the period of limitation is three years if there is no written engagement, or, if there is a written engagement, not registered within six months. The bond in question was not registered. It was held in the case of Hemp *vs.* Garland, 4 Queen's Bench Reports, p. 519, that, when a note payable by instalments contains a provision that, if default be made in payment of one instalment, the whole shall be due, the cause of action arises upon the first default of all that there remained owing of the whole debt, and limitation is to be computed from such default.

The distinction between the present case and that of "Hemp *vs.* Garland" is that, while, in the latter, no instalments were paid after default, in the former one instalment was paid by the defendant, and accepted by plaintiffs. In this respect the present case resembles that of "Hullodhur Bangal *vs.* the Administrator-General," 1 Weekly Reporter, Civil Rulings, p. 189, in which it was held "that, when a default was made in the payment of an instalment on a bond whereby the whole became due, and the holder did not avail himself of the right to sue, but continued subsequently to the default to receive payment from the maker, the effect of such subsequent payment and acceptance was to waive any existing right to take advantage of the previous default, and to rest on the provision for the payment by instalments, and that, on proof of such waivor, limitation ought not to be taken to run from the date of such default."

I am doubtful whether this decision is consistent with the provision of Section 4, Act XIV. of 1859; for by that Section it is enacted, "if, in respect of any legacy or debt, the person who but for the Law of Limitation would be liable to pay the same shall have admitted that such debtor, legacy, or any part thereof, is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the

original liability, shall be computed from the date of such admission." In the present case, the payment of Rupees 25 was not an acknowledgment in writing. It was a fact which would wholly depend upon mere verbal testimony, so that the only thing by which a case can now be taken out of the Statute of Limitation is an acknowledgment in writing signed by the party.

Under the old Law of Limitation, Regulation III. of 1793, a payment of an instalment on a bond would be an admission or acknowledgment that the debt is due, and it would bar the operation of the Statute of Limitation; but the present Law of Limitation allows no acknowledgment which is not in writing and signed by the debtor to bar the operation of the same. The Limitation Act does not extinguish the debt, but simply bars the remedy; and, accordingly, a lien in respect of the debt is not destroyed, though the remedy by action to recover the debt itself may be gone. Upon the same ground the debt may be revived by the debtor's subsequent acknowledgment in writing without any new consideration.

The case was originally considered by Peacock, C.J., and L. S. Jackson, J., who referred it to a Full Bench in consequence of the decision referred to in the case. The judgment of the Full Bench was delivered as follows by—

Peacock, C.J.—We are of opinion that the view taken by the Judge of the Small Cause Court is the correct one. The suit is brought upon the bond itself, and not upon any fresh agreement alleged to have been come to between the parties. Under these circumstances, we are of opinion that limitation did run from the time when default was made in payment of the first instalment, in consequence of which the whole amount became due.

It is unnecessary for us to express any opinion as to the correctness of the decision to which reference has been made by the Judge of the Small Cause Court.

Norman, J.—I entirely agree. I had occasion to consider this question in the case of Breen *vs.* Balfour, Bourke's Reports, p. 120.

The 8th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Damages—Breach of contract—Lease.

Case No. 1843 of 1866.

Special Appeal from a decision passed by Mr. H. R. Madocks, Judge of Bhaugulpore, dated the 28th May 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th July 1865.

Fireenge Sing (Plaintiff), *Appellant,*

versus

Shah Ahmed Hossein (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

No one for Respondent.

A suit will lie for damages sustained by a lessee by his lessor's breach of contract to put him in possession of a portion of the property of which he granted the lease.

Macpherson, J.—We think that the Lower Court is wrong in holding that such a suit as this will not lie.

The defendant gave the plaintiff a lease of a 5 annas 6 gundahs 5 cowrees share of a certain property. But it turned out, after much litigation, that the defendant had no right to grant a lease save to the extent of a 1 anna 6 gundahs share in two of the villages, and in 1 anna 12 gundahs share of another village. The Lower Court holds that the doctrine of *caveat emptor* applies, and that, as no fraud or wilful misrepresentation is shewn, the defendant is not liable for damages sustained by the plaintiff by the breach of the contract to put him in possession of the share of which he granted the lease. We do not think that the doctrine of *caveat emptor* applies to this case. There was an implied, if not an expressed, consent on the part of the lessor that he owned the share of which he gave the lease. As he did not own it, and as the plaintiff has suffered loss thereby, the latter is entitled to recover such damages as will compensate him for his loss.

The case is remanded, in order that the amount of those damages may be ascertained.

The 8th January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Sale by Guardian of Minor—Necessity.

Case No. 2152 of 1866.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of East Burdwan, dated the 28th May 1866, affirming a decision passed by the Moonsiff of Soleemabad, dated the 12th September 1865.

Radha Kishore Mookerjee and another (Defendants), *Appellants,*

versus

Mirtoonjoy Gow and others (Plaintiffs), *Respondents.*

Baboos Mohesh Chunder Bose and *Nil Madhub Sein* for Appellants.

Baboos Unnoda Pershad Banerjee and *Khetturnath Bose* for Respondents.

Where a Hindoo widow sells as guardian of her minor son and for his maintenance, the purchaser need only satisfy himself of the necessity of the sale, but he is not bound to see to the application of the money.

Glover, J.—The plaintiff in this case sued to recover possession of certain property left by his maternal uncle Gudadhur, his allegation being that, on the uncle's death childless, his effects descended in regular succession to him (plaintiff) and his uterine brother Khettur in equal shares; that Khettur on his death made a verbal gift of his moiety to plaintiff; but that the defendants, claiming as purchasers from his mother, Prosunno Moyee, ousted him from all the property.

The defence was that Gudadhur died in his father's lifetime, and that the property went to his two sisters, Prosunno Moyee and Kumul Moyee; that Kumul Moyee sold her moiety to her sister, from whom it came by purchase to the defendants. The defendants also deny that Khettur made any verbal gift to his brother.

Both Lower Courts decreed for the plaintiff.

It is now urged in special appeal (1) that the Principal Sudder Ameen has come to no finding as to the verbal gift of his share of the estate by Khettur; and (2) that the sale by the mother to the defendant, being made as guardian of her minor son, the plaintiff, and for his maintenance, must be upheld during the vendor's life; and that the Principal Sudder Ameen has gone beyond the law in requiring proof that the purchase-money was applied to the maintenance of the plaintiff.

These objections appear to us valid. We do not find anything in the Principal Sudder Ameen's judgment in the shape of legal proof, on which the alleged verbal gift by Khettur was based. Mention is made of a petition said to have been filed by Prosunno Moyee in which the fact of the gift is recited; but the question does not appear to have been properly enquired into—indeed, no evidence was either offered or called for. If Khettur did not make the gift in question, his share of the estate would, according to Hindoo Law, have reverted to his mother for her life, and, for that term, she would be authorized to dispose of it to the special appellants. It is very necessary to the proper disposal of this suit, therefore, that the fact of the gift by Khettur to Mirtoonjoy should be either proved or disproved.

With regard to the second objection, we think that the Principal Sudder Ameen has put the proof demandable from the special appellant too high. The Privy Council in the case of Hunooman Pershad Pandey (Moore's Indian Appeals, Volume VI., page 393) have ruled that all that is required of a purchaser, under such circumstances, is that he should satisfy himself as well as he can of the necessity for the sale; and that, if he makes proper enquiries and acts honestly, the real existence of an alleged necessity is not a condition precedent to the validity of his charge which renders him bound to see to the application of the money.

Taking this view of the case, we remand the suit to the Principal Sudder Ameen to try (1) whether the verbal gift by Khettur to his brother, the special respondent, is proved: and, if so, (2) whether the special appellants, purchasers from the mother and guardian Prosunno Moyee, had made due enquiry, and had reasonably satisfied themselves as to the existence of a necessity such as would justify the mother in selling her son's property. The costs on this portion of the claim will follow the result of the enquiry.

The 9th January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Jurisdiction—Ejectment—Section 82, Act X. of 1859.

Case No. 2097 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 9th May 1866, affirming a decision passed by the Collector of Howrah, dated the 14th September 1865.

Umrit Lal Banerjee (Plaintiff), *Appellant,*

versus

Bhoobun Mohinee Dossee and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Khetturnath Bose* for Appellant.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Respondents.

An eviction by the Collector in consequence of a suit brought by the zemindar under Section 82, Act X. of 1859, if it be proved to have been fraudulent and collusive, is illegal and remediable under that Act.

Glover, J.—This was a suit under Clause 6, Section 23 of Act X. of 1859, to recover possession of 12 cottahs of land, from which plaintiff alleged himself to have been ejected by the Collector, in consequence of a suit brought by the zemindar under Section 82 of the Act.

The plaintiff (special appellant) states that he purchased the land which was a transferable tenure from the mowroseedar in 1269 B. S., from which date he paid the rent regularly to the defendant; that the latter colluded with the old ryot, plaintiff's vendor, and sued to eject him on the ground of non-payment of rent, and got a decree, in execution of which he, special appellant, has been ejected from his purchased jote.

The Court of first instance held that a third party could not be evicted by a decree passed against a defendant under Section 82 of Act X. of 1859, and that plaintiff had therefore sustained no injury.

Whilst the Judge on appeal considered that, as the plaintiff had been evicted by the Collector under due process of law, he could not be said to have been "illegally" ejected; and that, therefore, the plaintiff's remedy was not under Act X. at all, but in the Civil Court.

We think that the Judge's decision in this case is much too summary, and leaves out altogether the points for determination precedent to an application of Clause 6, Section 23 of Act X.

The special appellant alleged from the first that he had duly attorned to the zemindar by paying him rent from the date of his entry on the land; and that, although he had not registered his purchase, he was prepared to prove his rights by evidence. He alleged further that the so-called arrear, on account of which the zemindar sued the original tenant, was for the year 1271 B. S., for which year the special appellant himself had paid the rent; and that the suit under Section 82 was a collusive and fraudulent transaction between his vendor and the zemindar, with the object of nullifying his purchase of the jote.

These were questions which ought to have been enquired into before the eviction by the Collector could be pronounced legal, so far as regards the party who put the Revenue Court in motion. If the special appellant had been allowed to give evidence, he might have been able to show that, from the date of his purchase, he had paid the rent of the land regularly to the zemindar; and that the latter, in suing special appellant's vendor for an alleged arrear of rent in 1271 B. S., acted fraudulently with the intention of cheating him out of the purchase; and that the eviction brought about by such collusion was "illegal," and therefore remediable under Act X. of 1859.

If the special appellant failed to prove payment of rent, then, as he never registered his purchase in the zemindar's serishtah, the latter would not be obliged to know anything about the matter, and the eviction under Section 82 would not have been illegal.

We remand the case, therefore, to the Court of first instance, in order that evidence as to the payment of rent may be called for, and the suit decided with reference to the remarks recorded above. The special respondent states also that the special appellant only bought one-half of the jote he claims. This point has not been enquired into, and the Deputy Collector will consider it with the others.

Costs will follow the result.

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The 9th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction (of Revenue Courts)—Plea of payment by Burrat.

Case No. 2047 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 17th May 1866, reversing a decision passed by the Deputy Collector of that District, dated the 11th February 1865.

Poorno Chunder Roy (Plaintiff), *Appellant,*

versus

Nund Lall Ghose and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Issur Chunder Chuckerbutty* for Appellant.

Baboo Bhugobutty Churn Ghose for Respondents.

In a suit for rent, where payment by a *burrat* is pleaded by the tenant, and execution of the *burrat* by the landlord is proved, the Revenue Courts have jurisdiction to try the question of *burrat.*

Shumbhoonath Pundit, J.—We do not agree with the special appellant. Payment by a burrat is pleaded by the tenant, and it is proved that the landlord had executed it.

The special appellant objects that the Revenue Courts have no jurisdiction to try this question of burrat, particularly because the consideration for the burrat is alleged to be an old bond denied by the special appellant, and not enquired into by the Court of first instance. It is also contended that the bond could not be enquired into by the Revenue Courts. It is further added that, if there be jurisdiction, the case should at least be remanded to the Court of first instance with directions to try the question of the bond.

We think, when the burrat is the mode of payment alleged in the case, the Revenue Courts had authority to try the question before it connected with that payment by this burrat. Further, as the burrat does not make any specific allusion to any bond, the omission of the Court of first instance to try that document is immaterial. In this view we see no reason to interfere, and reject the special appeal with costs.

The 9th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Suit for rent below 100 rupees—Section 77, Act X. of 1859—Intervenors—Dispute as to title—Appeal—Jurisdiction.

Case No. 2144 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Mymensing, dated the 28th May 1866, modifying a decision passed by Mr. W. C. Taylor, Deputy Collector of that District, dated the 30th December 1865.

Gouree Dass Byragee (Defendant), *Appellant,*

versus

Jugurnath Roy Chowdhry (Plaintiff), *Respondent.*

Baboo Khetturnath Bose for Appellant.

Baboo Sreenath Doss for Respondent.

Section 77, Act X. of 1859, does not apply to a suit for rent below 100 rupees, where the plaintiff's right to receive the rent is not disputed, merely on the ground that the intervenors had actually and in good faith received and enjoyed such rent before, and up to the time of the commencement of the suit, but where the ryot and the intervenors denied the title of the plaintiff and his vendor, and the ryot denied that he gave the kubooleut upon which the plaintiff was suing.

In such a case the appeal lies from the Deputy Collector to the Judge, and not to the Collector.

Quære.—Whether, even if the appeal lay to the Collector, the defendant, after having appealed to the Judge, could appeal specially to the High Court against the decision of the Judge, on the ground that the Judge had no jurisdiction.

Peacock, C.J.—This is an appeal from a decision of the Judge in a suit brought by the plaintiff against the defendant for arrears of rent under 100 rupees, and the principal question is whether this is a case in which the Judge had jurisdiction to try an appeal from the Deputy Collector.

The plaint stated that one-anna share of a certain talook belonged to the late Dwarkanath Chowdhry; that, upon his death, his share devolved upon his widow Brindaranee; that the plaintiff in Aughran 1271 purchased from the widow 5 gundahs of her one-anna share, and took from her a lease of the remaining 15 gundahs of that share; that plaintiff was the proprietor and in possession; that the defendant held a portion of the land included in the talook at a certain rent, and executed a kubooleut to the plaintiff for the same; and he claimed to recover the arrears

of rent due under the kubooleut from Aughran 1271 to Assar 1272.

The defendant denied the title of the widow (the plaintiff's vendor). He also denied the execution of the kubooleut, and stated that he had been paying his rent to certain other persons. These persons subsequently intervened, and were made parties to the suit. The intervenors stated that the rights of Dwarkanath Chowdhry and his co-sharers had been made over in 1244 to a certain idol, and that they, as shebaits, had been in possession of the property ever since.

The Deputy Collector laid down two issues: *1st*, whether the kubooleut was extorted from the defendant; and, *2ndly*, whether the rights of Dwarkanath and his co-sharers had been transferred to the idol.

Upon the *first* issue he found that the kubooleut was extorted; and, on the *second*, that the plaintiff and Brindaranee, his vendor, were in possession, and had not lost their right to collect the rent, and that the intervention was a dishonest attempt to deprive the widow of her right; and he gave the plaintiff a decree for the rent at the rate at which the defendant admitted he held the land occupied by him.

The ryot and the intervenors thereupon appealed to the Judge. The plaintiff also appealed. He at first appealed to the Collector, who dismissed the appeal upon the ground that a question of title had been determined, and that he had no jurisdiction. The plaintiff then appealed to the Judge.

The Judge, instead of the issues laid down by the Deputy Collector, laid down fresh issues, and amongst others the following:—

"Have the plaintiffs or the intervenors "hitherto and up to the date of institution "of suit been in receipt and enjoyment of "the rents?"

"Is the kubooleut valid?"

"What arrears are due?"

As to the *first* of these issues, he stated that he did not consider that the intervenors had shewn that they collected or enjoyed the rents of the one-anna share at all, and he further stated that the plaintiff had the right to take the rent and kubooleuts; *2ndly*, that the kubooleut was executed willingly, and was not extorted; and upon the *3rd* issue he awarded to the plaintiff rent calculated at the rate fixed by the kubooleut.

The present appeal is that which was preferred by the defendant himself, and his principal objection is that the Judge had no jurisdiction to try the appeal, as the amount sued for did not exceed 100 rupees. He contends that, as the intervenors came in under Section 77 of Act X. of 1859, the only question which ought to have been tried was whether the intervenors were in the actual receipt and enjoyment of the rent, and that no question of title was determined by the judgment. But this is not the case, as the plaintiff's right to receive the rent was not disputed, merely on the ground that the intervenors had actually and in good faith received and enjoyed such rent before and up to the time of the commencement of the suit, and the right of the intervenors was not claimed by them upon that ground alone. Both the ryot and the intervenors denied the title of the plaintiff and of his vendor, and the ryot denied that he gave the kubooleut upon which the plaintiff was suing.

Section 77 does not apply to such a case. It applies only to cases in which the right of the plaintiff to receive the rent is disputed, and such right is claimed by a third person upon the ground that such third person or a person through whom he claims has actually and in good faith received and enjoyed such rent before, and up to the time of the commencement of the suit. In such a case, if the actual receipt and enjoyment of the rent by such third person is not established, the plaintiff would be entitled to recover; but, where the title of the plaintiff is denied, that question must be enquired into, if the receipt of the rent by the intervenor is not established. A ryot is not allowed to dispute the title of a person from whom he has taken land; but where the plaintiff is not the person from whom the land was originally taken, but claims under a derivative title from him, the ryot would not be precluded from denying such derivative title, or proving that the person from whom he took had conveyed the land to some other person. For instance, if a ryot were to take land from *A B*, and after *A B's* death without issue *C D* should claim to receive the rent accruing subsequently to such death as the adopted son of *A B*, the ryot would not be precluded from denying that *C D* was the adopted son of *A B*, and *C D* could not, in such case, recover without proving a valid adoption. If the ryot, instead of merely denying the adoption, should go on and allege that, from the time of the death of *A B* up to the time of the commencement of the suit, *A B's* widow had actually and in good faith enjoyed the rent as the heir of *A B*, and the widow should intervene and claim the rent upon

the ground of her receipt of rent, the Court, upon failure of proof that the widow had received the rent, could not give a decree for the plaintiff without his proving the adoption; for it would not follow from the fact of the widow's not having received the rent that the plaintiff was entitled to it as an adopted son. In such a case the plaintiff would necessarily have to prove his title.

In the present case the plaintiff's title was denied upon the ground that Dwarkanath Chowdhry had in his lifetime made over the estate to the idol; and both the ryot and the intervenors set up the title of the intervenors, as well as the actual receipt of the rent by them. If the first Court had laid down an issue as to the actual receipt and enjoyment of rent, and had determined that question against the intervenor, it would have been necessary to go into the question of the plaintiff's title; for, as the title of the plaintiff, as well as the receipt and enjoyment of the rent by him, was disputed, he would not have been entitled to recover without proof of his title, or showing that the kubooleut to him was executed, which of itself would amount to *primâ facie* proof of title. Although the Deputy Collector did not lay down an express issue as to who was in the actual receipt and enjoyment of the rent, he substantially decided that question against the intervenors, and the question of title in favor of the plaintiff. An error in not laying down an issue as to the actual receipt of rent could not affect the question of jurisdiction.

Under these circumstances, we think that a question relating to title within the meaning of Section 153 of Act X. of 1859 was properly raised, and was, in substance, determined by the judgment of the Deputy Collector, and, consequently, that an appeal lay to the Judge, and not to the Collector. No objection is made that the Judge did not lay down an issue as to the title of the intervenors. He did, in effect, determine that question, and he also found that the defendant had executed a kubooleut to the plaintiff. That was sufficient, for the intervenors had no right to intervene for the purpose of setting up title. When the issue as to the actual receipt of the rent by the intervenors was found against them, it was necessary under the defence set up by the ryot to try the question of the plaintiff's title. When the plaintiff proved the execution of the kubooleut, it was unnecessary for him to give any further proof of title.

The cases cited from the 1st Weekly Reporter, page 113, and the Full Bench Case of 26th May 1865, 3 Weekly Reporter, Act X., page 21, do not bear upon this case. In the view of the case which we have taken, it becomes unnecessary for us to determine whether the defendant having appealed to the Judge could appeal specially to this Court against his decision upon the ground that he had no jurisdiction. We doubt whether the defendant could raise such an objection, even if the case had been one which ought to have gone to the Collector.

The decision of the Lower Appellate Court, against which the Appeal No. 2144 was preferred, is affirmed with costs.

The 9th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Local enquiry—Section 73, Act X. of 1859—Ejectment—Right of occupancy.

Case No. 1861 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 18th May 1866, reversing a decision passed by the Deputy Collector of that District, dated the 30th December 1865.

Shaikh Bahadoor Ali and another (Plaintiffs), *Appellants,*

versus

Domun Singh and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Moulvie Murhumut Hossein* for Appellants.

Baboo Roopnath Banerjee for Respondents.

Where a local enquiry is necessary, a Collector should cause such enquiry to be made by a properly constituted officer according to Section 73, Act X. of 1859.

The question of a prescriptive right of occupancy cannot arise in a case where a tenant sues to recover possession of land from which he alleges he has been illegally ejected. The tenant might have been in lawful possession only six weeks, and yet his eviction might have been illegal, and he would be entitled to recover.

Loch, J.—THE plaintiff, special appellant, sued to recover possession of lands which he held as a tenant, and from which

he alleges that he was forcibly and illegally ousted by Domun Singh, the lessee or ticcadar of the zemindar in 1273. The defendant denies the possession of the plaintiff, and says that the lands were let by him from 1273 to one Sobhun Singh.

The first Court appointed one Ahmed Khan Ameen to make a local enquiry into the fact of possession, and the result of that investigation was in favor of the plaintiff. On appeal the Judge holds that the Ameen's report cannot be admitted, as there is no proof or order to show that Ahmed Khan was subordinate to the Collector, or that he is an officer of Government as required by Section 73, Act X. of 1859. The Judge, in coming to this conclusion, appears to have acted on the objection raised by the defendant in appeal. The order deputing Ahmed Khan to make the local enquiry is addressed to him as Ahmed Khan Ameen, and *primâ facie* this indicates that he is an officer of Government, and it was for the party who objected to his deputation to prove that he was not a legally constituted Ameen. If he were not so, the Judge should have directed the Collector, if there was a necessity for a local enquiry, to have such enquiry made by a properly constituted officer.

The Judge further finds against the plaintiff's claim, on the ground that there is no proof of occupancy for 12 years; and he goes on to say that, of the documents filed by plaintiff, one is untrustworthy, and the others do not establish his legal occupancy. It is difficult to understand what the Judge intends by these words. The question for the Judge to determine on the plaintiff's pleadings was whether plaintiff was in occupation as a tenant, and whether he had, as he alleged, been forcibly and illegally ejected in the course of the year when his crops were on the ground, or whether he had been legally evicted. No question of a prescriptive right of occupancy arises in this case. Plaintiff might have held lawful possession only for six weeks, and yet his eviction might have been illegally made, and he would be entitled to recover. We remand the case for the Judge to determine on evidence whether Ahmed Khan is or is not a properly constituted Ameen under the provisions of Section 73, Act X. of 1859; and if he be not, he will direct the Collector, if necessary, to depute a proper officer, and, if local enquiry be necessary, he will proceed to dispose of the case as indicated above.

The 9th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Arbitration.

Case No. 1424 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 5th March 1866, affirming a decision passed by the Moonsiff of Radhanuggur, dated the 12th August 1865.

Gooroo Churn Dey and others (Defendants), *Appellants,*

versus

Ram Dhun Paul and others (Plaintiffs), *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Chunder Kali Ghose for Respondents.

It is no ground to set aside an award of arbitrators under Section 324, Act VIII. of 1859, that the arbitrators decided the case against the written statement of the defendant.

Shumbhoonath Pundit, J.—THE special appellant contends that the Lower Appellate Court has set aside the award of the arbitrators, on the ground of the said arbitrators having decided the case against the written statement of the defendant.

As under Section 324 of Act VIII. of 1859 this is no ground to set aside an award of arbitrators, we decree the special appeal with costs, and, reversing the orders of both the Lower Courts with costs, dismiss the plaint.

The 9th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Tenants-at-will—Rent demandable from.

Case No. 2019 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 16th May 1866, reversing a decision passed by the Deputy Collector of that District, dated the 31st October 1865.

Baboo Gopaul Lal Thakoor (Plaintiff), *Appellant,*

versus

Budurooddeen (Defendant), *Respondent.*

Baboos Kalee Mohun Doss and *Kishen Doyal Roy* for Appellant.

Baboos Pearee Lal Roy and *Shushee Bhooshun Bose* for Respondent.

Where a tenant has no right of occupancy, the landlord is entitled, after service of notice, to demand rent from him at a fair rate, *i. e.*, the full market-rate.

Loch, J.—THE defendant pleaded a right of occupancy, but the Judge has not determined whether he has such a right or not, but, assuming that the defendant has no such right, has proceeded to dispose of the case. If the defendant have a right of occupancy, the plaintiff's case must be tried under the provisions of Section 17, as plaintiff claims an enhancement on the ground that the productive powers of the land have increased. If the defendant have no right of occupancy, the plaintiff is entitled to demand rent after service of notice at a fair rate; but "the fair rate in such a case is clearly the "full market-rate; the fullest rate which "other tenants similarly situated (that is, "without any privileges or right of any "kind) do, can, or are willing to pay." We refer the Judge to the cases reported at Volume III., Weekly Reporter, page 126, Act X.; and Volume IV., Weekly Reporter, page 45, in which the law is clearly laid down. The case is remanded for disposal according to the above instructions.

The 9th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation—Cause of action—Payment of Government Revenue by co-sharers.

Case No. 1975 of 1866.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 14th May 1866, reversing a decision passed by the Principal Sudder Ameen of Serajgunge, dated 31st October 1865.

Kalee Shunkur Sandyal (Plaintiff), *Appellant,*

versus

Huro Shunker Sandyal and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mittèr and *Sreenath Doss* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

The plaintiff's cause of action was held to arise when he paid the money to the Collector as Government revenue on account of his defaulting co-sharers, and not from the date when the money-lender, from whom he had obtained the money to make that payment, realized it from him under a decree of Court.

Loch, J.—WE think that the Judge is quite right. The plaintiff's cause of action arose when he paid the money to the Collector as Government revenue on account of his defaulting co-sharers, and not from the date when the money-lender, from whom he had obtained the money to make that payment, realized it from him under a decree of Court. The appeal is dismissed with costs.

The 10th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Evidence—Admission.

Case No. 2023 of 1866.

Special Appeal from a decision passed by Lieutenant-Colonel J. S. Davies, Judicial Commissioner of Chota Nagpore, dated the 18th May 1866, affirming a decision passed by Lieutenant R. C. Money, Deputy Commissioner of Maunbhoom, dated the 11th August 1865.

Rajah Nilmoney Singh Deo (Plaintiff), *Appellant,*

versus

Ramanoograh Roy and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Kishen Succa Mookerjee and *Poorno Chunder Shome* for Respondents.

Where a person uses the admission of another as evidence, the whole admission must be put in. He cannot put in half, and exclude the other half. Those who have to decide upon the evidence are not bound to believe the whole of the statement.

Peacock, C.J.—THE plaintiff sues to set aside a kherajee bromotur tenure, and, I suppose, to declare that the defendant holds as his tenant. The defendant, in his written statement, admits that he held as the plaintiff's tenant, but he stated that he and his family have held the tenure at a yearly quit-rent. The plaintiff now endeavors to take that statement as an admission that the defendant holds as his tenant, and to throw on

him the *onus* of proving that he holds at a yearly quit-rent.

The general rule is that, where a person uses the admission of another as evidence, the whole admission must be put in. He cannot put in half, and exclude the other half. Those who have to decide upon the evidence are not bound to believe the whole of the statement.

The Lower Court was justified in believing the whole statement, and in giving a decree for the defendant, there being no evidence to disprove it. The decision of the Lower Appellate Court is affirmed with costs.

Jackson, J.—I concur, and would only add that the plaintiff cited witnesses, and, when they appeared, declined to have them examined. The inference, not unfairly to be drawn from this conduct, is that those witnesses, on examination and cross-examination, would have deposed to a state of facts exactly that set up in the defendant's answer.

The 10th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Mortgage-accounts.

Case No. 2237 of 1866.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Mymensingh, dated the 19th June 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 29th May 1865.

Nilkant Sein and another (two of the Defendants), *Appellants,*

versus

Shekh Jaenooddeen and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Sreenath Doss for Respondents.

Though a mortgagee be not an usufructuary mortgagee, the mortgagee in possession is bound to give an account of the profits realized by him from the mortgaged property so long as it was in his possession, whether he took possession with or without the consent of the mortgagor.

Loch, J.—The defendants, special appellants, in this case executed a deed of conditional sale in Bhadur 1257 (August 1850) in favor of the plaintiff, who took possession of the property, and retained it till 1263 (1856), when the special appellant, having brought a suit for possession with mesne-profits during the period he remained out of possession, obtained a decree for possession with mesne-profits from date of suit, the mesne-profits for the period prior to suit being refused on the ground that the claim for such profits had not been properly brought. The cause of action in this suit was that, whereas the sale to plaintiff was only conditional, he claimed to have purchased absolutely, and had taken possession. The plaintiff subsequently gave notice of foreclosure, and the present action is brought to obtain possession of the mortgaged property. The defendant pleads that the plaintiff is bound to account for the profits of the estate while he remained in possession; but the Lower Courts have rejected the plea on the ground that the mortgage to plaintiff was not an usufructuary mortgage; and that, if plaintiff took possession contrary to the terms of his mortgage, the defendant could sue him for mesne-profits as well as for possession; that defendant did bring a suit, and, having failed thereon to get an award of mesne-profits, he was not entitled to ask for an account. We think this view of the case is wrong. Plaintiff is bound to give an account of the profits realized by him from the mortgaged property so long as it was in his possession, whether he took possession with consent of the mortgagors or without. He was in possession for some years, and is bound to account for the sums collected during that period, though the mortgage was not an usufructuary mortgage. We reverse the order of the Lower Court, and remit the case to the first Court, and direct the Sudder Ameen, after calling upon the plaintiff to produce his accounts, to dispose of the case for possession.

The 10th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Execution of Money-decree—Subsequent purchaser.

Case No. 2004 of 1866.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 14th May 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 25th July 1865.

Bhugwan Doss and others (Defendants).
Appellants,
versus
Shaikh Nubee Buksh (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellants.

Mr. R. E. Twidale for Respondent.

In a case between two holders of money-decrees upon bonds in execution of which they respectively put up for sale and purchased the same property, the first purchaser admittedly in possession was held entitled to the property, the subsequent purchaser being left to enforce his right under his bond, decree, and purchase, by a separate action.

Bayley, J.—PLAINTIFF in this case sued to reverse a sale in execution, at which defendant purchased the property in suit.

The plaintiff alleged that he had purchased the same property also at a sale in execution under a decree obtained by him, and had held possession under it.

Defendant pleaded that the suit could not lie, and that he had, under a bond and decree of a date previous to plaintiff's purchase, acquired title also by purchase at a sale in execution. Defendant, however, nowhere in the pleas in his answer denied that plaintiff had possession.

Both parties admit that plaintiff's purchase was anterior to that of defendant, and that the decrees both of plaintiff and defendant were money-decrees.

In a previous decision the Judge decided that a precedent of 22nd May 1862, on which the plaintiff (the appellant in the zillah) relied, had been overruled by a decision of a Full Bench of this Court, but the Judge did not specify the precedent. On this the case was remanded to the Judge, and he was referred to the Full Bench Decision of the 15th December 1864, Volume I., Weekly Reporter, page 315, as a guide to him for the proper decision of the case.

The Judge, on this remand, has decided that, as there was only a money-decree held by defendant, and there was no decretal order that it should be satisfied from the property pledged, the decision of the Full Bench cited above applied, and, in this view, the Judge gave plaintiff a decree.

Defendant appeals specially, and urges—

1. That the Court below has misapplied this precedent of 15th December 1864; that the Full Bench then in no way overruled the decision of the late Sudder Court, dated 22nd June 1857, page 185, by which it was ruled that, where there might be a previous lien on the property and a decree on that lien, the subsequent purchaser at a sale in execution would not be entitled to oust the holder of such lien and decree.

2. That the precedent of 15th December 1864 did not apply retrospectively to a transaction which had taken place before that precedent.

The *first* plea could only have any force if the facts of this case and of that decided on the 22nd June 1857 by the late Sudder Dewanny Adawlut were the same. That case rested on the holder of the lien and decree anterior to the subsequent purchase *being in possession*. Here, plaintiff clearly alleged that he was in possession under his purchase; and defendant, though advancing in his answer other pleas as his defence, did not, *in any way whatever*, deny plaintiff's allegation of *possession*. It is, therefore, legally admitted by defendant that plaintiff was in possession. Thus, the case of 1857 and this case differ in the most essential point. The special appellant urges, however, that, as plaintiff only got his sale-certificate and order of possession after defendant's purchase in execution and possession according to that order, plaintiff on his own statement was not in possession. We are, however, of opinion, *firstly*, that the plaintiff did not say that he got possession *after this order* of Court, but that he was in possession in *accordance* with it; and, *secondly*, we think that, when the possession was so clearly asserted by plaintiff, and *in no way denied* by defendant in his answer, the defendant must be held to have by that written pleading admitted plaintiff's possession.

In this view we are clearly of opinion that there has been no misapplication of the precedent of the Full Bench of the 13th December 1864.

On the *second* plea we are of opinion that the procedure laid down in the above precedent will apply, even if defendant's lien and decree and purchase are previous to it. The precedent lays down by what form of action parties in defendant's position must proceed from the date of that precedent. This action is brought admittedly after the date of the precedent, and we must be governed by it in deciding the case.

We hold, then, that, according to the precedent of the 15th December 1864, defendant cannot have the question of a prior right under his bond, decree, and purchase adjudicated, except by a separate action as laid down in the concluding portion of the precedent.

We, therefore, dismiss this special appeal with costs.

C

The 12th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Jurisdiction (of Small Cause Court)—Suit for contribution of Government Revenue.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Court of Small Causes of Pubna.

Kaleenath Roy, *Plaintiff,*

versus

Nilaram Puramanick, *Defendant.*

A suit by a co-sharer for contribution in respect of Government revenue paid by him in excess of his own quota is not cognizable by a Small Cause Court, as the extent of the share in respect of which contribution is sought cannot be determined without deciding a question of title.

Case.—PLAINTIFF states that, of the Joth Moodafut Rajendro Bhoomick, as mentioned in the plaint, held jointly in the names of the plaintiff's father and defendant in the village of Burrooreah, of which the annual rental has been fixed at Rupees 54-11-3-2, 5 *as.* 6 *gds.* 2 *c.* 2 *k.* share belongs to plaintiff himself, and 10 *as.* 13 *gds.* 1 *c.* 1 *k.* share belongs to the defendant; that, of the above-mentioned annual jumma of the said joth for the year 1271 B. S., plaintiff deposited in the Collectorate Rupees 7-10-9; that, subsequently, the zemindar brought a suit, No. 406 of 1865, for the balance of the rent of 1271 B. S., and another, No. 214 of 1866, for the rent of the year 1272 B. S., and obtained decrees confirmed in appeal; that he, the zemindar, afterwards, in execution of the said two decrees, caused the property only of the plaintiff to be attached; that the said decrees being both against the plaintiff and the defendant in the present case, and the defendant not having paid his own share of the judgment-debt, the plaintiff paid into the Collectorate the whole amount of the decrees, Rupees 154-4-9, and saved his own property from sale; and that the plaintiff now prays in this suit to recover from the defendant the sum of Rupees 108-6-5, being the total of the amount which he has paid for the defendant on account of the rent of the aforesaid joth and of interest for the same. The defendant objects that this suit is not cognizable by the Small Cause Court, because, though he (the defendant) is in fact only 5 *as.* 6 *gds.* 2 *c.* 2 *k.* shareholder of the joth for which plaintiff alleges to have paid defendant's share of the rent, the plaintiff states him to be holder of 10 *as.* 13 *gds.* 1 *c.* 1 *k.* share, and sues to recover from him contribution of the decreed amount accordingly; that this suit for contribution according to plaintiff's allegation, therefore, cannot stand; that the defendant having paid to the zemindar rent for the periods both prior to and after the alleged decrees, and received "dakhilas" for the same, is not liable for contribution of the amount of the decrees alleged to have been satisfied by the plaintiff; that there are other shareholders of the said jumma than the plaintiff and the defendant; and that, according to the circumstances of the case, plaintiff now cannot claim costs and interest of the present suit.

The points, therefore, for decision in this case are—

1. Whether this case is cognizable by the Small Cause Court or not?

2. What is the defendant's share in the jumma of which plaintiff alleges to have paid rent?

3. To what extent is the plaintiff liable, if he is at all liable, for contribution of the amount which plaintiff says to have paid on account of the rent of the aforesaid jumma, and, according to the circumstances of the case, can the plaintiff get interest and costs of the suit?

The copy of the Collector's decree in the suit for arrears of rent, No. 214 of 1866, filed by the plaintiff, shews that both litigants are joint shareholders of the joth land, for the rent of which the above-mentioned decree was passed; but it does not shew that each of the parties holds in it shares as alleged by them in their statements. Under this circumstance I am of opinion that, until the interest of the litigant parties in the aforesaid joth jumma be established by a competent tribunal, defendant's liability for the contribution and its interest cannot be ascertained. Plaintiff's pleader orally contends that, inasmuch as this is a suit for contribution of joint decrees, and inasmuch as the receipts of the amount of the rent deposited by the plaintiff in the Collectorate are with the record, there does not appear any objection to the suit being tried by the Small Cause Court, it being one purely for money. The issues fixed above cannot, I think, be decided by this Court, because Small Cause Courts have no jurisdiction to try such questions of interest and share. The principle that a joint proprietor, who pays into the Collectorate more than his own share of Government revenue, and thus saves the joint estate from sale by paying what is due by his co-sharer, cannot afterwards sue his co-

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sharer in the Small Cause Court for the recovery of the excess amount of revenue paid by him, applies, I think, to the case now under consideration.

The judgment of the High Court was delivered as follows by—

Peacock, C.J.—We are of opinion that the Judge of the Small Cause Court has taken a correct view of this case. The extent of the share in respect of which contribution is sought cannot be determined without deciding a question of title.

The 12th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Jurisdiction (of Civil Court)—Compounding of offence.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Court of Small Causes of Pubna.

Mothooranath Bhoomick, *Plaintiff*,

versus

No. 1, Kenaram Kurmokar; and No. 2, Shibnath Shah, *Defendants*.

Where *A* was criminally prosecuted by *B* for wrongful restraint, and he came to terms with *B* to pay him for the withdrawal of the complaint, or to deposit money or property with *C* to be paid over to *B* on the disposal of the case according to *B*'s petition of withdrawal; and the Magistrate, instead of allowing the withdrawal of the charge, punished *A* criminally—HELD that *A* could sue for the recovery of the money or property, as the charge was not one which it would have been illegal for *A* to withdraw with the consent of the Magistrate, the offence charged consisting of an act for which *B* might have sued for damages in the Civil Court.

Case.—PLAINTIFF states that, the defendant No. 2 having brought against the plaintiff in the Criminal Court a criminal charge of illegal restraint, &c., it was settled with the said defendant that he would file a razeenamah in the case, and would receive from the plaintiff in consideration thereof the sum of Rupees 55, on account of costs, if the case would be disposed of according to the razeenamah; that, with this understanding, plaintiff, on the 27th Joist of the current year, deposited with defendant No. 1 certain golden ornament called "*malla*," weighing 2½ tolahs, valued at Rupees 35, and a bond for Rupees 29, executed by the said defendant No. 2 in favor of plaintiff's sister; that, subsequently, the razeenamah filed by the defendant No. 2, Shibnath Shah, was disallowed by the Criminal Court, and plaintiff was punished according to the aforesaid charge; that afterwards plaintiff having demanded back from defendant No. 1 the bond and the golden ornament which he had kept with him, he did not return them, stating that the defendant No. 2 had taken them from him; and that plaintiff, therefore, now sues to recover back the said ornament and bond, or their value.

Defendant No. 1 answers that the things mentioned above were kept with him with the condition that, when the razeenamah which defendant No. 2 Shibnath Shah was to file in the aforesaid criminal case would be accepted by the Criminal Court, Shibnath was to receive the same; and that, subsequently, the said defendant No. 2, alleging that the razeenamah in the criminal case was allowed, took from him (defendant No. 1) the said ornament and bond.

Defendant No. 2, Shibnath Shah, alleges that he, having fulfilled his part of the contract, namely, having tendered a razeenamah in the criminal case, was entitled to take the said golden ornament and bond; and that there was no such condition that he would get the aforesaid things after the razeenamah would have been accepted by the Criminal Courts.

The only point for adjudication in this case is—

1. Can the plaintiff get any assistance from the Court of Judicature in recovering back, as prayed by him, either the property which he had deposited, or its value?

Plaintiff is not entitled to receive any assistance from any Court of Justice in suits of this nature, because the contract itself was illegal, inasmuch as plaintiff himself states in his plaint that defendant No. 2 having brought a criminal charge of illegal restraint, &c., against the plaintiff, he (the plaintiff), with the intention of having the case withdrawn from the Criminal Court by the said defendant No. 2, deposited with defendant No. 1 the property above mentioned, which the said defendant No. 2 was to receive from defendant No. 1, after the razeenamah shall have been accepted, and the case disposed of accordingly; that, as the razeenamah, filed by the defendant No. 2, was not accepted, and plaintiff was criminally punished for the charge, he now sues to get back the said deposited property and the bond. The sum and substance, therefore, of plaintiff's action seems to me to be that there would have been raised no objection to defendants' getting the deposited

articles, had plaintiff not been punished by the Criminal Court. Such attempt to save an offender from legal punishment cannot be countenanced. If any person doing any act which is prohibited by law is criminally prosecuted, and he comes to terms with the prosecutor to pay him for the withdrawal of the complaint any money or property, or to deposit any money or property with a third person for being paid to the prosecutor after the case shall have been disposed of according to the petition of withdrawal, he cannot, I hold, get any assistance from Courts of Justice in recovering such money or property.

The judgment of the High Court was delivered as follows by—

Peacock, C.J.—We are of opinion that the plaintiff is not precluded from maintaining this action upon the ground that the contract was illegal.

The charge was not one which it would have been illegal for the defendant to withdraw with the consent of the Magistrate. The offence charged, *viz.*, wrongful restraint, consisted of an act for which the prosecutor might have instituted a suit in the Civil Court for damages. This distinction is recognized by the Penal Code in the exception to Section 214. *See* the illustrations of that exception.

The 12th January 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Limitation—Suit for confirmation of right in land—Possessory award under Section 15, Act XIV. of 1859.

Case No. 2026 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Pubna, in Rajshahye, dated the 15th May 1866, reversing a decision passed by the Moonsiff of that District, dated the 10th August 1865.

Shanto Monee Gooptah (Defendant), *Appellant,*

versus

Suttobhama Gooptah (Plaintiff), *Respondent.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

In a suit by a Hindoo widow for confirmation of her title to certain land in right of her husband, the defendant, who had a possessory award of the property given to her under Section 15, Act XIV. of 1859, pleaded that the plaintiff never was in possession. HELD that the *onus* was on the plaintiff to show that she was in possession within the period of limitation.

Seton-Karr, J.—THE Moonsiff of Pubna, in a very clear and well-reasoned decision, dismissed the plaintiff's claim, but the Principal Sudder Ameen reversed the decision, and gave a decree.

The suit was brought by a widow for confirmation of her right in certain lands which she declared to be hers in right of her husband, whose the property was as ancestral, jointly held with his brother Kashinath.

The Moonsiff found that the plaintiff had not given any reliable evidence to show that she was ever in possession of the property within the prescribed time. The defendant, it is clear, has now a possessory award of the property given to her under Section 15 of Act XIV. of 1859. In her answer the defendant clearly pleaded that the plaintiff never had been in possession; and, looking to this plea and to the possessory award held by the defendant, we think that the Moonsiff was quite correct in treating the case as he did, and that the Principal Sudder Ameen was wrong in decreeing the claim on the ground that the property was at one time joint, and that it was not shewn exactly at what time separation took place. The Principal Sudder Ameen is further wrong in saying that limitation cannot be applied, unless it be ascertained why the plaintiff did not hold possession of the above property.

The case is one to which Clauses 12 and 13 of Section 1 of Act XIV. of 1859 strictly applies. The defendant is in possession by the award of a competent Court, and in the teeth of that award, the plaintiff cannot be presumed to have been lately in possession, and it is for her to get over the limitation pleaded by the defendant, and to show that she has been in possession within 12 years. The Principal Sudder Ameen's decision is set aside, and we cannot endorse the censure which he has passed on the Moonsiff, for the way in which he has tried the case, and for giving an opinion on the merits.

The Principal Sudder Ameen will re-try the appeal, calling on the plaintiff to get over limitation, and requiring from her strict proof of possession within 12 years, and he will remember that the exact time of separation of the family is, comparatively, immaterial. What is material is for the plaint-

iff, under the circumstances, to show possession, and to get over limitation.

Remand accordingly.

The 12th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Hindoo Law—Re-union after Partition.

Case No. 1991 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 10th May 1866, reversing a decision passed by the Moonsiff of Oondah, dated the 6th January 1866.

Gopal Chunder Daghoria (Plaintiff), *Appellant,*

versus

Kenaram Daghoria and another (Defendants), *Respondents.*

Baboos Rajendernath Bose and *Nil Madhub Sein* for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

According to Hindoo Law, mere living together in one residence or joint trade does not constitute a re-union after partition, but there must be a junction of estate. When such re-union is satisfactorliy established, Courts are bound to give a preference to the re-united parceners to the exclusion of the members or their issue who have not been so re-united.

Seton-Karr, J.—THE only point raised in this appeal is whether the facts proved before the Principal Sudder Ameen are evidence to justify his finding the re-union after the separation of the brothers according to Hindoo Law and practice.

The plaintiff claimed a third share in some property which, he said, descended to him from his youngest uncle Brindabun, after the death of this person's widow. The defendants pleaded limitation, but without effect, and then urged that they or their father had effected a re-union with his brother Brindabun after a separation had taken place between the brothers, and that, consequently, the plaintiff could not succeed.

The Moonsiff gave the plaintiff a decree, but the Principal Sudder Ameen dismissed the suit.

Cases of re-union after partition appear to be of rare occurrence in our Courts. One is quoted to us from page 250 of Volume V. of the Weekly Reporter, in which the Court (Justices Seton-Karr and Macpherson) reviewed the law on the subject, and held that, if a person could establish the fact of re-union after separation, he would be entitled to succeed to the exclusion of others who, but for the re-union, would be entitled to share under the usual provisions of Hindoo Law.

In that decision the law on the subject was considered, and we have, on this occasion, referred to the authorities named in the margin. The authorities relied on in the Vyavasta Durpana hold that families "separated may unite through affection, but that the re-union must not be simply a residence in the same house or abode.

Select Reports, Volume I., page 35.
Vyavasta Durpana, Vol. I., page 208.
Dyabhaga, page 168.
Vyavahara Mayukha, page 111.

"It consists in forming one household; and "their intentions are thus declared—'What "is thy property is mine.' Their effects are "thus intermixed—'The duties of both of "us shall be the same:' an agreement for "community of duties is thus made. In "like manner common fare; consequently, "two brothers again living together through "mutual affection as joint house-keepers, "after having made a partition, are called "re-united parceners."

The author then says—"Who can be called "a re-united parcener? To this Jimuta-"vahana says, father, son, brothers, paternal "uncles, and the rest, are, when re-united, "reckoned re-united parceners." (Colebrooke's Dyabhaga, page 168.)

And the Dyabhaga at this passage says: "Vrihaspati says, 'He, who, being once sepa-"rated, dwells again, through affection, "with his father, brother, or paternal uncle, "is termed re-united,'" and the author then goes on to say that the re-union must be a re-union of property—"The property which "is mine is thine, and that which is thine is "mine."

A consideration of these authorities leaves no doubt in our mind that mere living together in one residence or joint trade does not constitute a re-union, but that there must be a junction of estate; and, further, that, when such re-union is satisfactorily established, Courts are bound to give a preference to the re-united parceners to the exclusion of other members or their issue, who have not been so re-united.

Now, what does the Principal Sudder Ameen find in this case? He holds from the oral evidence, and from a decision of 1822, 26th of July, showing that Brindabun and the father of the appellant sued a tenant

jointly; as well as from a decision of the 20th of February 1846, that Brindabun, *after* the separation of the appellant's father and his four brothers, did again re-unite, did live in commensality, and did hold properties jointly. His exact words are "that the "parties lived in one mess (ekanne) and in "one place (ekatre) and like one family "(ek paribar nyaye), and that they again "joined each other's share of the property, "and remained in possession."

These expressions, used after a careful survey of the evidence, appear to us to amount to a clear and satisfactory finding of a mode of re-union after partition such as Hindoo Law contemplates, sanctions, and requires. The evidence, if credited, seems to us, further, legally sufficient to support such a finding, and, on the whole, we conceive the decision of the Principal Sudder Ameen to be quite correct and conformable to law, as well as to such practice as we find to exist.

We have, therefore, only to affirm his decision, and to dismiss the appeal with costs.

The 12th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Limitation—Suit for account and share of profits of dissolved partnership.

Case No. 2012 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 19th May 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 23rd December 1865.

Bhutoo Ram (Defendant), *Appellant,*

versus

Puhul Chowdhry (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Onookool Chunder Mookerjee and *Mohesh Chunder Chowdhry* for Respondent.

A suit for an account and for the plaintiff's share of the profits after an admitted dissolution of partnership is governed by the limitation prescribed by Clause 16, Section 1, Act XIV. of 1859.

Seton-Karr, J.—THE appellant tries to argue the point of limitation, which has been decided against him by both the Lower Courts. The Courts' judgments are correct on this point. Clause 9, Section 1 of Act XIV. of 1859, for which the appellant contends, does not apply to such a case. This is not a suit for "money lent, or interest, or for the breach of any contract," but for an account and the plaintiff's share of the profits after an admitted dissolution of partnership. Consequently, Clause 16 applies to this case, which is not specially provided for in any other Clause. The money embarked by the plaintiff in the common venture did not become a loan after the dissolution any more than it was a loan previous to that event.

This objection being disposed of against the appellant as quite untenable, it is unnecessary to discuss the other points raised. The plaintiff and the defendant, by their pleaders, consent that the plaintiff shall receive a sum, not of 368 rupees as awarded by the Judge, but of 300 rupees without *any interest, as in full of all claims.*

Both parties to pay their own costs in this special appeal. The costs in the Courts below to remain as fixed.

Decision accordingly to the above effect.

The 14th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Ejectment—Suit to recover possession—Onus probandi.

Case No. 2034 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensigh, dated the 18th May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 30th December 1865.

Shushtee Dhur Mozoomdar (one of the Defendants), *Appellant,*

versus

Nuteeja Bibee and others (Plaintiffs), *Respondents.*

Baboos Bhugobutty Churn Ghose and *Kishen Dyal Roy* for Appellant.

Baboo Sreenath Doss for Respondents.

If a person ejected without process of law fails to prove his right to recover possession, he is not entitled to be put back into possession.

Loch, J.—Plaintiff stated that he had been illegally ejected, and sued to recover possession, alleging that he held on a pottah, and had paid rent for the land. Defendant denied the plaintiff's possession. The Judge finds the pottah and receipts for rent filed by the plaintiff to be spurious, but holds that plaintiff had been in possession for a long time, and, therefore, the defendant was not entitled to eject him summarily and illegally, and he directed that the plaintiff be restored to possession.

In special appeal it is urged that the Courts below have not found that the relationship of landlord and tenant exists between the parties; that, as plaintiff has failed to establish his right to recover possession, the mere fact of his having been in possession is not a sufficient ground for putting him back, for he can only be looked upon as a trespasser, and as such it required no process of law to enable defendant to eject him. The case of Madur Khan, reported at page 389 of Marshall's Reports, appears to us to meet this case; and, as plaintiff has failed to prove his right to recover, he is not entitled to be put back into possession. We, therefore, reverse the order of the Lower Courts, and dismiss the plaintiff's suit with costs in all Courts.

The 14th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges*.

Interest—Jurisdiction—Appeal—Acquiescence.

Case No. 553 of 1866.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 30th January 1866, reversing an order passed by the Assistant Commissioner of that District, dated the 25th November 1865.

Rajah Ram Keran Deo (Judgment-debtor), *Appellant,*

versus

Mussamut Fuhima Bebee and others (Decree-holders), *Respondents.*

Baboo Nil Monee Sein for Appellant.

Baboo Kalee Kishen Sein for Respondents.

Where the Assistant Commissioner in execution in 1857 acted without jurisdiction in giving interest when the decree did not award it, and the claim for interest was disallowed by the Deputy Commissioner in execution in 1865, and the Deputy Commissioner's order was reversed in appeal by the Judicial Commissioner, on the ground that the Assistant Commissioner's order was a judicial one from which no appeal had been preferred—Held by the High Court that it was too late now to interfere with an order passed so long ago as 1857, as the judgment-debtor, by neglecting to appeal, must be presumed to have acquiesced in that order.

Loch, J.—In 1857 the Assistant Commissioner, in execution of a decree held by the respondent, allowed interest, though the decree was silent as to interest. No appeal was preferred from that order.

In 1865 the decree came up again for execution, and the Deputy Commissioner, on 25th November, disallowed the claim for interest, on the ground that the decree did not award it.

On appeal to the Judicial Commissioner, this last order was reversed on the ground that the order passed by the Assistant Commissioner was passed in his judicial capacity, and, as no appeal had been preferred from his order, it must, therefore, stand.

The point taken before us is that, as the Assistant Commissioner acted without jurisdiction in giving interest when the decree did not award it, the Deputy Commissioner was right in setting aside a decree passed without jurisdiction.

We think it now too late to interfere with an order passed so long ago as 1857, particularly as the appellant had at the time a right of appeal if he objected to the order passed, a right which he neglected to exercise, and therefore it may be supposed that he acquiesced in that order. Under these circumstances, we dismiss the special appeal with costs.

The 14th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale (Effect of—without payment of consideration).

Case No. 2321 of 1866.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 18th June 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 15th August 1865.

Bhyunkuree Dabee (Defendant), *Appellant,*

versus

Tarinee Churn Chuckerbutty (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboos Ashootosh Dhur* and *Bama Churn Banerjee* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A mere agreement to sell a certain property without any consideration passing cannot bar the right of the vendor on the same day to sell a portion of the property to a third party, or invalidate the third party's purchase.

Shumbhoonath Pundit, J.—THE Lower Appellate Court has faund as facts (1) that, after sale of the whole of the property of which a portion is now in dispute was agreed to be made to the defendant, special appellant, the portion now in dispute was sold to the plaintiff, special respondent, for a consideration proved to have been paid; (2) that the deed of sale to the plaintiff, special respondent, was registered; (3) that afterwards, the vendor and her son being gained over by the special appellant, the sale of the whole was made to him upon an insufficient stamp.

The defendant, special appellant, contends that the Lower Appellate Court has not decided whether the deed to the plaintiff or to the special appellant was the first executed, but we have already stated above that the Lower Appellate Court has tried that point.

The defendant, special appellant, does not make any point of the finding of the Lower Appellate Court that, before the execution of the sale to the plaintiff of the portion now in dispute, it was agreed to sell the whole property to the special appellant; but we find that there is no proof of any agreement or contract prejudicial to the present suit of the plaintiff. A mere agreement to sell *without any consideration passing* would not bar the right of the vendor of the plaintiff to sell to the plaintiff, though the vendor may or might be liable for damages according to circumstances.

Here we have to notice a plea of jurisdiction, *viz.*, the special appellant urges that, as the Act X. case for rents against certain ryots of the lands in dispute instituted by the special appellant, in which the plaintiff had unsuccessfully intervened under Section 77 of the Act, was for less than 100 rupees, there was no appeal to the Judge from the order of the Deputy Collector which awarded a decree to the special appellant; and that, therefore, the present suit for title and declaration of rights of the whole lands in dispute, being instituted more than one year after the decision of the Deputy Collector (though within one year of the decision of the Appellate Court upholding the decree), is barred by limitation.

Assuming that there was no right of appeal in that case, still, as we hold that this case is not for recovery of those same rents which were decreed to the special appellant, this suit, as now brought, does not come under Section 77, Act X. of 1859, and consequently is not liable to be dismissed as barred by limitation.

Plaintiff, special respondent, does not, in fact, so much rely upon any right of priority on the ground of the registry of his deed, but upon the fact of the priority of the execution of his deed. It is not, therefore, necessary to see whether plaintiff had (as he alleges) obtained possession, or whether, before the plaintiff's deed was registered, the sale to the special appellant had become so complete by possession as not to be liable to be set aside merely for want of registry.

Defendant, special appellant, pleads that he is a *bonâ fide* purchaser without notice, but we have strong doubts whether, after the finding of facts by the Lower Appellate Court which we have above set forth, he can urge this. Moreover, if the vendor, before he sold the whole to the defendant, special appellant, had sold a portion to the plaintiff, special respondent, we cannot think that the latter, plaintiff, special respondent, as a previous purchaser, loses his rights, because another had, on the same day on which the plaintiff purchased, bought the whole possibly in ignorance of the previous purchase.

We, accordingly, see no reason to interfere, and reject the special appeal with costs.

The 14th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Section 348, Act VIII. of 1859—Objection (by defendant or respondent against co-defendant or co-respondent).

Case No. 134 of 1864.

Application for review of judgment passed by Justices Morgan and Shumbhoonath Pundit, on the 12th January 1864, in Regular Appeal No. 129 of 1863.

Maharajah Tarucknath Roy (Plaintiff), *Petitioner,*

versus

Tuboorunnissa Chowdhrain (Defendant) and others (Objectors), *Opposite Party.*

Mr. G. C. Paul and *Baboo Gopal Loll Mitter* for Petitioner.

Mr. R. E. Twidale and *Baboos Sreenath Doss, Kishen Succa Mookerjee,* and *Nil Madhub Sein* for Opposite Party.

A defendant or respondent cannot be heard by way of cross-appeal under Section 348, Act VIII. of 1859, as against a co-defendant or co-respondent.

Bayley, J.—THIS case, having been originally before Messrs. Justices Morgan and Shumbhoonath Pundit, was, upon a cross-appeal of a respondent under Section 348, remanded by an order passed in review, and directions were given for the adjudication by the Court below of certain issues. These issues having been now adjudicated, the case came on for hearing to-day before Bayley and Shumbhoonath Pundit, JJ., when Baboo Kishen Succa, for the proprietor of Talook 46, took the objection that the cross-appeal under Section 348 by a co-respondent could not be heard as against him, another co-respondent. The other party contended that, as the proprietor of No. 46 had appeared after remand on the summons of the Zillah Court at the trial of the issues for which the remand was made, it must be considered that *all* objections as to the form of cross-appeal were waived.

We are of opinion that the objection to the hearing of this case, as it now is, is a valid objection, and that no co-defendant or co-respondent can, under the numerous precedents of this Court, be heard on a cross-appeal under Section 348 as against another co-respondent or co-defendant.

Mr. Paul for the appellant then asks permission to withdraw this appeal, without prejudice to his right to take such other course to obtain his rights as he may deem fit, *viz.*, by application to the Court to admit an appeal in which the proprietor of No. 46 or others interested may be directly made respondents, or by other motion.

We allow this. It is, therefore, ordered that this appeal be withdrawn, but without prejudice to appellant making such application, appeal, or motion as he may think fit.

The 16th January 1867.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Section 73, Act VIII. of 1859—Power of Courts to transpose parties to suits—Pleading (English Rules of).

Case No. 183 of 1866.

Regular Appeal from a decision passed by Mr. A. Davidson, Second Principal Sudder Ameen of Hooghly, dated the 8th February 1866.

Pitambur Pyne (Plaintiff), *Appellant,*

versus

Toolsee Dossee (Defendant), *Respondent.*

Mr. G. C. Paul for Appellant.

Mr. W. M. Bourke and *Baboo Poorno Chunder Shome* for Respondent.

Suit laid at Rupees 13,500.

A Court may, under Section 73, Act VIII. of 1859, add parties to a suit, as well as transpose a party from his position as *pro formâ* defendant and array him amongst the plaintiffs after amendment of the plaint under Section 29.

The Courts in India are not governed by the technical rules of pleading which obtain in Courts administering English Law.

Jackson, J.—I AM clearly of opinion that in this case the decision of the Principal Sudder Ameen is erroneous and ought to be reversed. He has held that the suit, as set forth in the plaint, has not been properly constituted, and is therefore not maintainable by the plaintiff alone. He has also held that, under Section 73, Act VIII. of 1859, the Court has no power to transpose parties to suits, and that, "if it had the power, no "good would result from the use of it in the "present case."

It is not denied that the plaint sets forth distinctly and truly, as far as that point goes, the interests of the plaintiff himself and of the *pro formâ* defendant Mutty Lal Seal *inter se.* Setting forth the interests of these parties, the plaint has made Mutty Lal Seal a *pro formâ* defendant. The Court below

considers that he ought to have been made a plaintiff; and that, by reason of his not being made a plaintiff, the suit could not proceed.

I am of opinion that the terms of Section 73, taken by itself, are wide enough to enable a Court to make a person, who has been improperly or unnecessarily made a *pro formâ* defendant, and who ought to be a co-plaintiff, such co-plaintiff, but that unquestionably, whether this be so or not, the Court has that power under the 29th and 73rd Sections combined; for it is competent in the first instance, under Section 29, to allow the plaint to be amended by the exclusion of the *pro formâ* defendant, and afterwards to bring him in, being then not a party to the suit, as plaintiff.

It appears that an application was actually made on the part of Mutty Lal Seal on the day when the Principal Sudder Ameen dismissed the suit, asking that he should be admitted as a plaintiff. The Principal Sudder Ameen records upon this an order: "The application is too late as being made at the time of delivering the judgment." Now, this was not a judgment delivered by the Principal Sudder Ameen upon the merits of the case when the parties upon the record had gone to trial, but was a judgment upon a preliminary issue on this very point, *viz.*, whether the suit was properly constituted or not.

Surely, when a party, whose omission from the category of plaintiffs was being made the ground of putting the suit out of Court, appeared and asked to be made a plaintiff, the Court ought to have held its hand, and allowed the record to be amended.

I am of opinion that the decision of the Principal Sudder Ameen on this ground was entirely erroneous, and that the decision should be set aside, and the suit remanded for trial on the merits.

The learned Counsel for the respondent urged that he was entitled to have some order made in respect of Mr. Braddon, who was a party to the original deed, but, in respect of whose interests, a subsequent deed is said to have been executed, to which Toolsee Dossee was no party. Of course, the Principal Sudder Ameen, having the case now before him, will make such order as he thinks fit in respect of Mr. Braddon, whether, in his judgment, he ought to be a plaintiff or defendant in the suit.

As to the authorities cited by the same learned gentleman from English Works on Pleading, and from English Law Reports, I think it only necessary to say that they have reference to a practice very different even now from that of our Courts; and that we must be guided by our own law of procedure and by the decided cases thereon.

Kemp, J.—I entirely concur with my learned brother in remanding this suit for trial on the merits.

This Court is not governed by the technical rules of pleading which obtain in Courts administering English Law.

In this case, a party, whose interests were concurrent with those of the plaintiff, having in the first instance (he subsequently applied to the Court to be made a co-plaintiff) refused to join in the action, was properly made a *pro formâ* defendant. Section 73 of the Code of Civil Procedure in my opinion empowers a Court to add parties to a suit "who may be "entitled to, or who claim some share or interest in, the subject-matter of the suit, and who "may be likely to be affected by the result," as well as to transpose a party from his position as *pro formâ* defendant, and to array him amongst the plaintiffs after amendment of the plaint under the provisions of Section 29 of the Code.

The objection to the suit as improperly constituted was removed by the application of the *pro formâ* defendant to be permitted to join the suit, and the Principal Sudder Ameen was clearly wrong in not proceeding to the trial of the suit.

The 16th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale of land—Right to hold nij-jote lands.

Case No. 2255 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 15th June 1866, affirming a decision passed by the Moonsiff of that District, dated the 10th February 1866.

Joy Dutt Jha and others (Defendants), *Appellants,*

versus

Bayee Ram Singh (Plaintiff), *Respondent.*

Baboo Anund Gopal Paulit for Appellants.

Baboo Tarucknath Sein for Respondent.

The right to hold nij-jote lands necessarily passes with the sale to the auction-purchaser.

Shumbhoonath Pundit, J.—We agree with the Lower Appellate Court in holding that

the right to hold nij-jote lands must necessarily pass with the sale to the auction-purchaser.

The ex-zemindar held and cultivated them before the sale, because he was zemindar, and on no other right. If he has been allowed to remain in possession after the sale, he cannot plead any right of occupancy. His holding after the sale is, of course, in the capacity of an ordinary ryot, and must be dealt with accordingly.

We, therefore, see no reason to interfere, and reject the special appeal with costs.

The 17th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Misappropriation of distrained crops—Section 27, Act XXIII. of 1861—Special appeal—Small Cause Court.

Case No. 2371 of 1866.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 27th July 1866, reversing a decision passed by the Moonsiff of that District, dated the 24th April 1866.

Shaikh Gureeboollah (Plaintiff), *Appellant,*

versus

Shaikh Syefoollah (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Debendro Narain Bose for Respondent.

Act X. of 1859 makes no provision for a case where, before the sale of the distrained property, because the defaulter paid the debt demanded by the landlord, the crops distrained, and alleged by the plaintiff to be his, were made over to the ryot who, the plaintiff states, has misappropriated them. In such a case a suit for damages only can be brought in the Civil Court.

Section 27, Act XXIII. of 1861, which bars a special appeal in suits below 500 rupees as being of a nature cognizable by a Small Cause Court, does not apply to a case in which the Lower Appellate Court has wrongly decided that the case is not cognizable by any Civil Court.

Shumbhoonath Pundit, J.—The special appellant rightly pleads that the decision of the Lower Appellate Court, deciding that his present suit is not cognizable by the Civil Court, is wrong. We hold with the special appellant that he could not sue for the damages he asks in this suit against his alleged wrong-doers in the Revenue Court under Section 139, 141, or 142 of Act X. of 1859.

Section 142 refers to a case where the property distrained is of a ryot who does not deny that relation to exist between himself and the distrainer; and the Lower Appellate Court refers the special appellant to that Section. Section 139 provides for a suit by a third party, not for damages, but for release of the property distrained, and is from the nature of it a suit which is to be instituted in the Collector's Court before the sale or before the release of the property on payment of debt by the defaulter. Special appellant had sued under this Section, but the Collector referred him properly to the Civil Court.

Section 141 allows a third party, who alleges that his property *has been sold* for debts due from any other person, to sue for damages in a Revenue Court, and the suit of the special appellant, under this Section, was dismissed by the Collector, with directions to bring a suit under Section 139 of the Act, as the distrained property had not been sold.

For a case like this, where, before the sale of the distrained property, because the defaulter paid the debt demanded by the landlord, the crops distrained and alleged by the special appellant to be his were made over to the ryot who, the special appellant states, has misappropriated them, Act X. of 1859 appears to us to make no provision. In such a case as this, a suit for damages alone could be brought, and such a suit can be tried only in the Civil Court.

It is pleaded by the respondent that, under Section 27 of Act XXIII. of 1861, we are debarred from passing an order reversing the wrong judgment of the Lower Appellate Court, because the suit is for less than 500 rupees, and is of a nature cognizable by a Small Cause Court.

If the Lower Appellate Court had tried the appeal, and passed an order against the special appellant, either on the merits, or any other ground of disqualification in the plaintiff to recover, the order would not undoubtedly have been open to special appeal. But, when the effect of the order of the Lower Appellate Court is to decide that plaintiff's case is one which cannot be tried either in a Small Couse Court or in a Civil Court, we do not think that such an order refusing *to try* the suit was intended by that Section to be the judgment and order in *a trial* against which no special appeal can be admitted.

We, accordingly, overrule the above objection of the special respondent, and remand the case to the Lower Appellate Court to re-try the suit on the merits.

The 17th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation—Alluvial Land—Order of Collector rejecting claims to.

Case No. 162 of 1866.

Regular Appeal from a decision passed by Moulvie Ali Newaz Khan, Officiating Principal Sudder Ameen of Mymensingh, dated the 19th February 1866.

Shurut Soonduree Debee and others (Plaintiffs), *Appellants,*

versus

The Government and others (Defendants), *Respondents.*

Baboo Dwarkanath Mitter for Appellants.

Baboos Kishen Kishore Ghose, Juggodanund Mookerjee, and *Mohesh Chunder Chowdhry* for Respondents.

Suit laid at Rupees 15,000.

The order of a Collector, rejecting a claim to alluvial lands, on the ground that a settlement of them had already been concluded, is not an award within the meaning of Section 3, Act XIII. of 1848.

Act XIV. of 1859 is not applicable to a case where the former condition of the lands sued for became entirely altered, and the former land-marks destroyed by diluvion.

Loch, J.—THE suit is brought to recover possession of certain alluvial lands which have formed on the site of certain villages appertaining to the plaintiff's estate which had been destroyed by the river Jumoona after the boundaries had been demarcated by the Survey Authorities in 1851.

The allegation of the plaintiffs is that the Government estate Chur Gabsurrah and Shamkore were surveyed in 1850; that their villages Tooniah, Hatbaree, and others were demarcated in 1851; that, after the survey, a great part of the villages diluviated; that, as the river receded from east to west, the alluvium formed on the site on the former village, and the plaintiffs as zemindars took possession of it; that Government took possession of 50 beegahs to the west of these new formed lands as appertaining to Chur Gabsurrah, and gave a lease to the second defendant in 1266 (1859); and that in 1268 (1861), the Government made a fresh survey, and included all the alluvial lands as belonging to Chur Gabsurrah, and evicted the plaintiffs.

The Government, defendant, answered that, when Chur Gabsurrah was resumed, there was a sotah of the river Jumoona which separated it from the plaintiff's estate; that, as the lands have accreted to the west of that sotah, the Government is entitled to them as an increment to the Government estate; that in 1860 (1266) Jogendur Narain Roy, the husband of the plaintiff, on attaining his majority, claimed the lands in question; but his application was rejected in 1860 by the Collector, who, after local investigation, laid down the boundary of the resumed lands, and his order was confirmed by the Commissioner; and the Civil Court is not competent to take cognizance of the suit, the object of which is to disturb the boundary so determined; that plaintiffs were never in possession, but that Government has held the lands since their resumption, previous to which they were in the possession of the former proprietors; that subsequently the lands diluviated, and have since reformed on their old site; and that Government have since held possession granting farming leases, and that the lands were never demarcated as part of the plaintiff's villages.

The Principal Sudder Ameen held, with reference to certain precedents quoted in the margin of his judgment, that the suit was not cognizable by the Civil Court, and that the plaintiffs were also barred by the special and general Laws of Limitation.

Against this judgment the points urged before us in appeal are, *1st*, that the Principal Sudder Ameen has dismissed the suit on grounds not applicable, until it be determined whether the lands in dispute and those in the undisputed possession of Government are new formed lands or were origiral lands as resumed before the diluviation; *2nd*, the Principal Sudder Ameen was wrong in not enquiring whether these lands have accreted to the plaintiffs' estate as provided for in Regulation XI. of 1825; for, though the plaint does not set forth that the lands are an increment, yet the plaintiffs' pleader, when examined by the Court, clearly stated them to be so.

3rd.—That the Principal Sudder Ameen has not considered what was the state of the river when the plaintiffs' villages were demarcated. The Government relies upon that fact that the lands in dispute are separated from those of the plaintiffs by a sotah.

to the west of which they are situated. The Moonsiff deputed to make a local enquiry could not find the sotah, and unfortunately did not state in his report whether the lands were an increment to the plaintiffs' villages.

4th.—The Principal Sudder Ameen has declared the suit to be barred by the special Law of Limitation, Section 3, Act XIII. of 1848; but it is contended that the order passed by the Collector in December 1860 does not come under the provision of that law, for there was no suit and no award, and the settlement of the lands had been completed, subsequent to which plaintiff's husband had claimed certain lands, and the Collector rejected his petition, as the settlement had been concluded, and for other reasons.

5th.—That the Principal Sudder Ameen is wrong in considering the suit barred by the general Law of Limitation, for the proceedings on which he relies were all passed before the lands diluviated, and they are not applicable to the present state of things.

We agree with the Principal Sudder Ameen in thinking that the suit must be dismissed, but on entirely different grounds from those taken by the Principal Sudder Ameen, which, we think, are not tenable. In our opinion, the suit is not barred, either by the special or general Law of Limitation, for the proceedings in 1860 were not such as were contemplated by Act XIII. of 1848, and no award was made, and the general Law of Limitation is not applicable, for, the condition of the lands having become entirely altered, and all former land-marks destroyed by the diluvion, it is impossible to apply any of the proceedings which took place prior to that diluvion to the lands as they now appear. There appears to have been at one time a sotah, dividing the Government estate from that of the plaintiffs; and it is said that the lands now in dispute lie to the west of that sotah; but when the sotah and the lands on both banks of that sotah were subsequently washed away, and that sotah is not in existence, and the Moonsiff is obliged to trace on his map an imaginary line as indicating the course of that sotah, it is quite impossible to rest any argument or base any judgment on proceedings which took place under an entirely different set of circumstances. It is necessary, therefore, to confine our attention to the state of the land since its reformation; and we find that in 1860 certain alluvial lands were formed in the bed of the river Jumoona, of which the Government took possession as Chur Gabsurrah. These lands were at that time separated from the lands of the plaintiff by the main stream of the Jumoona. After the settlement of these lands had been concluded with the defendant No. 2, the plaintiff's husband put in a claim for some of the land; but his petition was rejected, on the grounds that the settlement had been completed, and that the alluvial lands were separated from the plaintiff's lands by the unfordable bed of the Jumoona, which was the boundary of the Government lands. A map prepared at the time by the Collector, filed in the present case, shews that the flowing Jumoona, a deep and broad stream, lay between the Government chur and the plaintiff's land, a state of things altogether incompatible with the plaintiff's statement that the river gradually receded from east to west. Since that time the river has changed its course, and the main stream flows, as admitted by both parties, to the west of the chur, and the passage between its eastern side and the main land has gradually silted up, and become, as stated by the defendants, an increment to the chur, and still separated from the main land by a small sotah. Plaintiffs came into Court, claiming the lands, because they have reformed on the site of villages appertaining to their estate; but, finding this claim untenable, they now ask for possession, on the ground that the lands in dispute are an increment to their estate. This allegation they have wholly failed to prove, and we, therefore, dismiss the appeal with costs.

The 17th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Measurement—Evidence—Ameen's Report.

Case No. 2258 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Additionl Judge of Jessore, dated the 12th June 1866, affirming a decision passed by the Deputy Collector of that District, dated the 19th December 1865.

Chunder Monee Dossee (Defendant), *Appellant,*

versus

Nilambur Mustofee (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Romanath Bose for Respondent.

It is not necessary that oral testimony should be taken in order to effect a measurement, or that an Ameen's report must have depositions attached to it to make it legal evidence.

Bayley, J.—In this case plaintiff sued upon a bundwara for rents of lands as in possession of defendant.

Defendant stated before an Ameen deputed to make a local investigation that dagh No. 5 was not in his possession as plaintiff's ryot. He at the time was present, and made no other objection. On the Ameen's report being given in, defendant subsequently objected also as to daghs 19 to 25 being not in his possession as plaintiff's ryot.

The first Court held, as a fact found on the evidence, that none of these objections were established; and that the lands were in defendant's possession as part of the tenure for the rents of which plaintiff sued, and as occupied by defendant as plaintiff's ryot.

The Lower Appellate Court affirmed this decision, and it substantially held that possession of defendant as plaintiff's ryot was established as for the lands sued for by plaintiff.

Defendant appeals specially, and urges—

I. That the Lower Appellate Court has awarded to plaintiff daghs 5 and 19 to 25, although not asked for in the plaintiff's bundwara.

II. That the Ameen did not take evidence, and, therefore, his report could not be acted upon by the Courts.

On the *first* plea we observe that plaintiff sued on a bundwara, and that an Ameen was deputed to make a measurement in verification of that *bundwara*. The Ameen measured in special appellant's presence, and found defendant in possession of the lands claimed by plaintiff. There is nothing to show that the Ameen's daghs *included* anything *excluded* from plaintiff's plaint.

On the *second* plea we observe that it does not require that oral testimony should be taken in order to effect a measurement; or that an Ameen's report must have depositions attached to it to make it legal evidence. Here the Ameen's report has been found to be good evidence by the Lower Courts, and a conclusion of fact based upon it.

Seeing, therefore, no reason to interfere with this finding of fact on a special appeal, we dismiss this special appeal with costs.

The 17th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Suit for rent — Plea of Lakheraj — Presumption of uniform payment of rent.

Case No. 2363 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 30th August 1866, reversing a decision passed by the Deputy Collector of that District, dated the 21st May 1866.

Bissessur Chuckerbutty and others (Objectors), *Appellants,*

versus

Wooma Churn Roy (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

No one for Respondent.

The proper course to be observed where, in answer to a claim for rent, a lakheraj title is pleaded.

The difference between Rs. 11-13 and Rs. 13-4 was held sufficient to destroy the presumption of a uniform payment of rent.

Loch, J.—The plaintiff, dur-putneedar, sues to enhance the rent of the defendants on the ground that the productive powers of the land have increased. The defendant pleads that his rent is not liable to enhancement, and urges that, of the land in his possession, 3 plots, comprising 2 beegahs 12 cottahs, are lakheraj given by the predecessors of the plaintiff for public purposes, *viz.*, the excavation of tanks which have been dug; that of the remaining land, two are ancient jotes, one comprising 4 beegahs 5 cottahs assessed at Rupees 13-4, and the other, 6 beegahs, assessed at Rupees 9, and two recent jotes, one of 15 cottahs, the rent of which is 8 annas, and one of 8 cottahs, the rent of which is Rupees 1-8; that the lands, when taken by him, were worthless, and it is only because the tanks have been dug that the lands have become productive, and that the tanks were dug at the expense of the defendant.

The Judge in appeal finds that defendant has not been paying rent at a uniform rent for any of the land in his possession, and rejects the plea of lakheraj set up by defendant, and gives a decree for enhanced rent.

Against this judgment the present special appeal is preferred, and we think that the Judge is wrong in giving a decree for the land claimed as lakheraj. The decision of the High Court in the cases reported at page 115 of Sutherland's Full Bench Rulings, and at page 44, Volume II., Weekly Reporter, Act X., lay down the proper course to be observed where, in answer to a claim for rent, a lakheraj title is pleaded; and in this case the plaintiff does not appear to have proved that he had realized rent for the lands claimed by defendant as lakheraj. We reverse so much of the Judge's order as relates to the land claimed as lakheraj.

As for the jotes, the defendant, special appellant, admits that, with regard to three of them, he cannot resist the finding of the Judge; but, with regard to the one comprising 4 beegahs 5 cottahs, he contends that the Judge is wrong in considering the small difference of 10 annas sufficient to prove a variation of rent in opposition to the evidence of the zemindar's naib and of other witnesses who state that the defendants have, for more than 20 years, been paying an invariable jumma of Rupees 13-4, and he refers to the decision of the High Court, 4 Weekly Reporter, Act X., page 33, Anund Lall Chowdhry, appellant, where the Court held that the difference of one rupee, not accounted for, was not sufficient to destroy the presumption that the tenant had held at an invariable rate for more than 20 years. The case cited is not on all fours with the present, for the deed of sale under which the appellant holds shows that the vendor had been paying sicca Rupees 11-13 up to the date of the sale, whereas the order to the headman to recognise the vendee requires him to take rent at sicca Rupees 13-4 from him, as if the naib, when sanctioning the transfer, had taken the opportunity of enhancing the rent. We concur, therefore, with the Judge in thinking that the defendant's tenures are not protected from enhancement by a uniform payment of rent; but we think that the Judge has overlooked an important plea urged by the defendant, that the productive powers of the land have increased through his agency by digging tanks. This point must be determined before the plaintiff can be allowed to enhance the rent. The case is remanded to the Judge for its determination.

The 17th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Section 11, Act XXIII. of 1861—Execution—Damages.

Case No. 672 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 30th July 1866, reversing an order passed by the Sudder Ameen of that District, dated the 29th December 1865.

Kashee Kishore Roy Chowdhry (Judgment-debtor), *Appellant,*

versus

Noor Khan, Decree-holder, *Respondent.*

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Appellant.

Baboo Greeja Sunker Mozoomdar for Respondent.

A claim for damages in respect of injury sustained by goods while under attachment in execution of a decree, which was afterwards set aside, is not a matter to be disposed of under Section 11, Act XXIII. of 1861, but must be made the subject of a separate suit.

Macpherson, J.—In this case it appears that the appellant held a decree against the respondent, and in execution of it sold his right, title, and interest in a certain other decree, and attached a quantity of grain. In appeal the decree under which the appellant had issued execution was set aside. Thereupon the respondent, under Section 11 of Act XXIII. of 1861, applied to the Court, not only for a refund of what had been paid into Court as the price of what was sold at the sale of the respondent's right, title, and interest in the other decree, but also for the payment to him of a sum by way of damages sustained by him by reason of the sale in question, and by reason of the grain which was seized having been damaged while under attachment.

In appeal it is contended, and as we think rightly, that, so far as regards the damages sustained by the sale and by the grain having been attached, the matter cannot be disposed of under Section 11 of Act XXIII. of 1861. That Section relates to all matters immediately connected with, or arising out of, the execution of decrees. But a question of damages, such as is here raised, is far too remote. It is not directly connected with the carrying out of the decree, and it must be made the subject of a separate suit.

Therefore, so far as relates to damages claimed in respect of the loss sustained by the sale, and by the injury caused by attaching the grain, the order of the Lower Court is reversed, and with costs.

The 21st January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Limitation—Section 1, Clause 9, and Section 4, Act XIV. of 1859—Section 170, Act VIII. of 1859.

Case No. 102 of 1866.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 10th January 1866.

Gireedharee Singh (one of the Defendants), *Appellant,*

versus

Kalika Sookul (Plaintiff) and another (Defendant), *Respondents.*

Baboo Dwarkanath Mitter for Appellant.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Respondents.

Suit laid at Rs. 14,060-4-2.

Case No. 112 of 1866.

Doorga Dutt Singh (one of the Defendants), *Appellant,*

versus

Kalika Sookul (Plaintiff) and another (Defendant), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Respondent.

Suit laid at Rupees 14,430-6-9.

The want of an admission or acknowledgment in writing, as required by Section 4, Act XIV. of 1859, to qualify the limitation prescribed by Clause 9, Section 1 of that Act, cannot be supplied by oral evidence to the admission of the debt sued for.

Section 170, Act VIII. of 1859, was not intended to empower a Court to decree a claim which, on the face of it, is barred by limitation.

Seton-Karr, J.—THESE are two appeals against a decision in the plaintiff's favor given by the Principal Sudder Ameen in a suit for the recovery of principal and interest due on account of certain woollen and cotton goods.

The appeals have been brought on the pleas that the suit is out of time, and that the grounds on which the Principal Sudder Ameen has got over the plea of limitation are not sound in law.

The debt was incurred between 1265 and the 19th of Aghran 1267, and, admittedly, the suit has not been brought within three years from the latter date, as it ought to have been by Clause 9, Section 1 of Act XIV. of 1859. The Principal Sudder Ameen got over the obvious difficulty occasioned by the failure to sue within three years' time, by recourse to the evidence of trustworthy witnesses on the plaintiff's side, and by the deposition of the plaintiff himself, by which he says that it is proved that the defendants have admitted the justice of the claim, and have every year promised to pay. The Principal Sudder Ameen further states that, if the date of the last promise to pay were not considered as the date from which the cause of action began, the creditors of wealthy Rajahs and landholders would have great difficulty in realizing their just dues; and he adds that he summoned the defendants under Section 16 of Act VIII. of 1859; and, as they did not think fit to appear, he dealt with the case under Section 170 of the same Act.

We have heard Mr. Allan in support of the decision in favor of his client, in reply to the pleader for the appellant who took his stand on the strict letter and meaning of the law; but we have no doubt that, whatever we may think of the hardship of the plaintiff's case, of the conduct of the defendants in resorting to such a plea, and of the not unnatural desire of the Lower Court to render substantial justice, it is our duty to construe the Law of Limitation strictly, and to admit the force of the arguments for the appellant.

The words of the law, Clause 9 of Section 1, are imperative. In suits brought to recover money lent, or for the breach of any contract, the time specified is "three years from the time when the debt became due, or when the breach of contract, in respect of which the suit is brought, first took place, unless there is a *written engagement to pay the money lent,* or the interest, *or a contract in writing.*"

This Clause is further strengthened by Section 4 of the same Act, which rules that the time may be computed from the date of an admission that the debt is due, provided that the person liable for the same shall have admitted that the "debt or legacy, or any part thereof, is due by an acknowledgment in writing signed by him." But in the case before us there is no such admission or ac-

knowledgment in writing, and, on the face of such precise and specific provisions of a law known to be intended to shorten the period for bringing suits, we cannot supply the place of a writing by oral evidence to the admission of the debt, or strain the Act in order to do equity.

We regret the hardship which our decision causes to the plaintiff, but we have no option except to admit both appeals, and to decree them with costs.

Norman, J.—I concur in thinking that, in each of these two cases, the plaintiff's suit is clearly barred by limitation.

When the appeal first came before this Court, we advised the parties to compromise, expressing our hopes that the defendants would, at least, pay what their own accounts might shew to be justly due to the plaintiff. They have not thought fit to do so, and we have no alternative, but must dismiss the suits with costs.

Section 170 of Act VIII. of 1859 was not intended to give power to the Court to decree a claim which, on the face of it, is barred by the express words of the Limitation Act, XIV. of 1859.

The 21st January 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Voluntary depositions (by Moonsiffs).

Petition of Kulno Khond Kar, praying for the restoration of Special Appeal No. 1169 of 1866.

Where a special appellant alleged sickness as the reason of his inability to deposit the requisite fees for serving notice upon the respondent in proper time, and, being unable to satisfy the Court that he was sick, appeared before the Moonsiff of the District to prove that fact—HELD that the Moonsiff ought not to institute voluntary enquiries of this kind, except under the direction of the superior authorities.

IT appears from the petition that, by reason of the petitioner's illness, he was unable to deposit the fees for serving the notice upon the respondent in proper time. Petitioner afterwards appeared before the Court (present L. S. Jackson, J.), stating the circumstances of his illness, and the Court intimated that, if the petitioner could by medical certificate satisfy it that he was sick, proper orders would be passed. Petitioner, accordingly, submitted the certificate of the native medical doctor who had treated him: but the Court was not inclined to rely on that certificate, and ordered the case to be struck off. Petitioner then appeared before the Moonsiff of the District to prove that he was actually seriously ill, and, accompanied by an attested copy of the Moonsiff's proceeding, now applies for the restoration of his case.

Jackson, J.—Let the case be restored. But the Moonsiff should be directed not to institute voluntary enquiries of this kind, except under the direction of the superior authorities. He has no power to take the depositions of witnesses in such cases, and, if those witnesses swear falsely, it would not be possible to punish them for perjury.

The 21st January 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeals to Privy Council (Re-admission of).

Petition of Sreekant Roy, praying for the restoration of two appeals to Her Majesty in Council, which had been dismissed for default in making deposit.

Mr. W. E. Peacock for Petitioner.

The High Court has no authority to restore appeals to Her Majesty in Council, dismissed or struck off the file for default in making deposit.

I MUST hold, as I have already held, that I have no authority in such a case to restore appeals to Her Majesty in Council, dismissed or struck off the file for default in making deposit. The application in this case, it is true, is that the Court should reconsider its order. But that is, in effect, precisely the same thing. It is not contended that in this case there was any mistake in making the order to which the application refers.

The 21st January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Encroachment on land—Civil remedy—Order of Magistrate.

Case No. 2436 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 19th June 1866, affirming a decision passed by the Moonsiff of Busseerhaut, dated the 30th December 1865.

Azeezoollah Guzee and others (Defendants), *Appellants*,

versus

Bunk Beharee Roy and others (Plaintiffs), *Respondents*.

Baboos Bhowanee Churn Dutt and *Woopendur Chunder Bose* for Appellants.

No one for Respondents.

A plaintiff is not debarred from suing in the Civil Court for a declaration of his civil rights to land encroached upon by the widening of a road, on the ground that the order of the Magistrate, directing the road to be kept up as widened, is liable to be reversed as illegal.

Pundit, J.—We agree with the Lower Appellate Court that the order passed by the Magistrate was not an order coming within Section 308 of the Criminal Procedure Code. The Magistrate had not ordered the existing and recognized *public* road which had been wrongfully obstructed to be kept open, but had upheld the report of the arbitrators to the effect that the old road of 3 cubits, which had been of late widened to 10 or 11 cubits, should be kept as at the latter width, because it would benefit the tradesmen who had so widened it.

Now, as the lands of the plaintiff had been encroached upon by the road being so widened, the special respondent has every right to come before a Court of Justice to prove that his lands have been wrongfully taken without his consent, and included within a public road. It does not follow that, because plaintiff might have obtained on the criminal side an order from this Court reversing this illegal order of the Magistrate, the plaintiff is to be considered as debarred from coming into the Civil Court for a declaration of his civil rights to the land in question, or that such Civil Court has no jurisdiction.

We, accordingly, dismiss this special appeal without costs, as nobody appears for the respondent.

The 22nd January 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Suit to enforce summary decree for rent—Estoppel—Limitation.

Case No. 2778 of 1866.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of 24-Pergunnahs, dated the 17th August 1866, reversing a decision passed by Baboo Koonj Lal Banerjee, Second Principal Sudder Ameen of that District, dated the 24th January 1866.

Gyan Chunder Roy Chowdhry (Defendant), *Appellant*,

versus

Kalee Churn Roy Chowdhry (Plaintiff), *Respondent*.

Baboo Chunder Madhub Ghose for Appellant.

Baboo Poorno Chunder Shome for Respondent.

In a suit brought in the Civil Court to enforce a summary decree for rent against the immoveable property of the defendant, that Court is not estopped by the decision of the Collector that the remedy upon that summary decree was bound by limitation, but it is the duty of the Court to decide whether the suit to enforce the decree against the immoveable property is barred or not.

A plaintiff is not bound to sue to enforce a summary decree against the immoveable property of the defendant, pending a regular suit brought by the defendant in the Civil Court to set aside the summary decree. Limitation will count, not from the date of the summary decree, but from the date at which the suit brought in the nature of an appeal to set aside that decree is determined.

Peacock, C.J.—If the question had now arisen for the first time as to what was the meaning of the words at the end of Clause 4, Section 18, Regulation VIII. of 1819, "if "the zemindar or other plaintiff should be "desirous of having any other estate, or "house, or landed property of a defaulter "brought to sale in satisfaction of his claim "of rent, it will be necessary for him to in-"stitute a regular suit for the purpose, not-"withstanding the existence of the sum-"mary award in his favor," with reference to the words "claim of rent," I should have probably held that these words referred to the rent itself. But I understand that the practice has always been to sue in the Civil Court upon the summary decree in order to have it enforced against the land of the defaulter; and it has been admitted by the pleader for the special appellant that, according to his experience, that has been the course adopted. That being so, I do not think that we ought to disturb a practice which has prevailed from the year 1819 down to the present time, and that we should uphold the practice.

I think, therefore, that this suit was properly brought to obtain satisfaction of the summary decree against the land of the de-

fendant. That suit having been properly brought before the Civil Court, the Civil Court was not estopped by reason of the decision of the Collector that the remedy upon that summary decree was barred. That decision was binding so far as it related to the enforcing of the summary decree against the moveable property, to which extent alone the Collector has jurisdiction. Not being estopped by the decision of the Collector, it became necessary for the Judge to decide whether the suit to enforce the summary decree against the immoveable property was barred by limitation or not; and I think that the Judge came to a correct conclusion in holding that the suit was not barred, and that the plaintiff was not bound to sue for the enforcement of the summary decree against the immoveable property of the defendant pending the regular suit which the defendant brought in the Civil Court to set aside the decree in the summary suit. That regular suit was in the nature of an appeal. It has been held in many cases under Act XIV. of 1859 that, in a proceeding to obtain execution of a decree against which an appeal has been preferred, the period of limitation runs, not from the date of the original decree, but from the date at which the appeal is determined. The same rule ought to apply to summary suits where a regular suit is brought in the nature of an appeal.

Under these circumstances, it appears to me that the Judge was right, and that his decision must be affirmed with costs.

Jackson, J.—I am of the same opinion. There can be no doubt, I think, that the practice and the prevailing construction of the terms of Clause 4, Section 18 (now repealed) of Regulation VIII. of 1819, have been that stated by my Lord, and confirmed by the special appellant's pleader.

I would only add that it appears to me that the suit would have been more regularly and properly framed, if it had been a suit for the purpose of having some particular estate or immoveable property declared liable in execution of this summary award. At the same time I am not prepared to say that a suit, for the purpose of having it declared that the immoveable property generally of the defaulter should be so liable, could not be entertained.

I entirely concur in holding that the Judge was right in reversing the decision of the Principal Sudder Ameen who held that the plaintiff and the Court were estopped by the decision of the Collector.

The 22nd January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Appeal—Liability of co-defendant or co-respondent.

Case No. 2093 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 19th May 1866, affirming a decision passed by the Sudder Moonsiff of that District, dated the 26th June 1865.

Greesh Chunder Singh (one of the Defendants), *Appellant,*

versus

Gour Mohun Banerjee and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboos Romesh Chunder Mitter and *Bhowanee Churn Dutt* for Respondents.

In a suit by *A* against *B* and *C*, in which a decree was given against *B* alone—HELD that *C* could not be made liable, either on the appeal of *B*, or on the cross-appeal of *A*, to *B's* appeal.

Trevor, J.—THE plaintiff sued the putneedar and the Rajah as a mokurrureedar for possession of a ferry ghât.

The first Court gave plaintiff a decree against the putneedar.

The second Court, on appeal by the putneedar, released him, and made the Rajah liable to plaintiff.

The Rajah now appeals specially, urging, *1st*, that, on the putneedar's appeal, he, a co-defendant below and co-respondent with plaintiff in appeal, could not be made liable; and, *2nd*, that, on the cross-appeal of the plaintiff to the appeal of the putneedar, he, a co-respondent of the cross-appellant, could not be made liable.

We think that the special appellant could not legally be made liable, either on the appeal of the putneedar, or on the cross-appeal of plaintiff to the putneedar's appeal. The question for the Court on the putneedar's appeal simply was, is the putneedar liable, and, on plaintiff's cross-appeal, he might urge any point as against the putneedar which he might have pleaded below, but he could not open out the case as against a non-appealing co-respondent. Under this view, through his own negligence in being

satisfied with the decree against the putneedar alone, the plaintiff's case has altogether miscarried. Be that as it may, it only remains for us to decree the special appeal with costs against the plaintiff, special respondent. The putneedar, under the circumstances, will bear his own costs.

The 22nd January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale Law—Section 32, Act XI. of 1859—Ejectment of Howaladars and Neem-Howaladars by purchaser of Ousut Talook.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 16th June 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 7th February 1866.

Case No. 2286 of 1866.

Buroda Kanth Laha and others (Defendants), *Appellants,*

versus

Gobind Chunder Gooho (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellants.

Mr. R. V. Doyne and *Baboo Onookool Chunder Mookerjee* for Respondents.

Case No. 2290 of 1866.

Kalee Kinkur Roy and others (Defendants), *Appellants,*

versus

Gobind Chunder Gooho (Plaintiff) and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Romesh Chunder Mitter* for Appellants.

Baboo Kalee Mohun Dass for Respondents.

Where certain howala and neem-howala tenures were never set aside by the Revenue Settlement or Revenue Commissioner's orders, from the time they were recorded as existing rightful hereditary tenures of those classes at the first Settlement—HELD that the purchaser of the ousut talook cannot eject the holders of those tenures under Section 32, Act XI. of 1859, so long as they pay their jumma according to the Settlement jummabundee.

Bayley, J.—IT is admitted by the pleaders on both sides that one and the same decision here in special appeal will govern both the above cases.

Plaintiff, as purchaser of an ousut talook in the Backergunge Soonderbuns, sues to eject defendants from their alleged howala and neem-howala tenures, and claims to do this under Act XI. of 1859.

The defendants plead that, in the original and renewed settlements made by the Commissioner of the Soonderbuns, that officer and the superior Revenue authorities have recognized their howala and neem-howala tenures, and that they cannot, therefore, be ejected. There are 15 sub-tenures in respect to which this is pleaded; but the owners of four only aver that they hold pottahs from DeSilva, the ex-proprietor, and our remarks in the judgment will apply only to those 11, and not to those four whose pottahs are of more recent date.

Both the first Court and the Lower Appellate Court have decreed plaintiff's case, the Lower Appellate Court holding that plaintiff has a right to eject under Section 32, Act XI. of 1859, and both Courts holding that, as the settlement-proceedings and the orders of the superior Revenue authorities did not expressly recognize the howalas and neem-howalas of defendants, and as the Commissioner of Revenue recorded specifically that the proprietary right was in the Government, the plaintiff had a right to eject.

From the decision of the Lower Appellate Court, defendants (11) appeal specially, urging—

I. That their howalas and neem-howalas existed before any settlement was made of the mehal as an ousut talook, and were never set aside.

II. That none of the settlement-proceedings, nor the orders of the Commissioner of Revenue, revoked or annulled their tenures, but affirmed them by recognizing throughout the jummas at which they held, and by the fact that the Revenue Commissioner upheld the settlement in which the hereditary rights of defendants as howaladars and neem-howaladars were set forth.

III. That they have been in occupancy at fixed rates for more than 12 years, and are therefore not liable to ejectment, with reference to Section 6, Act X. of 1859.

IV. That Section 32, Act XI. of 1859, applies to their case, and not Section 37 of that Act.

After hearing very fully Counsel on both sides and the records of the several settlement-proceedings, we are clearly of opinion that the judgments below are erroneous, and

must be reversed as to the 11 defendants, special appellants, above referred to.

It is pressed on us that the settlement-proceedings clearly state Government to be the proprietor, and no one else to have rights. But the rights referred to are those of proprietor. and defendants claim no such rights. Further, it is not by any means incompatible with the rights of Government, *as a proprietor*, that howalas and neem-howalas duly constituted originally and since existing should be maintained. If they are found valid holdings, they are always upheld by Settlement Officers at their old jumma, whether in Government mehals or not, and the power to eject does not exist as long as they pay their jummas recorded in the settlement jummabundee.

It is then urged that the settlement-proceedings of the Revenue Commissioner of September 1844 do not uphold the proposition of the Settlement Officer, to the effect that these are howalas and neem-howalas whose owners have hereditary rights (*mowrosee huq rakhe*). But, in the revision of a settlement-proceeding, a Revenue Commissioner does not *specifically* uphold separately *each* proposition or *each* tenure recorded under the head of "*Ryots and their several rights*" by the Settlement Officer. The Revenue Commissioner confirms all which he does not specifically disallow. He not only does not in terms disallow the howala and neem-howala tenures of special appellants, but the jummabundee fixed for them *as such holders* is confirmed, and that is the jumma which forms a portion of the assets on which the approved sudder jumma is sanctioned by the Commissioner, and ordered to be brought on the Rent Roll of the district to which the mehal settled may, after confirmation of settlement, be attached. The other proceedings of the Collector of the District are mere matters of form and record to enable him to collect that revenue which is so brought on his Zillah Rent Roll. Moreover, throughout, the jumma of defendants has remained the same in all the various settlements; whereas, if the tenures were absolutely or in any way set aside or varied, the jummas would have been varied also.

Considering, then, that the howala and neem-howala tenures of the 11 defendants, special appellants, were never set aside by the Revenue Settlement or Revenue Commissioner's orders, from the time they were recorded as existing rightful hereditary tenures of those classes at the first settlement, we hold that the plaintiff cannot eject as long as these defendants pay their jumma according to the settlement jummabundee, and we reverse the decisions below, and *decree* these two special appeals with costs.

The 22nd January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Butwara—Joint sharers with different interests.

Case No. 2356 of 1866.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Mymensingh, dated the 13th July 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 24th June 1865.

Doorga Kant Lahoory (one of the Defendants), *Appellant,*

versus

Radha Mohun Gooho Neogy (Plaintiff) and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Shushee Bhoosun Roy* for Appellant.

Baboos Onookool Chunder Mookerjee and *Mohinee Mohun Roy* for Respondents.

Lands held in joint possession, each proprietor receiving his proportion of the rent according to his interest in the land, cannot be divided under the butwara laws.

Loch, J.—We think, under the circumstances stated, that no partition of the lands can be made either by the Collector or the Civil Court. The lands in question form a portion of eight or nine different talooks, each paying revenue to Government, and are held jointly by the proprietors of all these talooks, who realize from the tenants their proportion of the rent according to their respective interest in the land—one collects 2 annas, another 2½, and so on. Lands held thus in joint possession cannot be divided under the butwara laws, nor can a partition be made by the Civil Court irrespective of the Revenue authorities. We decree the appeal with costs.

The 22nd January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution—Representatives.

Case No. 790 of 1866.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Purneah, dated the 6th August 1866.

Lekraj Roy (Decree-holder), *Appellant,*

versus

Becharam Misser (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Romanth Bose and *Moonshee Ameer Ali* for Respondent.

Execution cannot issue against the estate of a deceased person if there is no one on the record as representing the estate. Execution, if issued at all, must be issued against some person as representing the estate.

Macpherson, J.—We dismiss this appeal with costs.

We think that the Lower Court was wrong in supposing that the application was barred by lapse of time. There is no doubt that proceedings had been taken from time to time quite sufficient to keep the decree alive under Section 20 of Act XIV. of 1859. But the present application is defective and wholly bad. It is made against no one in particular—it is made generally against "the estate of the deceased Becharam Misser."

The suit was originally brought against Becharam in his lifetime. While it was pending, he died, and a decree was passed against his estate, the widow being declared to be released paying her own costs. The decree does not seem to have been framed with reference to Section 203 of Act VIII. of 1859 as it should have been. On a recent application for execution against the widow, the Court held that she was not personally liable, and ordered her name to be struck out. Whether this order was right, or whether the original decree was right, we need not now say. But we are quite clear that no execution can issue till some one is placed on the record as representing the estate. Section 210 of Act VIII. speaks of execution issuing against the estate; but that does not in our opinion mean the estate independent of some person who is, for some reason or another, legally liable to a greater or less extent as representing the deceased person under the decree. We know of no precedent for the issue of execution against the estate of a dead man, when there is no one on record who represents him; and, for the purposes of the present application, there is no one on the record—the widow having been released by the Court.

The decree, so far as we can see, ought to have been framed and enforced under Section 203. The present application was clearly irregular, and cannot stand. We dismiss the appeal with costs.

The 23rd January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* G. Loch, J. P. Norman, F. B. Kemp, L. S. Jackson, A. G. Macpherson, and W. Markby, *Judges.*

Letters Patent—Appeal (from Judgment of Senior Judge of Division Bench of High Court in the exercise of Civil Appellate jurisdiction).

Special Appeal No. 336 of 1866.

Ranee Shurno Moyee, *Appellant,*

versus

Luchmeeput Doogur and others, *Respondents.*

Petition of Ranee Shurno Moyee.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Petitioner.

Quære—Whether, under the provisions of the new Letters Patent of the High Court, an appeal lies from the judgment (not being a sentence or order passed or made in a criminal trial) of a Division Court in the exercise of appellate jurisdiction, when the Judges of such Court are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges.

The Petition was as follows:—

"That on 30th July last, this special appeal, wherein your petitioner was appellant, came on for hearing before a Divisional Bench, consisting of the Hon'ble Justice L. S. Jackson and the Hon'ble Justice G. Campbell.*

"That, after hearing Counsel on both sides, the said Justices were equally divided in opinion as to the manner in which the said special appeal was to be disposed of, Justice Jackson holding that it was to be dismissed at once, and Justice Campbell being of opinion that the finding of the Lower Appellate Court was not sufficient; and that, therefore, the case should be re-

* *See* 6 Weekly Reporter, p. 118.

"mitted to the said Lower Appellate Court "for a specific finding thereon. That their "Lordships delivered their several judg- "ments in the said case separately as set forth "in the copy of the decision hereunto an- "nexed.

"That, under Section 36 of the new "Letters Patent, the judgment of Justice "Jackson became the judgment of the said "Divisional Court, and the said special ap- "peal was, accordingly, dismissed with "costs.

"That, under these circumstances, your "petitioner feels herself aggrieved, and be- "lieves that, from the judgment aforesaid, your "petitioner has, under Section 15 of the said "new Letters Patent, a right of appeal to "the High Court at large, and that, therefore, "your petitioner prays that, as your peti- "tioner's case is the first of its kind, leave "might be granted to your petitioner to pre- "fer an appeal from the said judgment to the "said High Court at large under the pro- "visions of the said Section 15 of the new "Letters Patent aforesaid."

The application having been originally made before Peacock, C.J., and Markby, J., on the 22nd September 1866, the following order was recorded :—

"This being a new point and of consider- "able importance, the applicant is to be at "liberty to renew this application before "the first Full Bench which shall sit after "the vacation."

The matter accordingly came under the consideration of a Full Bench of seven Judges, by whom the following orders were recorded :—

Peacock, C.J.—The question referred for the decision of a Full Bench is whether, under the provisions of the Letters Patent of the 28th of December 1865, an appeal lies from the judgment (not being a sentence or order passed or made in a criminal trial) of a Division Court in the exercise of appellate jurisdiction when the Judges of such Court are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges.

The determination of this question depends upon the construction which ought to be put upon Section 15 of the Letters Patent.

If the marginal note of that Section is to affect the determination, it is clear that no such appeal would lie, and that the Section was intended to apply only to judgments of the Courts of original jurisdiction. But the marginal notes in the printed copies of the Letters Patent form no part of the original ; and we ought, therefore, not to allow our minds to be influenced by them.

The headings, however, of the different divisions of the Letters Patent do form part of the original, and may, therefore, be taken into consideration in construing them.

Section 15 falls under the heading "Civil Jurisdiction of the High Court." This heading includes all the Sections of the Letters Patent from Section 11 to Section 18, both inclusive, and not Section 32, 34, or 35.

Section 11 defines the local limits of the ordinary original civil jurisdiction of the Court. Section 12 defines the suits which the Court is empowered to try in the exercise of original civil jurisdiction. Section 13 points out under what circumstances the Court may exercise extraordinary original civil jurisdiction, and Section 14 makes provision for the trial of several causes of action in certain cases in which the Court has original jurisdiction in respect of one of them only; and then comes the important Section 15, which gives an appeal to the High Court from the judgment, not being a sentence or order passed or made in any criminal trial, of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to Section 13 of the 24 and 25 Vic., c. 104, and also an appeal to the High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court or of *such* Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being.

Section 16 invests the Court with appellate jurisdiction from the Civil Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence.

The position of Section 15, with reference to the other Sections to which I have referred, would, at first sight, lead to the conclusion that it had reference only to judgments given in the exercise of the ordinary and extraordinary original civil jurisdiction which was vested in the Court by the preceding Sections; for, without explanation, it seems remarkable that, if it was intended to apply to judgments passed in the exercise of appellate civil jurisdiction, it should follow immediately after Sections 11, 12, 13, and 14, and should precede Section 16, by which appellate civil jurisdiction was conferred

But the locality of the Section is explained by the fact that it is substituted for Section 14 of the former Letters Patent.

If, in consequence of its locality, Section 15 is to be construed as relating to judgments passed in the exercise of the jurisdiction conferred by the Sections which preceded it, and not to judgments passed in the exercise of the jurisdiction vested in the Court by Section 16, it seems to follow that it must be held to extend to the former judgments only, and not to judgments passed in the exercise of any jurisdiction conferred by any Section subsequent to Section 16; and consequently that no appeal is given to the High Court from the judgment of one Judge in the exercise of the original civil jurisdiction vested in the Court by Section 32 of the Letters Patent in Admiralty and Vice-Admiralty cases, or in the exercise of the testamentary, intestate, and matrimonial jurisdiction conferred by Sections 34 and 35. It was at one time doubted whether, under Section 14 of the former Letters Patent, an appeal would lie to the High Court from a judgment passed by one or more Judges, not being a majority of the full number of Judges of the Court in the exercise of original testamentary jurisdiction; but finally it was determined in 1862, in the case of Saroda Soonduree Dossee *vs.* Tincowree Nundee, by two Judges in a Division Court consisting of three Judges, that such an appeal would lie, the third Judge holding that such an appeal would not lie. We cannot suppose that that decision, which was reported in 1864 in Hyde's Reports, page 70, was unknown to the authorities at home when the new Letters Patent were granted; and we can scarcely imagine that such power of appeal, which had been determined to exist under the old Letters Patent, would have been taken away by the new Letters Patent without an express declaration to that effect. That decision shows that Section 14 of the old Letters Patent was not limited to judgments passed in the exercise of the jurisdiction conferred by the Sections which preceded it; and that it was not confined to ordinary original civil jurisdiction as to suits, but that it extended to cases of original civil jurisdiction in matters relating to the granting of probates which was conferred by a subsequent Section. It must be admitted that Section 14 of the former Letters Patent did not extend to judgments passed by a Division Bench in the exercise of appellate jurisdiction; but, under those Letters Patent, the senior Judge had no greater power than any of the other Judges of the Division Bench when such Judges were equally divided in opinion. By the express words of Section 14, the appeal therein given was clearly limited to cases of original civil jurisdiction. The question which arose in the case of Saroda Soonduree Dossee *versus* Tincowree Nundee was not whether the Section applied to judgments of a Division Court in the exercise of appellate jurisdiction; but whether a judgment in the exercise of the original jurisdiction conferred by Section 34 of that Charter was a judgment in a case of original civil jurisdiction within the meaning of the previous Section 14.

Mr. Justice Levinge, who differed from the majority of the Judges who decided the case, considered that the words "original civil jurisdiction" in Section 14 was intended to deal with civil suits in the ordinary and extraordinary jurisdiction vested in the Court by Sections 12 and 13, and not to judgments passed in the exercise of original testamentary or intestate jurisdiction. He remarked, however, that, if he could find words in the 14th Clause which would warrant him in extending the provision of that Clause to decisions passed under the testamentary Clause 34, he would willingly do so, for that in his judgment words in a Statute should be construed liberally so as to confer or aid a right of appeal.

Mr. Justice Wells, who formed one of the majority, held that the words "all cases of civil jurisdiction" in Section 14 must be taken to have the same meaning as the words "in any matter not being of criminal jurisdiction" in Section 39, and that an appeal did lie to the High Court under Section 14 from a decree made in the exercise of original jurisdiction in testamentary cases. This opinion expressed by Mr. Justice Wells will be found to be very important when we come to examine the alterations which were made in the present Charter in the Section corresponding with Section 14 of the old Charter.

By Section 36 of the new Charter, a power which did not previously exist was vested in the senior Judge of a Division Court, if the Judges should be equally divided, and should not amount in number to a majority of the Judges of the High Court; and it was ordained that, in such cases, the opinion of the senior Judge should prevail. This provision extended, not only to cases in the exercise of the original jurisdiction of the Court, but also to cases in the exercise of the appellate jurisdiction.

At the same time the power of appeal to the High Court, which was given by Section 14 of the old Letters Patent, was altered by Section 15 of the new Letters Patent. By Section 14 an appeal was given to the High Court from the judgment in all cases of original civil jurisdiction of one or more Judges of the High Court or of any Division Court, unless the decision was passed by a majority of the full number of Judges of the High Court. By Section 15 an appeal is given only in two cases:—

1st.—When the judgment is that of one Judge only.

2nd.—When the judgment is that of two or more Judges of the High Court or of a Division Court, and the Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the Court at the time being.

The *2nd* case applying to judgments of two or more Judges only when the Judges are equally divided in opinion extends only to certain cases in which, under Section 36, the opinion of the senior Judge shall have prevailed. In such a case or cases, in which the Judges who are equally divided in opinion do not amount in number to a majority of the whole of the Judges of the Court, and in which the opinion of the senior Judge has prevailed, the judgment is placed in the same category as judgments of only one Judge.

The question is, does this rule apply to judgments of a Division Court consisting of a less number of Judges than a majority of the whole of the Judges of the Court when exercising appellate jurisdiction?

The words of Section 14 of the old Letters Patent were "from the judgment in all cases of original civil jurisdiction," but those words were altered in Section 15 of the new Letters Patent, and the appeal thereby given to the High Court is from a judgment not being a sentence or order passed or made in any criminal trial—a very remarkable alteration, considering the conflict of the opinions of Mr. Justice Wells and Mr. Justice Levinge in the case already referred to, and in which the latter stated that, in his opinion, a judgment in the exercise of testamentary jurisdiction was not a judgment in a case of "original civil jurisdiction" within the meaning of Section 14 of the old Charter, whilst the former held that those words were tantamount to the words "not being of criminal jurisdiction" in Section 39 of that Charter.

If it be held that the judgments referred to in Section 15 are those only which are given in the exercise of the jurisdiction vested in the Court by the preceding Sections, judgments given by a single Judge, in the exercise of original jurisdiction in Admiralty and Vice-Admiralty suits, and in the exercise of testamentary, intestate, and matrimonial jurisdiction, will not be subject to an appeal to the High Court, and great inconsistency will be caused. For instance, if a single Judge were, in the exercise of the jurisdiction given by Section 12, to try a suit for a collision of two ships, an appeal from his judgment would lie to the High Court under Section 15; but, if it be held that that Section does not extend to judgments given in the exercise of Admiralty or Vice-Admiralty jurisdiction, a decision of the same Judge for the same collision would not be subject to an appeal to the High Court, notwithstanding an appeal would not lie, as of right, even to the Privy Council, if the value in dispute were under 10,000 rupees. Thus, suppose a collision should take place between ship *A* and ship *B*, and the owner of *A* should sue the owners of *B* in a suit under Section 12, alleging that the collision was caused by the negligence of the captain and crew of *B*. Suppose the owners of *B* should sue ship *A* and the owners of it in a suit brought under the Admiralty or Vice-Admiralty jurisdiction given by Section 32, alleging that the collision was caused by the negligence of the captain and crew of *A*. Suppose the two suits should be tried by the same Judge, and the same witnesses examined, and similar evidence given in both suits, and the Judge should come to the conclusion that the negligence was caused by the captain and crew of *A*, and should consequently dismiss the suit No. 1 brought by the owners of *A*, and should award to the owners of *B* 9,000 rupees damages against ship *A* and the owners thereof, and order ship *A* to be sold for the purpose of satisfying those damages. Now, suppose the owners of *A* should appeal to the High Court in suit No. 1, but should be unable to appeal in suit No. 2, upon the ground that Section 15 did not extend to judgments passed in the exercise of the Admiralty or Vice-Admiralty jurisdiction given by Section 32, and suppose that, in the appeal in No. 1, the High Court should differ from the single Judge, and hold that the collision was caused by the negligence of the owners of *B*, and award to the owners of *A* 9,000 rupees damages. The consequence would be that *A* would recover

9,000 rupees against *B*, upon the ground that the collision was caused by the negligence of the captain and crew of *B*; whilst in the Admiralty suit the original judgment would stand, and *B* would recover 9,000 rupees as damages against ship *A* and the owners of it, upon the ground that the collision was caused by the negligence of the captain and crew of *A*.

The words of Section 15, "the judgment (not being a sentence or order passed or made in a criminal trial) of one Judge," &c., are sufficiently comprehensive to include judgments passed in the exercise of every jurisdiction vested in the Court except the criminal jurisdiction. As at present advised, it appears to me that the words should be read in their ordinary and natural sense, and ought not to be restricted, by reason of the position of Section 15, to judgments passed in the exercise of the jurisdiction vested by the preceding Sections. In this view of the case, Section 15 would apply to judgments passed in the exercise of the original jurisdiction conferred by Sections 32, 34, and 35, as well as the judgments passed in the exercise of the civil jurisdiction vested in the Court as a Court of Appeal by Section 16. To hold otherwise would, in my opinion, be to take away a right of appeal given by the words of Section 15, if read in their ordinary and natural sense, by giving them a narrow and restrictive construction. If that construction is to be put upon them, it must apply as well as to cases falling within Sections 32, 34, and 35 of the Charter as to cases determined by the Court as a Court of Appeal under Section 16.

Further, if Section 15 is to be read as applicable only to judgments passed in the exercise of the ordinary and extraordinary jurisdiction given by the preceding Sections, no force or effect will be given to the words "not being in any criminal trial" introduced into Section 15 by way of amendment of Section 14 of the former Charter: for a judgment in a case, falling under Sections 11, 12, 13, and 14, must be in the exercise of civil jurisdiction, and could not, by possibility, be in a criminal trial, the criminal jurisdiction being given by subsequent Sections from 22 to 29, both inclusive.

Again, Section 15 gives an appeal from the judgment of one Judge of a Division Court pursuant to Section 13 of the recited Act of the 24 and 25 Vic., c. 104, and from the judgment of two or more Judges of *such* Division Court (that is to say, of a Division Court pursuant to Section 13 of the said Act) whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges. The judgment of a Division Court, wherever the Judges are equally divided in opinion, must be a judgment in which the opinion of the senior Judge has prevailed under the provisions of Section 36. It is clear, therefore, that the judgment referred to by Section 15 must be a judgment given under the powers conferred by a Section subsequent to Section 15; and, if a judgment passed in pursuance of the power given to the senior Judge by Section 36 is intended, why should not a judgment, passed in pursuance of the powers vested by Section 16, be also intended? Why should Section 15 be held to extend to a judgment given in pursuance of Section 36 when passed in the exercise of the jurisdiction given by Sections 11, 12, 13, and 14, and not to a judgment passed in pursuance of Section 36 when given in the exercise of the jurisdiction conferred by Section 16? The words "pursuant to Section 13 of the said recited Act" seem to show very clearly that the word "judgment" in Section 15 was intended to apply to judgments given in the exercise of appellate civil jurisdiction, as well as to judgments given in the exercise of original civil jurisdiction. The Section referred to applied equally to both jurisdictions. It ordained that the High Court might provide for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the original *and appellate jurisdiction* vested in the Courts. The words "the judgment of two or more Judges of a Division Court pursuant to Section 13 of the said Act" must mean of a Division Court constituted for the exercise either of the original or of the appellate jurisdiction vested in the Court.

It has been said that there cannot be a judgment of one Judge of a Division Court, inasmuch as Section 13 does not authorize the constitution of a Division Court of less than two Judges. This may be so; but it is not material with reference to the present case. The words "of two or more Judges of *such* Division Court" in Section 15 must mean two or more Judges of a Division Court pursuant to Section 13 of the said recited Act.

If the words of Section 15 had been ambiguous, I should have thought that they ought to receive a liberal construction, so as,

if possible, to give an appeal; but, so far from being ambiguous, the words are clear. The words used are sufficient in their ordinary and natural sense to give an appeal from the judgment of two or more Judges of a Division Bench in the exercise of appellate civil jurisdiction wherever such Judges are equally divided in opinion, and do not amount to a majority of the Judges of the High Court. The alteration of the words of Section 14 of the former Charter, and the substitution in Section 15 of the new Charter of the words "from the judgment not being a sentence or order passed in a criminal trial" for the words "from the judgment in all cases of original civil jurisdiction" in Section 14 of the former Charter, and the use in Section 15 of the words "of any Division Court pursuant to Section 13 of the said recited Act," in my opinion, tend to show that Section 15 was intended to apply to Division Courts exercising appellate civil jurisdiction, as well as to Division Courts exercising original civil jurisdiction. If the words are to be read in a narrow and limited sense, and it be held that Section 15 does not extend to judgments given by a Division Court in the exercise of the appellate civil jurisdiction, the consequences will be that, in a Division Court consisting of two Judges of the High Court where the Judges are divided in opinion, the senior Judge, in a regular appeal, may, in opposition to the opinion of the junior Judge of the Division Court, overrule the decision, upon a question of fact, of a Zillah Judge who may have heard and examined all the witnesses orally, and have pronounced a decision in which the junior Judge of the Division Court concurs, and this without an appeal to the High Court, and in a case in which the amount involved is less than 10,000 rupees without any appeal as of right to Her Majesty in Council. In like manner, in special appeal, the senior Judge may, without being subject to any appeal as of right, overrule the decision of the two Lower Courts upon a matter of law, although the junior Judge of the Division Court agrees with the two Lower Courts. This would involve another glaring inconsistency; for, if one Judge cannot constitute a Division Court of Appeal, and by himself overrule a decision of a Lower Court when there is no other Judge of the High Court opposed to his view of the case, would it not be, in the highest degree, inconsistent to hold that he may do so without any appeal as of right in certain cases when he is sitting with another Judge of the High Court who may happen to be his junior, and who is opposed to his view of the case?

It has been said that Section 39 of the Letters Patent gives an appeal to Her Majesty in Council from any final judgment, decree, or order of the High Court made on appeal in any matter not being of criminal jurisdiction, but that, with respect to judgments, decrees, or orders made in the exercise of original jurisdiction, an appeal is given to Her Majesty in Council only when the judgment is one from which an appeal shall not lie to the High Court under the provision contained in the 15th Clause of the Charter; and it is argued that, if it had been intended that Section 15 should apply to judgments passed in the exercise of appellate civil jurisdiction, as well as to those passed in the exercise of original civil jurisdiction, the words "from which an appeal shall not lie to the said High Court under the provision contained in the 15th Clause of these presents" in Clause 39 of the Charter would have been made applicable to judgments passed on appeal, as well as to judgments made in the exercise of original jurisdiction, and that, reading Section 15 by the light thrown upon it by Section 39, it must be held not to be applicable to judgments made on appeal.

The argument is plausible, but it is not conclusive. We cannot say that it was not the intention of Section 39 of the Charter to draw a distinction between judgments passed in appeal and judgments passed in the exercise of original jurisdiction to the extent of leaving it optional to parties to judgments given by a Division Bench to appeal at once to Her Majesty in Council from a judgment given by a Division Court in the exercise of appellate jurisdiction, even though it might be one from which an appeal would lie to the High Court; but in the case of judgments given in original jurisdiction, to allow an appeal to Her Majesty in Council only in cases not appealable to the High Court. It cannot be said that such a distinction would have no reason in support of it, when it is borne in mind that every judgment given in appeal must be on a matter which has been previously before one other Court at least, and in special appeal before two other Courts.

We ought not, in my opinion, to speculate as to what may or may not have been the object of the distinction made by Section 39 between judgments made on appeal, and judgments made in the exercise of original jurisdiction. We ought to give the words of

Section 15 their natural and ordinary meaning, unless we can ascertain, beyond all doubt, from the whole of the Charter taken together, that it was the intention to use the words in a restricted sense. It would require very clear words to justify a decision which would substantially enable the senior Judge of a Division Court, consisting of two or more Judges who are equally divided in opinion, to decide without further appeal a case according to his view, though the effect of his decision might be to overrule the decision of one or two Lower Courts with whom the junior Judge of the Division Court might concur. This, as regards cases in which the value is under 10,000 rupees, would be the result of a decision holding that Section 15 does not apply to judgments given on appeal. It may be said that, in such a case, even under the value of 10,000 rupees, an appeal would lie to Her Majesty in Council if a Judge of the High Court should declare the case to be a fit one for appeal. But I doubt very much whether the mere fact that the case had been decided according to the opinion of the senior Judge in a Division Court consisting of Judges who were equally divided in opinion would be a good ground for declaring a case under the value of 10,000 rupees to be a fit one for appeal to Her Majesty in Council, if, according to the Charter, it was intended that the case should be decided according to the opinion of the senior Judge, and that an appeal should not lie from such judgment to the High Court. But, at any rate, in such a case, the appeal would not lie as a matter of right.

It appears to me that, before an appeal is allowed to be filed in this case, the opposite party ought to be heard. I am, therefore, of opinion that a rule should be granted, calling upon the opposite party to show cause why the appeal should not be admitted. I have expressed my reasons at length in order that, on showing cause, the opposite party may have an opportunity of meeting them, and of satisfying me that I am wrong, if the view which I am at present disposed to take of the case is not a correct one. I am open to be convinced by argument that my present impression is founded upon an erroneous construction of the Letters Patent.

I may also remark that the High Court at Bombay has, apparently as a matter of course, treated Section 15 as applicable to the Appellate Division Courts, as they have passed rules specially applicable to such appeals.

Norman, J.—This is an application for the admission of an appeal from the decision of a Division Court, composed of two Judges, in which the Judges, on the hearing of a special appeal, being divided in opinion, judgment was given according to the opinion of the senior Judge.

The question we have to consider is whether, in such case, an appeal to this Court is given by the Charter of the 28th December 1865. Under the heading of "Powers of single Judges and Division Courts," the 36th Clause is as follows: "And we do here- "by declare that any function, which is here- "by directed to be performed by the said "High Court of Judicature at Fort William "in Bengal, in the exercise of its *original* "*or appellate jurisdiction*, may be performed "by any Judge or by any Division Court "thereof appointed or constituted for such "purpose under the provisions of the 13th "Section of the Act of the 24th and 25th "years of our reign; and if such] Division "Court is composed of two or more Judges, "and the Judges are divided in opinion as "to the decision to be given on any point, "such point shall be decided according to the "opinion of the majority of the Judges, if "there shall be a majority; but, if the Judges "shall be equally divided, then the opinion "of the senior Judge shall prevail."

Under the heading of "Power to High Courts to provide for exercise of jurisdiction by single Judges or Division Courts," Section 13 of the 24 and 25 Vic., c. 104, is as follows: "Subject to any laws or regula- "tions which may be made by the Govern- "or-General in Council, the High Court "established in any Presidency under this "Act may, by its own rules, provide for the "exercise by one or more Judges, or by "Division Courts constituted by one or more "Judges of the said High Court of the "*original and appellate* jurisdiction vested "in such Court in such manner as may "appear to such Court to be convenient for "the due administration of justice."

In the Charter of December 1865, Clauses 11 to 18 come under the general heading, "Civil Jurisdiction of the High Court." Clause 15 is as follows: "And we do further "ordain that an appeal shall lie to the said "High Court of Judicature at Fort William "in Bengal from the judgment (not being a "sentence or order passed or made in any "criminal trial) of one Judge of the said "High Court, or of one Judge of *any* Divi- "sion Court pursuant to Section 13 of the "said recited Act; and that an appeal shall "also lie from the judgment (not being a "sentence or order as aforesaid) of two or

"more Judges of the High Court, or of "such Division Court, whenever such "Judges are equally divided in opinion, and "do not amount in number to a majority of "the whole of the Judges of the said High "Court for the time being; but that the "right of appeal from other judgments of "Judges of the said High Court or such "Division Court shall be to us, our heirs, "and successors, in our or their Privy "Council as hereinafter provided."

Reading the language of this Clause according to its plain grammatical construction, it would appear to include all judgments without exception, other than those in criminal cases, either by one Judge, or where the Court is equally divided in opinion, unless such Court so divided consist of a majority of the Judges of the High Court.

Clauses 11 to 18 come under a general heading "Civil Jurisdiction of the High Court." Therefore, the language of Clause 15. being quite general, presumably deals with the civil jurisdiction generally. Clause 15 follows three Clauses relating to original jurisdiction. As if to remove all ambiguity and doubt as to whether, in the 15th Clause, the Charter was still dealing with the original jurisdiction only, after the words *from the judgment* are inserted that which is the only qualification of the generality of the terms, *viz. (not being a sentence or order passed or made in any criminal trial).* The expression is perhaps larger and more comprehensive than if the words had been "all judgments in civil suits" (*see* the discussion which arose in Saroda Soonduree Dossee *versus* Tincowree Nundee, 1 Hyde's Reports, page 70). The appeal is given from every judgment of one Judge or a divided Court, whether strictly speaking in a civil suit or not, which does not fall within the definition of a sentence or order passed or made in a criminal trial. The Section is in express terms dealing with the judgments of Courts constituted under the 13th Section of the Act, and decrees pronounced under the 36th Clause of the present Charter. The 13th Section of the Act and the 36th Clause of the Charter apply without distinction to Courts constituted for appellate as well as for original jurisdiction. The terms of the 15th Clause include all judgments of such Courts, or pronounced in pursuance of such power without exception.

Some difficulty has been supposed to arise from a comparison of the language of the 39th Clause. But the two Clauses may be perfectly reconciled and made consistent with each other by reading the words "from which an appeal shall not lie to the said High Court under the provision contained in the 15th Clause of these presents," as overriding and applying to both members of the preceding portion of the sentence. This, though not the most natural construction, is one of which the language appears to me fairly capable. If the relative "which" is read as applying only to the last antecedent, the consequence would be that, in cases where the Court is equally divided on the hearing of an appeal, the party against whom the decision is given in pursuance of the provisions of the 36th Section would have a remedy either by appeal to the High Court or to the Privy Council at his election. Either construction would give full force to every word, both of the 15th and 39th Clauses.

A comparison of the 14th Clause of the Charter of 1862, with the 15th Clause of the present Charter, is useful as throwing light on the true meaning of the latter.

The 14th Clause came under a heading, "Appeal from the Courts of Original Jurisdiction to the High Court in its Appellate Jurisdiction," and an appeal was given from the judgment "in all cases of original civil jurisdiction" of one or more Judges of the High Court or of any Division Court pursuant to Section 13 of the said recited Act. The present Charter amends the provision as to these appeals; and it is difficult to suppose that all the words in the Charter of 1862 confining appeals to the High Court from judgments of Judges and Division Courts of the High Court to cases of original civil jurisdiction could have been struck out in the new Charter without good reason. One would say that the obvious intention of the framers of the Charter, in striking out the words of limitation, must have been to extend the appellate jurisdiction which had been given by the former Charter. The construction adopted by the Judges whose views on this subject are opposed to those which are here put forward narrows it, because it is admitted on all hands that no appeal to the High Court from the decision of two Judges, sitting as a Court of Original Jurisdiction, is given unless they differ in opinion.

It is always desirable, when endeavoring to put a construction on the language of any document which is supposed to admit of more than one interpretation, to test that which appears at first sight to be the true

meaning according to the grammatical construction of the document by enquiring what would be the consequences of that interpretation; whether its adoption would involve any manifest inconvenience or inconsistency.

Now, it appears to me that, when one Judge overrides the opinion of a colleague, or two or more override that of an equal number of their colleagues, it may be reasonably thought that the decision is not so completely and conclusively that of the High Court that it is necessary to put the parties to the great expense of an appeal to the Privy Council. Nor do I see that there is any inconvenience if the person against whom a decision is given under Clause 36 has an alternative remedy. Cases may be supposed where the decision of the senior Judge is so far in accordance with previous rulings of the High Court that the suitor may know that a further appeal to that Court would be useless. Why should he not at once appeal to Her Majesty in Council instead of going through what he may know to be the useless form of presenting a second appeal to the High Court in the first instance?

I am of opinion that an appeal lies to this Court in the present case. I think we ought to grant a rule calling on the other side to show why the appeal should not be admitted in order that the question may be fully discussed at the bar.

Jackson, J.—I heartily concur in thinking that the rule should go.

I admit also that the Chief Justice's reasoning disposes of the difficulty arising from the relative situation of Section 15 and other Sections.

But I still think that the argument from the words of Section 39 is not merely a "plausible," but a very forcible argument, and I must reserve my opinion whether it will prevail or no, till the respondent shall have been heard.

As to the expediency and justice of allowing the appeal, if such considerations are to influence us, things appear to be nearly balanced.

On the one hand, the case might be even stronger than stated by the Chief Justice, for, in a Court consisting of 8 Judges, an Officiating Chief Justice, concurring with three Acting Puisne Judges, might overrule the four senior Puisne Judges in the circumstances which the judgment of the Chief Justice so forcibly sets forth.

On the other hand, to allow an appeal to the Court at large, where the senior Judge, agreeing in the facts with the Court of first instance, overrules his junior, and affirms the judgment, is a proceeding of which the advantage is not so obvious.

There can be no doubt that the statement of the reasons which at present incline the Chief Justice and some of my brethren to the admission of the appeal is very convenient, with a view to the full argument of the point at issue.

Kemp, J. (Loch and Macpherson, JJ., concurring).—I think that a rule should go. I reserve my opinion.

Markby, J.—I agree with the construction put upon the Letters Patent by the Chief Justice and Mr. Justice Norman, and that a rule should be granted to show cause why the appeal should not be admitted.

The 23rd January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Limitation—Possession—Section 264, Act VIII. of 1859.

Case No. 2194 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 11th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 2nd September 1865.

Asudoollah (one of the Defendants), *Appellant,*

versus

Shaik Akbar Ali (Plaintiff) and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Greesh Chunder Ghose for Respondents.

The possession of an auction-purchaser at a sale in execution of a decree runs from the date of delivery as provided by Section 264, Act VIII. of 1859, *i. e.*, by publication of sale-certificate and proclamation by beat of drum, and not from the date of his possession.

Glover, J.—This was a suit to recover possession of 10 beegahs of land purchased by the special respondent at an auction-sale in execution of decree in November 1851. The purchaser for some reason or other, the exact nature of which is not clearly stated, did not obtain his certificate from the Civil Court until the 24th September 1861, from which date he alleges himself to have been dispossessed by the ryot in possession, one Asudoollah, the person whose rights and interests special respondent bought at auction 10 years before.

The defendant, Asudoollah, pleaded more than 12 years' adverse possession, and the first Court allowed his plea; but the Principal Sudder Ameen, on appeal, held the suit not to be barred, and restored the plaintiff to possession. This is the only point taken in special appeal.

We see no reason to interfere with the Lower Appellate Court's order. Special respondent took out his purchase-certificate on the 24th of September 1861, and it is found, as a fact, by the Lower Court, that a copy of this certificate was fixed in a conspicuous place on the land, and that the usual proclamation regarding the change of right and title had been made by beat of drum. This was a sufficient delivery of possession under Section 264 of the Civil Procedure Code, and the special respondent's possession must run from this date, and not from that of his purchase, 10 years before. Calculating from the 24th September 1861, the present suit, which was instituted in September 1865, is clearly within time.

We look upon this case as a most barefaced attempt on the part of the special appellant, the original judgment-debtor, Asudoollah, to cheat a purchaser out of his rights. Asudoollah's interest in the 10 beegahs was sold; and because (apparently through collusion with the Court officers as surmised by the Moonsiff) he contrives to keep the special respondent out of his purchase for 10 years, he now thinks to come forward and take advantage of his own tortious act, and declare the purchaser barred by limitation.

We have no doubt that the special respondent's dispossession dated from September 1861 only, and that this special appeal should be dismissed with costs.

The 23rd January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Appellate Court (Duty of)—Decree for rent (Liability of holder of—against under-tenants).

Case No. 2183 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 31st May 1866, modifying a decision passed by the Assistant Collector of that District, dated the 22nd February 1866.

Kashinath Roy Chowdhry and others (Plaintiffs), *Appellants,*

versus

Roy Dwarkanath Chuckerbutty and another (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Appellants.

Baboo Gopaul Lal Mitter for Respondents.

An Appellate Court should not ordinarily travel beyond the record, or take up points which are not the subject of appeal before it.

The holder of decrees for rent against his under-tenants is bound to pay in his turn to his superior holder, and cannot plead the non-execution of his decrees in answer to a suit by the superior holder.

Glover, J.—This was a suit for arrears of rents due in the year 1271, and 8 months of the year 1272 B. S.

The defence was payment in full for the year 1271, and in part for 1272. An arrear of Rupees 35 only was admitted.

The Deputy Collector decreed plaintiffs' case, with a deduction of 300 rupees deposited with the Collector under Act VI. of 1862, Bengal Council. But the Judge, whilst upholding the Lower Court's order in respect of the arrears of 1271, considered that the claim for 1272 was premature, and could not be allowed until the expiry of the current year.

Both parties appeal against this decision, the defendant under Section 348, Civil Procedure Code.

The plaintiff (special appellant) urges that, as no appeal was preferred to the Judge against the Deputy Collector's order in regard to the arrear of 1272, that officer had no power to entertain the question, or to reverse the first Court's order.

The defendant, in cross-appeal, objects that there is no proof that he recovered the rents of 1271 from his under-tenants, and that he has improperly been made liable for them to the plaintiff.

The first of these objections must, we think, be allowed. The petition of appeal to the Judge contains no objection to the Deputy Collector's order as to the rents of 1272, and it must, therefore, be presumed that the defendant was satisfied with that order, and should be bound by it. We are not shown, nor can it be discovered from the judgment itself, how the objection presented itself to the Judge's mind. We may gather from the wording of his judgment that he took it up *proprio motu*; but, as it was one that was not apparent on the face of the plaint, and could not be determined without looking into the evidence, we do not

think that he was justified in taking it up when no appeal on the point was before him. We do not express an opinion as to the correctness or otherwise of the Judge's reasoning, but merely lay down, what has often been ruled by this Court, that an Appellate Court should not ordinarily travel beyond the record, or take up points which are not the subject of appeal before it.

The cross-appeal cannot be allowed. The Judge has found, as a fact on the evidence, that the defendant collected rent from the under-tenants, and was, therefore, justly liable to pay in his turn to the superior holder. The defendant objects that, although he certainly did get some decrees against the under-tenants, he has not been able to execute them; but with this the Court has no concern; it is sufficient that the defendant obtained the decrees, and has by law the power of executing them if he pleases.

We, therefore, decree the special appeal No. 2183 with costs, and dismiss the cross-appeal.

The 23rd January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution of decree.

Case No. 779 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 14th August 1866.

Bhoobun Moyee Debia Chowdhrain (Decree-holder), *Appellant,*

versus

Brojonath Roy (Judgment-debtor), *Respondent.*

Baboos Sreenath Doss and *Anund Chunder Ghosal* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

A decree cannot be executed against a person who, though originally named as a defendant in the suit, was not named in the decree as one of those against whom the decree was given.

Macpherson, J.—We dismiss this appeal with costs.

The decree certainly cannot be executed against a person who, though originally named as a defendant in the suit, was not named in the decree as one of those against whom the decree was given.

The 23rd January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Relinquishment of lease—Fraud—Section 19, Act X. of 1859.

Case No. 2219 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 9th June 1866, affirming a decision passed by the Deputy Collector of that District, dated the 28th February 1866.

Bholanath Khan, Tehsildar, and others (Plaintiffs), *Appellants,*

versus

Ram Chunder Sirkar (Defendant), *Respondent.*

Baboo Mohendro Lal Shome for Appellants.

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Respondent.

A suit for the relinquishment of a lease on the ground of fraud is only cognizable by a Civil Court. A Revenue Court can only take notice of relinquishments when made under Section 19, Act X. of 1859.

Pundit, J.—The defendant was sued in the Collectorate by the special appellant for rents of an ijarah which the former had taken for 10 years, at a fixed rent under a kubooleut executed by the defendant, in favor of the special appellant.

It is pleaded in answer, but we do not think correctly, that it is a good defence in a Revenue Court in such a case, that the special appellant had *deceived* the defendant by misrepresenting the annual collections at a sum much higher than those from which the annual rents would have to be met. Further, that the special appellant, on being asked to allow an abatement, refused this to the defendant, special respondent, who accordingly *resigned* the lease under Section 19 of Act X. of 1859.

It is apparent that Section 19 applies to actual ryots; and it is not denied that the defendant is *not* a ryot. Further it has been decided in a case, dated 9th May 1866 (page 81, Act X. Rulings, Volume V., Weekly Reporter), that, even if the defendant were a ryot holding under a lease for a fixed number of years, he could not resign under Section 19 of Act X. of 1859.

The Lower Appellate Court itself admits that that Section does not apply to the defendant. The Lower Appellate Court holds that the defendant had a right to resign on the

ground of *fraud*, and the decision of the Lower Appellate Court is not quite clear upon those facts on which it bases its finding of fraud. We further think that a Revenue Court is authorized to take notice of resignations only when made under that Section, and a suit on the ground of fraud can be heard in a Civil Court when the defendant may seek thereto have himself released from the contract.

The Collector is not authorized to try whether there is or is not proper proof of fraud to justify a reversal of the contract, and that cannot be effected by the defendant of his own act. He must move a Civil Court to afford him that relief. As long as the deed executed by the defendant is not thus properly set aside, it must stand good, and so the special appellant is right in his contention that his present claim before the Collector should be decreed, whatever may be the rights of the defendant, and whatever privilege he may have of adopting proceedings by a Civil Court to get himself relieved from his liability upon proof of fraud under the above contract.

In this view we reverse the decision of the Lower Appellate Court, and decree the appeal with costs, decreeing the plaintiff's claim with costs for both the Courts.

The 23rd January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Enhancement (of Dependant talook).

Case No. 248 of 1866.

Regular Appeal from a decision passed by Mr. H. B. Lawford, Officiating Judge of Jessore, dated the 10th April 1866.

Mussamut Mohamoya Dossee (Defendant), *Appellant,*

versus

Mussamut Doya Moye Chowdhrain (Plaintiff), *Respondent.*

Baboos Sreenath Doss, Bungshee Dhur Sein, and *Bungshee Buddun Mitter* for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

Suit laid at Rupees 4,326-9-5-1.

Suit for enhancement (under the old law) of rent of a talook held to be a dependant talook within the meaning of Section 51, Regulation VIII., 1793, although not duly registered by the zemindar—HELD that the defendant having made out a strong *primâ facie* case to prove that he and those through whom he claimed had held the talook at a fixed rent from a date more than 12 years prior to the Decennial Settlement, and the zemindar having relied on the weakness of the defence, and having failed to show that the rent had varied, the tenure was exempt from re-assessment.

Macpherson, J.—IT appears to us that the judgment of the Lower Court ought to be reversed.

The plaintiffs, as zemindars of a ten-annas share of Pergunnah Hooghla, sue to assess the principal defendants, who are the only defendants to whom it is necessary to refer in the course of this judgment, with rent at the rates prevailing in the pergunnah, alleging that the defendants hold a jumma "in Mouzah Nundunpore within "the said Pergunnah Hooghla *under no settlement of any kind.*" The defendants in their answer plead (amongst other things), and their contention throughout the proceedings has been that Nundunpore is their ancestral dependant talook, "and was held for "a long series of years before the Decennial "Settlement at a jumma of sicca Rupees "40-13-5, and has since then been held at "a uniform rent of Co.'s Rs. 43-8-16-2."

This suit is now for the third time before the High Court on appeal; and it is impossible to make the present position of the parties intelligible without going in detail into the various proceedings which have been taken in the course of the suit.

The suit was originally tried by the Principal Sudder Ameen of Jessore, and it was dismissed by him—and subsequently on appeal by the Zillah Judge also—on a preliminary ground which in no way touched the merits. On the 6th December 1862, the decision of the Lower Courts was, on special appeal, reversed by the High Court, and the case was remanded for trial on the merits. The suit was then transferred to the file of the Judge's Court. It was tried by Mr. Simson, the Officiating Judge, who, on the 6th of December 1864, delivered the following judgment:—

"This was a suit brought by the plaintiffs, "as zemindars of Pergunnah Hooghla, to "assess at an enhanced rate the defendants' "holding; the jumma to be assessed was "put at 4,326 rupees.

"The case was instituted on the 30th "July 1859, or one day before it would "have fallen under the operation of Act X. "of 1859.

"The case was first brought in the Court of "the Principal Sudder Ameen, and he de-"cided a plea in bar, *viz.*, that the plaintiffs "were only *benamee*, and not *bonâ fide*

"owners, adversely to the plaintiffs. In appeal before Mr. Belli, Judge of Jessore, this ruling was upheld on 18th August 1860; but in special appeal in the High Court on the 6th December 1862, both rulings were reversed. Mr. Russell then put the case on the Judge's file.

"There are only two real issues:—

"*1st.*—Was the tenure liable to enhancement? The *onus* to prove this fell on the defendants, and they averred that the talook was protected from enhancement as in existence more than 12 years before the Decennial Settlement.

"The plaintiffs brought several cases of this description; and for this particular Talook of Nundunpore, there had been a suit by the owners of the six-annas share, who had been unsuccessful—and, on appeal, Mr. Russell, on the 26th of January 1863, upheld the decision of the Lower Court, and no special appeal was preferred.

"The pergunnah was held in two shares of 10 annas and 6 annas. The present suit was for the 10-annas share.

"The same plaintiffs brought a very similar suit for another dependant talook Rajnuggur, which was decided by Mr. Seton-Karr on the 31st of March 1860, also adversely to the plaintiffs; and this ruling was upheld in the High Court's judgment of the 28th February 1863.

"The whole of these decisions have been read by the Court.

"The defendants aver that the talook was bought in 1168 on 21st Srabun by their ancestors, and file a copy of the kowalah. In 1169 the sale was ratified by the zemindars in a *likhun;* and a copy of a dowl of the 25th Bhadro 1179, and another *likhun* of the same date, and documents also of 1815 A. D. (1205 B. E.), 1211, and 1175 were filed, together with numerous bundles of dakhilahs; and the defendants rested their case on these documents and the rulings in the cases quoted.

"The plaintiffs objected to the deeds as copies as unsatisfactory, and because the history in the dowl did not make out the jumma sicca Rupees 40-13-10, and that it did not agree with the *likhun* of the same date, 25th Bhadro 1179. They averred that Mr. Russell's decision as to the 6-annas share had been settled after the appeal-decree was given, and special appeal thus stopped; but of this, and, indeed, with reference to their whole case, they offered no proof at all.

"Mr. Seton-Karr's decision and the High Court's judgment in appeal refer indeed to Talook Rajnuggur; and though it is separate, yet the connection between that talook and Nundunpore now under review is intimate, and the history of the two nearly identical, and the whole argument in both decisions applies to the case now before the Court. The whole of the evidence offered by the defendants was offered to the Principal Sudder Ameen and to Mr. Russell and accepted; and it was not open to this Court now summarily to reject the deeds as copies, or on strict grounds; and, considering the dates of the original transactions and the history of these deeds, they are unobjectionable. The arguments of the High Court Judges, throwing the blame of non-registration on the zemindars, and preventing their taking undue advantage of non-registration, apply in this case.

"The Nundunpore Talook was created at the same time as Rajnuggur by the same zemindars, and given to connections of the Rajnuggur talookdars. Mr. Russell's history of the way Rajnuggur got its name is by consent of vakeels allowed to be incorrect. The jumma of the two talooks is identical, sicca Rupees 40-13, and made up in the same way; the deeds connected with the two talooks bear many of them the same dates. The six-anna portion and the ten-anna portion have been subject to the same transfers; and the judgment on the six-anna portion is final. As in the case of Rajnuggur, the zemindars have remained quiet and contented with the rent of 1179.

"Similarly, both suits were brought at the last moment the old procedure admitted. Similarly, plaintiffs fail to show that the jumma fluctuated, or that they collected a higher rent. The deeds and *likhun* in this case refer also to Rajnuggur Talook by name and proprietor, and the presumption that, if the Rajnuggur deeds are genuine, these must be genuine, is very strong; and the plaintiffs in one argument allowed the *likhun* in the Rajnuggur case, and attempted to found on it an argument that defendants had forfeited their rights by breach of contract in attempting to obtain the separation of their talook from the zemindaree. All the objections brought by the plaintiffs to the documents were made in the Rajnuggur case and refuted; and, though they cite a High Court decision of the 31st May 1859, in which in this same pergunnah the zemindars were successful, and

"the asserted talookdars worsted, the two "cases are not similar; the proof in the last-"mentioned case was weak and of an entirely "different character.

"The decision of this Court of March "31st, 1861, High Court's Decision of 28th "February 1863, and Mr. Russell's ruling, "with reference to the other share in this "talook, are all similar, and agree with each "other; and any rejection of the evidence in "this case and annulment of the talook-"daree right of the defendants would be "adverse to the above decisions and cause "endless trouble, and, in the opinion of this "Court, would be contrary to justice; for, "although the proof is not as satisfactory "as it might be, yet, taken as a whole, it "affords a very strong mass of proof to show "that the talook was in existence 12 years "before the Decennial Settlement, and that it "has always been regarded as a permanent "unalterable jumma. Against the argu-"ments and proofs of the defendants, plaint-"iffs merely urge that they are not sufficient; "they give no possible account or reason "why they should have allowed a property "worth more than 4,300 rupees per annum to "remain at a rent of 40 rupees. If there "was no valid reason against enhancement, "they would have enhanced long ago.

"The Court considers the defendants' "tenure protected from enhancement, and "the case is dismissed, all costs to be paid "by the plaintiffs."

The case having thus been tried on the merits by the Zillah Judge sitting as a Court of first instance, the parties, if dissatisfied with the decision, ought to have appealed by way of regular appeal to this Court. But the course of procedure which the law prescribes was departed from, for some reason which has not been explained. No regular appeal was brought: but the decision of the Judge was treated as if it had been a decision passed in appeal from a judgment of the Principal Sudder Ameen, and a special appeal from the decision of the Judge was instituted. How such an appeal ever came to be admitted on the files of the Court, we are at a loss to comprehend. But it was admitted, and the appeal was heard by Campbell and Shumbhoonath Pundit, JJ., by whom, on the 5th of September 1865, an order was made remanding the case to the Lower Appellate Court for re-trial, on the one bare ground that it appeared that certain copies of documents had been received in evidence, and the judgment did not explain why those copies had been received.

Before the suit came on for re-trial under this remand order, Mr. Simson, the Judge, whose decision had been deemed defective, was no longer the Judge of the Lower Appellate Court. The case, accordingly, came on for re-trial before Mr. Simson's successor, who, putting his predecessor's judgment on one side, proceeded to try the whole case on the merits *de novo*, and eventually passed the judgment which is now before us in regular appeal. The result of that judgment in effect is that the Judge on the re-trial took a view of the case directly opposed in almost every particular to that taken by the Judge who originally tried it, and that a decree has now been passed in favor of the plaintiffs. It thus comes about that, in consequence of the irregular bringing of this case before the High Court on the former occasion by special appeal, the defendants, on the case coming on in regular appeal, have the decree of the Lower Court against them instead of in their favor.

We proceed to consider the judgment which is immediately before us in appeal. The Lower Court does not doubt that the defendants and their ancestors have held the lands in dispute for a great number of years, and that the lands were, in fact, in their possession twelve years before the Decennial Settlement—but is of opinion that the defendants give no trustworthy proof that their holding is a talook within the meaning of Section 51 of Regulation VIII., 1793, or that they held all along at a fixed rent. And it is apparent that the real reason on which the Lower Court's judgment is based is to be found in the fact that the Court discredited and rejected the whole of the documentary evidence adduced for the defence. We do not concur, however, with the Judge in his wholesale rejection of all the defendants' documents; and, moreover, it appears to us that, independently of the rejected documents, the defendants have made out a strong case which has in no way been rebutted by the plaintiffs.

It is clear upon the whole evidence (as indeed is found by the Lower Court) that the defendants, and those through whom they claim, have held these lands from a date more than 12 years prior to the Decennial Settlement: they have from the first alleged that they have held at a fixed rent: there is no allegation in the plaint, and there is no evidence on the part of the plaintiffs, to show that the rent has varied; and there is no evidence of any attempt on the part of the zemindars to enhance the rent until they

instituted this suit, a day or two before Act X. of 1859 came into operation, *i. e.*, a day or two before the right to enhance (if it existed) would have been lost for ever.

Then, we find that in 1815 those whom the defendants now represent appeared before the Collector and tried, but unsuccessfully, to obtain a separation of their talook from the parent estate. The zemindars (through whom the plaintiffs claim), in an answer put in by them in opposing the separation, admitted that the defendants' ancestors had held since 1170 "under a Jungleboooree Mofussil pottah," and that they paid a rent of Rupees 41 and some annas. The Lower Court seems to us to err in considering that the proceedings before the Collector in 1815 are unfavorable to the defendants' case. We cannot discover any indication of an opinion on the part of the Collector that the tenure was liable to enhancement. The Collector held that the defendants' ancestors were not independent talookdars, and were not entitled to a separation. But there is nothing to show that they were not deemed dependant talookdars under Section 51 of Regulation VIII., 1793, or that they were treated as holders of a tenure which was then liable to re-assessment. Even if the tenure in its origin more than 12 years before the Decennial Settlement was a Jungleboooree talook, it does not necessarily follow that now, or even in 1815, it was liable to re-assessment.

The decision of this Court on the 28th of February 1863 in one of the other suits referred to by Mr. Simson in his judgment (Doya Moye Chowdhrain *versus* Nund Coomar Dey, 2 Hay & Co.'s Reports, page 220, in which the plaintiff in the present suit was also plaintiff) is very much in point; although, no doubt, the facts proved are not identical, and the case for the defence was stronger in that case than in this. That suit related to other lands in this same zemindaree, and its object was to re-assess rents on a tenure created apparently at the same time and under the same circumstances as the tenure which is the subject of the present litigation. In that suit the High Court, confirming the decision below, held that the plaintiffs had failed to establish their right to increase the rent; that the tenure of the defendants was a dependant talook within the meaning of Section 51 of Regulation VIII., 1793, although the zemindars had not registered as they should have done; and that the *onus* of proving the right to assess the rents lay upon the plaintiffs. We say that the tenures, the subject of the present and former suits, were created apparently at the same time and under the same circumstances. In the judgment of this Court in the former suit, it is stated that the plaintiffs "show that by the pottah of 1869 the defendants held as Jungleboooree talookdars and had agreed, &c.;" while we find from the evidence in the present suit that, in the proceedings before the Collector in 1815, the plaintiffs' ancestors stated in their answer that the defendants' ancestors held under a Jungleboooree pottah of 1170. Moreover, in a document (a dowl of 25th Bhadro 1179) rejected in the Court below as not proved, but which was received in the former suit which came before this Court, and which we now accept as a genuine paper, it will be found that the zemindars dealt both with the tenure which was the subject of the former suit, and that which is the subject of this suit, and that they treated both the tenures as being on exactly the same footing, and as of exactly the same description. There may be some slight discrepancy between the amount appearing in some of the papers as the rent of this talook, and the amount at which the defendants allege they have held. But we do not think that this really affects the case in any way, the discrepancy being trifling, and not such as involves or indicates a substantial variation.

On the whole, we think that the defendants, independently of the rejected documents other than the one just mentioned, have made out a case which is quite sufficient for the purposes of this suit in which the plaintiffs rely solely on the weakness of the defence.

This suit and that which was decided here in February 1863 were both instituted at the last moment before Act X. of 1859 came into force and in the same Court. It is much to be regretted that one should have been tried by the Judge, and the other by the Principal Sudder Ameen, and that they were not both disposed of together, intimately connected as they are in very many respects.

By this Court's decision in the former case, it is finally decided that a talook, which in its origin was precisely similar, if not identical, could not be re-assessed. By the decision of the Lower Court itself passed in a suit brought by the proprietor of the six-annas share which forms the complement of the ten annas held by the plaintiffs, it has been finally decided that no re-assessment can be

made as regards these six annas. These decisions are rightly said by the Judge not to bind him conclusively in dealing with the suit. But these decisions are, in our opinion, quite sufficient to make it imperative on the Judge to be careful not to reject too readily evidence which has been received, or of a kind precisely similar to that which has been received and acted upon by the Courts (including the High Court) in these other suits. We are not prepared to concur in the conclusion that none of the documents relied on by the defendants can be admitted as trustworthy evidence. But it is unnecessary to enter further into the detailed consideration of the documents, as we think that without them the defendants have made out a sufficient case.

We reverse the decision of the Lower Court, and dismiss the plaintiffs' suit with all costs, both in this Court and in the Court below.

The 24th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Simple Mortgage—Conditional Sale.

Case No. 1911 of 1866.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th April 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th July 1865,

Baboo Raj Narain Singh (one of the Defendants), *Appellant,*

versus

Sheera Mean (Plaintiff), *Respondent.*

Baboos Kishen Succa Mookerjee and *Kalee Kishen Sein* for Appellant.

Moonshee Ameer Ali and *Baboos Romanath Bose, Mohendro Lal Shome,* and *Taruck-nath Sein* for Respondent.

A purchaser under a decree for sale obtained by a mortgagee under a simple mortgage does not purchase, subject to a conditional sale executed by the mortgagor, after the prior mortgagee had obtained a decree of sale, but before the property was actually sold.

Markby, J.—In this case the question is whether the plaintiff or the defendant is entitled to the surplus proceeds under a sale for arrears of Government revenue, after satisfying the claim of the Government. The plaintiff purchased under a decree for sale obtained by one Gunga Pershad, who, at the date of the decree, was the only mortgagee under a simple mortgage. The defendant was a mortgagee under a conditional sale executed by the mortgagor after the first mortgagee had obtained a decree of sale, but before the property was actually sold to the plaintiff. The defendant contends that, under these circumstances, the plaintiff purchased subject to his mortgage, and that the plaintiff purchased the rights and interests of the mortgagor, such as they were on the day of sale only. But we cannot assent to this. The effect of such a doctrine would be to place a mortgagee by simple mortgage in no better position than an ordinary creditor, and would render his lien wholly ineffectual; because, if a purchaser were held to purchase subject to the later encumbrance, and the later encumbrance was equal to, or exceeded, the value of the property, the prior mortgagee would be altogether excluded.

We, therefore, think that the decision of the Lower Courts was right, and that this appeal ought to be dismissed with costs.

The 24th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Jurisdiction — Remand — Limitation — Suit for breach of contract against a del credere agent.

Case No. 128 of 1866.

Regular Appeal from a decision passed by Baboo Digambur Biswas, Principal Sudder Ameen of Moorshedabad, dated the 30th December 1865.

Mussamut Phool Koomaree Bibee (Defendant), *Appellant,*

versus

Woonkar Pershad Rustoby (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Sreenath Doss* and *Onookool Chunder Mookerjee* for Appellant.

Mr. G. C. Paul and *Baboos Dwarkanath Mitter* and *Bykuntnath Paul* for Respondent.

Suit laid at Rupees 16,051-11-10.

Where the Lower Court decided the issue of limitation against, but the other issues in favor of, the defendant, and the Appellate Court remanded the case without passing any judgment on the issue of limita-

tion—HELD that the Appellate Court had jurisdiction, when the whole case again came up before it, to try the question of limitation.

A suit for breach of contract not in writing against a *del credere* agent, who, for a certain commission, was employed to sell the plaintiff's goods, is governed by the limitation prescribed by Clause 9, Section 1, Act XIV. of 1859, and is not taken out of the operation of that law by either Section 4 or Section 8.

Peacock, C.J.—THIS is a suit brought for the recovery of a balance of money due as per khatta book with regard to the sale of cotton laid at Rupees 16,051-11-10. That is the allegation in the plaint. The plaint then sets out as follows :—

"The particulars are that the said moneeb "(employer) has, for a long time, been carry- "ing on trade in cotton as a mahajun at "Jiagunge ; that the defendant, on obtaining "the goods consisting of cotton, only used to "take them under his charge as an arutdar ; "that, after these had been sold, he deducted "the arutdaree and chootkee according to "the practice amongst arutdars from the "value thereof, and gave the remainder to "us ; that, some time ago, my accounts with "the defendant Oodit Narain, with regard to "the sale of cotton being settled up to Ashin "Soodi Nobomee 1915 Sumbut, 1st Assin "1265 B. E., it was found that some Rupees "18,908-6-3 are due to me, and the above "sum was carried forward in the Account "Book for the new year ; that, afterwards, "my accounts with the defendant from the "date aforesaid to Assin Soodi Nobomee 1919 "Sumbut, 15th Kartick 1269 B. E., being "again examined in the presence of her (the "defendant's) gomashtah, the sum of sicca Ru- "pees 15,532-10-5, Co.'s Rupees 16,568-2-5, "became due to me from her; that I "demanded the above sum from her, but she "would not pay it ; that I, therefore, insti- "tuted this suit for recovery of Rupees "16,551-11-10 after allowing Rupees 516-6-3 "to the defendant as chootkee for cotton "which remained in her arut from the said "15th Kartick to 12th Magh 1269, and "which I have sold myself."

In the statement which was made by the plaintiff's vakeel to the Judge, and which was taken down by the Judge himself prior to the first trial of the suit, he says : "My "client's statement is that the defendant's "husband was his commission agent ; he "received property from my client, kept it "under his care, sold it to purchasers, and, "after deducting his commission from the "price, gave in the balance to my client. "The amount was made up in the presence "of the defendant's gomashtah on 15th "Kartick 1126. We do not sue on an ad- "justed amount, but we seek adjustment "from the Court."

This clearly showed that he did not contend that the debt due to him was upon an actual statement of an account ; but that, upon his books which were examined in the presence of the defendant's gomashtah, and which probably the defendant's gomashtah did not dispute, it appeared that that amount was due to the plaintiff, and he sought to recover that amount or such an amount as the Court might find to be due to him.

The issues were settled, and amongst others was this—Is the claim barred by limitation? There were several other issues which went to the merits.

The Principal Sudder Ameen, in the first trial, showed what he considered to be the plaintiff's claim, and that seems to be exactly in accordance with the statement of the defendant's gomashtah.

The Principal Sudder Ameen gave judgment as follows on the issue of limitation :—

"The plaintiff has brought this suit for "recovery of Rupees 16,051-11-10, stating "that his master carried on trade in cotton "with the arut of the defendant at Jiagunge, "since the time of her (the defendant's) "ancestor, that it lasted till 1269, and that "the above sum is due from the defendant to "his (the plaintiff's) master on account of "the said trade. The defendant has ad- "mitted that the plaintiff's master carried on "mercantile transactions by storing up "goods in her arut. The plaintiff has "stated that his master traded with the de- "fendant's arut till 1269, and the opposite "party has not denied it. Now, when the "parties carried on mercantile transactions "with each other till 1269, and the plaintiff "has instituted this suit for the balance due "on account of the said trade on 2nd Srabun "1270, his claim has been preferred within "the prescribed time. Consequently, it is "not barred by limitation. Hence this issue "is disposed of against the defendant."

The Principal Sudder Ameen then went on to try the other issues which he found in favor of the defendant. The plaintiff, therefore, appealed to the High Court, and the case came on for hearing before Mr. Justice Steer and Mr. Justice Morgan. There appears to have been a contest between the parties whether the defendant was liable as *del credere* agent.

The Court said : "The plaintiff's case is "that he at least has never yet been paid, "and that the defendant is liable to him. "He files his accounts, such as they are, and

"he produces witnesses, who aver that these "accounts were compared with those of the "defendant, and being found to correspond, "the defendant, through her agent, admitted "the balance as therein shown against her "to be correct. This is a probable state- "ment. In the mode in which the parties "dealt, be the system of sales the pucka or "the kucha aratdaree system, it was ab- "solutely necessary that accounts should be "kept on both sides, and there must have "been an adjustment from time to time. "The defendant (only equivocally) denies "the adjustment said to have been made on "the 15th Kartick 1269, and she does not "admit that there ever has been any adjust- "ment at all; she produces no books to "show what the state of the accounts were "with the plaintiff, and she cites no witnesses "to contradict the plaintiff's version of the "story.

"We think that the plaintiff has estab- "lished such a case as requires the defend- "ant to rebut it; she has only to produce "her accounts, and the truth or falseness of "the plaintiff's case may probably be shown "at once. If they show that there is nothing "whatever due to the plaintiff, or that the "balance due to the plaintiff is not anything "like the sum claimed, there will be reason "to conclude that the story of an adjust- "ment and a settlement on the basis of the "account filed by the plaintiff (*i. e.*, the basis "of a *del credere*) is false. We think the "plaintiff has made out a case, if not a com- "plete case, a *primâ facie* one.

"The only doubt we have is whether we "ought to remand the case to give the "defendant an opportunity of filing her "accounts and producing further evidence. "She might certainly have filed them "before; but, on the other hand, seeing that "the suit was in the allegation of an ad- "justed account, she might not have seen "the necessity of producing any accounts "of her own. However this may be, we "think, as this is a dispute involving in a "great measure the good faith and charac- "ter of the parties concerned, and as it ap- "pears to us to admit of a clear explana- "tion, we will remand the case for a new "trial and a full investigation. Both par- "ties will offer all the evidence in their "power which can serve to throw light "upon the true nature of the dealing "between them, and whether this dealing "was of the pucka or kucha kind, the "evidence of some at least of the purchas- "ers for whom the plaintiff now seeks "to make the defendant liable may be "useful. The defendant's books should be "produced and examined, and also the wit- "nesses who are said in her behalf to have "adjusted the accounts, and the real char- "acter of the adjustment, and whether it "proceeded in an admission of the defend- "ant's liability for the amount, should be "ascertained."

Upon that the case went down for a second trial before the Principal Sudder Ameen, and he delivered his judgment on that second trial on the 30th December 1865. He says:—

"The issues first fixed in this case by the Judge are as follows:—

"*First*, whether the suit is barred by limitation."

On that he says: "On the first hearing "the first issue which refers to limitation "was rejected, that is to say, the plea on "the score of limitation was disallowed on "the ground that, as karbar or business "between the two parties was carried on "till 1269, and as the present suit was in- "stituted on the second Srabun 1270, limit- "ation could not bar it.

"On this point the defendant took no "exception whatever in appeal. The Ap- "pellate Court has remitted the case for "re-trial on merits; therefore, as this case "is not barred by limitation, I proceed to try "it on its merits."

Whether he means to say that, having already held that the suit was barred by limitation, he upheld that opinion, or whether he means to say that he was precluded from trying the question of limitation, is not very clear. He merely says that the Appellate Court had remitted the case for re-trial on the merits; and that, as the case was not barred by limitation, he would proceed to try it on its merits. Therefore, he has either treated his former finding on the question of limitation as his finding in the case now, or held that the remand did not authorize a fresh trial on that issue. But whether he means to say that he was precluded from trying the question of limitations or not, is not material; it could never have been intended to exclude the defendant from a further finding on the issue of limitation upon the facts as they should appear upon the new trial. It appears to me that it is now competent for the defendant to enter into the question as to whether the Principal Sudder Ameen was right in holding that this case was barred by limitation.

Looking at the facts of the case, I am of opinion that the suit is barred by limitation. It is said that the case falls under Section 8, inasmuch as it was a suit for balance of accounts current between merchants and traders who had had mutual dealings. Section 8, Act XIV. of 1859, says: "In suits "for balances of accounts current between "merchants and traders who have had mu- "tual dealings, the cause of action shall be "deemed to have arisen at, and the period "of limitation shall be computed from the "close of the year, in the accounts of which "there is the last item admitted or proved, "indicating the continuance of mutual "dealings; such year to be reckoned, as "the same is reckoned in the accounts."

It appears to me that this is not a case falling within Section 8. The dealings between the parties were not accounts between merchants and traders. Assuming the plaintiff's case to be correct, they were merely dealings between the plaintiff and the defendant as a *del credere* agent. The charge against the defendant was that he was to pay what was due from the purchasers of the cotton, if the purchasers should not pay within the period of credit allowed to them. The defendant was credited with the amount of his commission. But, according to the evidence, the defendant was not to receive the full amount of commission; but, in consideration of that commission, he was not only to sell and guarantee payment by the purchasers, but was to find certain things for the plaintiff's servants. The defendant was to receive his commission subject to certain deductions in the event of his not providing certain stipulated things for the use of the plaintiff's servants. There was nothing coming to the defendant except his commission; he was credited with that, and debited with the price of the goods sold and not paid for by the purchasers. There never were any dealings in which the defendant had a claim against the plaintiff for anything exceeding his commission. The defendant was not a merchant or trader within the meaning of Section 8. He was a person who, for a certain commission, was employed to sell the plaintiff's goods. It appears to me that that did not constitute him a merchant or trader. But, even if it did, it appears to me that there were no accounts current between the plaintiff and defendant. The whole of the accounts between the parties were confined to the transactions which they had together as principal and agent. Both might have kept the accounts of those transactions; but the accounts were not accounts of mutual dealings between merchants and traders.

But, even if the case falls within Section 8, it does not appear that the suit was brought within the period of limitation. The transactions between the plaintiff and defendant were founded upon a contract not in writing. Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might be properly assumed that they had agreed to carry on business on the terms upon which we find them carrying it on. It was an engagement on the part of defendant that he would sell the plaintiff's cotton, and that he would guarantee the purchasers. That was a liability on the part of the defendant not arising from a wrong but a liability arising out of an engagement which he must be assumed to have entered into with the plaintiff. It, therefore, falls within Clause 9 of Section 1. It is a suit for the breach of a contract not in writing. The period of limitation is 3 years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place.

Now, assuming the case to be a case within Section 8, the period of 3 years is to be computed from the close of the year in the accounts of which there is the last item admitted or proved, indicating the continuance of mutual dealings. Now, it cannot be shown that, in the accounts between the parties, there is any such item within 4 years next before the commencement of the suit. Taking 3 years from the end of the year in which the last item appears, more than 3 years elapsed between the date of that item and the date of institution of this suit. Therefore, whether the case falls within Section 8 or not, it appears to me that the suit is barred by limitation.

Mr. Paul contended that the case did not fall within Section 4 of the Act, and that there was not a debt due by the defendant to the plaintiff. But whether there was a debt or not, it appears to me that Section 4 does not make out the plaintiff's case. If the case does not fall within Section 4, then no new period of limitation can arise. If Section 4 applies, the period of limitation must be calculated according to the rule fixed by Clause 9, Section 1 of Act XIV. of 1859, if Section 8 does not apply, or according to the rule fixed by Section

8 coupled with Clause 9, Section 1, if Section 8 does apply, unless it can be proved that there was an acknowledgment in writing signed by the defendant. In this case it is not pretended that there was a written acknowledgment signed by the defendant or by the defendant's gomashtah admitting a liability.

Therefore, it is not material whether the case falls within the principle of Section 4 or not.

For these reasons it appears to me that the decision of the Principal Sudder Ameen upon the first trial was incorrect, inasmuch as he held that the suit was not barred by limitation in consequence of the case being of mutual dealings between merchants. If he supposed that he was precluded by the order of remand from entering into the question of limitation on the second trial, I think he was wrong in that respect. The remand did allow him to try the question of limitation with reference to the facts as they might appear upon the new investigation.

Under these circumstances the appeal must be allowed, the decision of the Lower Court reversed, and a decree given for the defendant on the question of limitation, with all costs in both Courts.

It is not necessary to enter into the question of the accounts which would necessarily occupy a long time, inasmuch as the plea of limitation is a bar to the suit.

Jackson, J.—I am entirely of the same opinion.

As to the question whether or not the plea of the limitation can be taken at this stage of the proceedings, I have no doubt whatever but that the defendant is entitled now to raise it. It appears that, from some cause or other, an order of remand was made on the first hearing of this appeal under circumstances in which, looking at the terms of Act VIII. of 1859, an order of remand could not regularly be made. The Court was of opinion that the plaintiff made out a *primâ facie* case; but, for certain reasons, it also considered that the defendant should be allowed further time, and should have an opportunity of adducing her own accounts, and of thus rebutting the plaintiff's case. The proper course apparently would have been in this case to direct the Court below, or for the Appellate Court itself, to take the additional evidence which the defendant was thus allowed to adduce; and with that additional evidence, whether taken by the Lower Court or by the Appellate Court, the Court ought to have proceeded to give its final judgment in the matter.

Now, it seems to me that the respondent would have been then entitled, at the final hearing of the appeal, to take such objection as he might have taken if he had preferred a separate appeal of his own. In that point of view, therefore, as the appeal is now before us for final hearing, the defendant, as respondent, is entitled to take that objection to the original finding of the Lower Court, which he would have been able to take if the case had come up, with fresh evidence, before the Bench which first heard it in this Court. But, even if that be not so, and if this be legally and properly a new trial by the Lower Court, then, as this Court, when it remanded the case (if it can be called a remand), did not pass any judgment on the question of limitation, and as the whole case comes now before this Court to try, nothing deprives us of our jurisdiction to try this point. Then, as the evidence which came before the Lower Court shows that the transaction took place at a period which threw the suit into the category of suits barred by limitation, surely we can and must as an Appellate Court, if the Lower Court did not apply the law, do so ourselves. I, therefore, think that the defendant is unquestionably entitled to our decision on the question of limitation.

Then, as to whether limitation applied or not, I entirely concur with His Lordship that limitation does apply.

The learned Counsel for the respondent, Mr. Paul, does not deny that this case falls within Clause 9, Section 1, Act XIV. of 1859, *i. e.*, that the defendant is alleged to be liable to pay this amount to the plaintiff in consequence of his breach of a contract to pay the sums of money claimed, being the price at which the plaintiff's goods were sold, less commission. By that Clause, the ordinary period of limitation is 3 years.

Only two provisions of the law (Act XIV. of 1859) have been suggested, by either of which this case could have been taken out of the operation of that law. One of these Sections is Section 8, and the other is Section 4.

I entirely agree, for the reasons stated by the Chief Justice, that this is not a case under Section 8. It is no case between merchants and traders, no case of mutual dealings. It is a case in which the dealings between the plaintiff and the defendant were wholly one-sided, and in which there were no "reciprocal dealings." (*See* the judgment

of Mr. Justice Morgan, in the case of Bhyro Doss *versus* Kalee Pershad Augurwallah, which is quoted at page 167 of Mr. Ninian Thompson's Work on the Law of Limitation.)

I think it equally clear that Section 4 will not apply. It will be observed that the words of that Section are somewhat different from those of Section 8. Section 8 says: "In suits for balances of "accounts current between merchants and "traders who have had mutual dealings *the "cause of action shall be deemed to have "arisen at*, and the period of *limitation* "shall be *computed from the close of the "year* in the accounts of which there is "the last item admitted or proved indicat- "ing the continuance of mutual dealings; "such year to be reckoned, as the same is "reckoned in the accounts."

Section 4, on the other hand, does not say that the cause of action shall be deemed to have arisen at a particular time; but "a *new period of limitation*, according to the nature of the original liability, shall be computed from the date of such admission." But, in order that a new period of limitation shall be computed from the date of that admission, there must be an acknowledgment in writing signed by the party liable. Here there is no written acknowledgment signed by, or even on behalf of, the plaintiff, but merely an alleged examination of accounts by the defendant's gomashtah which rests upon no special authority, and which is supported only by oral evidence. That certainly does not bring this case within the category of Section 4.

It appears to me, therefore, that this was undoubtedly a case in which the law of limitation applied, and that we are bound to apply it.

The 24th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Jurisdiction—Sale of joint undivided estate for arrears of revenue—Suit against joint owners for damages.

Case No. 142 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 27th January 1866.

Odoit Roy and others (some of the Defendants), *Appellants,*

versus

Radha Pandey and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Khetturnath Bose for Appellants.

Mr. R. T. Allan and *Baboo Kalee Kishen Sein* for Respondents.

Suit laid at Rupees 3,082.

A suit will not lie between joint owners of an undivided estate for damages sustained by the plaintiff by the sale of the estate at an inadequate price in consequence of the default of the defendants in paying their share of the Government revenue.

Norman, J.—This is a suit by Radha Pandey and nine others, sons of Dhurmoon Pandey, against Bhaga Roy and forty other persons, members of families named Roy, Ojha, Koowar, and Lall, alleging that the plaintiffs were owners of two annas of Mehal Domree Bethowlee; that Bhaga Roy and others, defendants, numbered 1 to 33, being owners of shares in the same mehal, made default in payment of their proportion of an instalment of the Government revenue due in Bysack 1271, in consequence of which, the mehal being ijmalee, the whole was put up for sale for the arrears, and sold at an inadequate price.

The plaintiffs alleged and proved in the Lower Court that they had deposited in the Collectorate Rupees 72-12, being the amount of their own share of the instalment in question.

The Principal Sudder Ameen gave a decree in favor of the plaintiffs assessing the damages at Rupees 3,082.

From this decision defendants numbered 1 to 33 (the Roy family), owners of an 8 annas share of the mehal, appeal.

Baboo Khetturnath Bose, for the appellants, contends that the action is not maintainable, and he referred to a decision of the late Sudder Court, S. D. A. Rep., 1857, page 1244, Gunga Pershad Sahee *versus* Madho Pershad Sahee.

We are of opinion that this contention is well founded. The plaintiffs and the defendants, as joint owners of an undivided estate, were each under a common liability to pay the *entire* revenue assessed upon it.

If the plaintiffs, in order to save the estate from sale, had paid the whole amount, they would have had an undoubted right to sue the other co-sharers for their proportion.

It is not suggested that there was any actual agreement amongst the co-sharers by which each bound himself to the others to *continue* to pay his quota of the Govern-

ment revenue. As a matter of fact, it would appear that, for their own convenience, the parties had been in the habit of paying the amount of their several shares into the Collectorate separately.

The Sudder Court, in the case decided in 1857, showed that there was no implied agreement by each sharer in the undivided estate to pay the proportion of revenue due upon his share; and it declared that, if any shareholder were not able or willing to retain his share, he committed no wrong if he chose to allow the estate to be sold.

The law so laid down imposes no hardship on any one. The sharers have abundant means of protecting themselves. Any one of them may pay the entire revenue. If he does so, he can recover contribution in a suit against his co-sharers, or ask for and obtain an order putting him in possession of the shares of the defaulters under Section 9 of Act XI. of 1859. Again, he may open a separate account with the Collector in respect of his share under Section 10 of Act XI. of 1859; and in that case he would be protected, if he paid up his own quota against the consequence of default by his co-sharers, because the shares of the defaulting proprietors would be put up for sale under Section 13.

For any loss which the plaintiffs may have sustained, they have only themselves to blame.

The decision of the Lower Court must be reversed, and the suit dismissed.

The appellants will get their costs in both Courts.

The 24th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Special Appeal—Damages—Jurisdiction (of Small Cause Courts)—Title.

Case No. 2415 of 1866.

Special Appeal from a decision passed by the Judge of Purneah, dated the 25th June 1866, affirming a decision passed by the Moonsiff of that District, dated the 30th April 1866.

Hedaetoollah and others (Defendants), *Appellants,*

versus

Shaikh Karloo (Plaintiff), *Respondent.*

Baboo Greesh Chunder Ghose for Appellants.

Mr. R. E. Twidale for Respondent.

A special appeal will not lie in a case for damages for value of crops misappropriated under 500 Rs. cognizable by a Small Cause Court, notwithstanding that the case involved a question of title.

Bayley, J.—We are of opinion that the objection of the special respondent under Section 348, Act VIII. of 1859, to the effect that there is no special appeal in this case, as it is one for damages under 500 rupees, and cognizable by the Small Cause Court, is valid. This was a suit for damages for value of crops misappropriated. The question of title formed the subject of litigation in the Zillah Courts and in special appeal here; and in both jurisdictions the present special appellant was unsuccessful. It is now urged on us that the Small Cause Court cannot decide the case as it involves a question of title. But, in the first place, we hold that (as above shown) the question of title has been decided; and in the next place, even if that question had not been decided, the Small Cause Court would have jurisdiction to enquire into title so far as might be necessary to give it the means of properly adjudicating the claim for damages, although its judgment would, of course, be conclusive only as to the damages.

In this view we dismiss the special appeal with costs.

The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Hindoo Law—Guardian of Minors (Appointment of).

Regular Appeals from a decision passed by Moulvie Syud Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 20th January 1866.

Case No. 113 of 1866.

Soobah Pirthee Lal Jha and others (Defendants), *Appellants,*

versus

Soobah Doorgah Lal Jha and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellants.

Messrs. R. V. Doyne and *G. C. Paul,* and *Baboos Onookool Chunder Mookerjee* and *Debendro Narain Bose* for Respondents.

Suit laid at Rupees 24,263-5-9.

Case No. 131 of 1866.

Soobah Doorgah Lal Jha (Plaintiff), *Appellant*,

versus

Rajah Neelanund Singh (Defendant), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Debendro Narain Bose* for Appellant.

Messrs. R. V. Doyne, G. C. Paul, and *R. E. Twidale*, and *Moonshee Ameer Ali* for Respondent.

Suit laid at Rupees 6,000.

The Hindoo Law does not prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children.

A person who disputes the authority of another to act as his guardian, and repudiates the acts done by such guardian in that capacity, cannot take advantage of those acts so far only as they are beneficial to him.

Loch, J.—It is necessary for a right understanding of the merits of this case to give a short account of the family and of certain legal proceedings taken before the institution of the present suit.

Koolanund Jha had two wives; by the first he left a son Heera Lal Jha, and by the second he left three sons, Pirthee Lal, Bhyro Lal, and Baya Lal. Koolanund died in August 1847, leaving all his property by a will, dated 21st August 1847, to his eldest son Heera Lal, reserving only maintenance for his other three sons. On 27th July 1848, the three brothers brought a suit against Heera Lal to set aside the will, and to obtain possession of their shares of the paternal property. Heera Lal died on 31st October 1848, while the suit was pending, leaving two widows, the eldest Suthbhama, mother of two sons Sunth Lal Jha and Junnuk Lal Jha, and the younger Izzutmonee, mother of Doorgah Lal Jha, the plaintiff in the present suit. On the death of Heera Lal, the plaintiffs applied to the Court to substitute the widows as guardians of their respective sons as defendants in the place of Heera Lal, but Suthbhama objected to Izzutmonee being admitted to defend the suit as guardian for her son, alleging that Heera Lal, under a will, dated 30th October 1848, had appointed her guardian of his three sons, leaving the bulk of his property to his eldest son Sunth Lal Jha. The suit brought by the brothers was non-suited on their failing to give security for costs; but a fresh suit was instituted by them in February 1849 in which they made Suthbhama and Izzutmonee defendants as guardians of their respective sons. Suthbhama again applied to be permitted to represent the three sons of Heera Lal, alleging her right to do so under the will. The Principal Sudder Ameen, on 6th July 1853, disallowed her application to defend the suit as guardian of Doorgah Lal; but, on appeal to the Sudder Dewanny Adawlut, it was held that Suthbhama was entitled under the will to appear as guardian of the three sons of Heera Lal, and the order of the Principal Sudder Ameen was reversed, and Suthbhama, in her capacity of guardian of the three sons, filed an answer in the suit. The suit brought by the brothers was ultimately decreed in their favor on 26th December 1861, and the judgment upheld by the High Court in appeal on 2nd July 1863. By this decree the will of Koolanund was set aside, and the brothers were declared to be entitled to share equally with Heera Lal in the paternal estate, and possession of their respective shares with mesne-profits was awarded to them.

When execution of the decree was taken out, Sunth Lal and Junnuk Lal entered into a compromise, bearing date the 22nd August 1864, with regard to the mesne-profits, and execution proceeded against Doorgah Lal, the plaintiff in the present suit. He filed a petition of objections, urging that he could not be held liable under the decree, as Suthbhama was not his legal guardian, and had no right to represent him in that suit; that the will of Heera Lal was a forgery; and that he had been kept out of possession by the misconduct of Suthbhama. The Lower Court admitted these objections as valid; but the High Court, in appeal on 6th July 1865, reversed the order, and declared Doorgah Lal to be liable under the decree.

Suthbhama, as stated above, claimed to be guardian under a will alleged to have been executed by Heera Lal on 30th October 1848. He died the next day, and the will, by some oversight in the Registrar's Office, was registered on the 4th or 5th November following. By this will Heera Lal left all his property to his eldest son Sunth Lal, reserving one village as maintenance for his other sons, with certain elephants and horses. Heera Lal had, also, during his lifetime, taken a mortgage of certain villages in Pergunnah Dhuppa from Rajah Budyanund Singh, father of the defendant Rajah Neelanund Singh, on a loan of 80,000 rupees. After his death, Suthbhama, as guardian of her eldest son, whom she styled the owner of the property left by Heera Lal, gave notice

of foreclosure to Rajah Neelanund Singh, and, after the year of grace had expired, brought an action for possession ; but, before the suit was tried, she made an arrangement with the mortgagor on 29th November 1856, receiving from him Rupees 51,000 in satisfaction of all claims.

The object of the present suit is to set aside the order of the High Court, dated the 6th July 1865, to have it declared that the plaintiff is not liable to pay mesne-profits under the decree of the High Court, dated 3rd July 1863, to set aside the compromise entered into by Sunth Lal Jha, dated the 22nd August 1864, to set aside as spurious the will of Heera Lal Jha, dated the 30th October 1848, to recover a third of the paternal property with mesne-profits, to set aside a proceeding under Act XIX. of 1841, and the compromise made with Rajah Neelanund Singh by Suthbhama, and to recover possession of the mortgaged property.

The Principal Sudder Ameen has held that, as Izzutmonee, the mother of the plaintiff Doorgah Lal, was his natural guardian, and so recognized by the Hindoo Law, Heera Lal could not appoint Suthbhama to be his guardian. Under this view of the law, he considers that the plaintiff was not properly represented by Suthbhama, and is, therefore, not liable under the decree for mesne-profits, and he releases him from the effect of that decree, setting aside the order of the High Court, dated 6th July 1865, and the deed of compromise entered into by Sunth Lal and Junnuk Lal Jha with the decree-holders bearing date 22nd August 1864. The Principal Sudder Ameen finds the will of Heera Lal Jha to have been duly executed, but holds it to be inoperative as being contrary to the principles of the Hindoo Law current in Mithila ; and he gives the plaintiff a decree for a third of the ancestral property with mesne-profits. With regard to the compromise entered into by Suthbhama with Rajah Neelanund Singh, the Principal Sudder Ameen considers it to have been made for the interest of the minor, that the property was the self-acquired property of Heera Lal, and as such he could give it to whom he pleased, and assigned it under the will to his eldest son, and, therefore, the plaintiff's claim to it is untenable.

Two appeals have been preferred from this judgment—one by the defendants, Pirthee Lal and others, who urge that the plaintiff's suit cannot lie, and should be dismissed as regards them; the other by the plaintiff in regard to so much of the claim against Rajah Neelanund Singh as has been dismissed, and also to set aside the judgment of the Lower Court in respect to the genuineness of the will executed by Heera Lal Jha.

We think the objection to the suit taken by the appellants Pirthee Lal and others to be unanswerable, nor has the Counsel for the respondent been able to meet the objection. We think the Principal Sudder Ameen has taken an erroneous view of the Hindoo Law as regards the power of a parent to appoint a guardian for his children. No doubt, the mother is the natural guardian of her child ; and, were any person to attempt to deprive her of this right without authority, her right would, under ordinary circumstances, be supported ; but we are not aware of any provisions of the Hindoo Law, nor have any such been shown us in support of the Principal Sudder Ameen's view, which prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children. The Principal Sudder Ameen has found the will to have been duly executed. If his finding in this respect be correct, the will, though inoperative as regards the disposition of the property which is contrary to the principles of the Hindoo Law current in Mithila, is not so as regards the appointment of a guardian.

Plaintiff is now trying to set aside a decree passed after full investigation by instituting a fresh suit to contest the correctness of that decree. If he has been injured by that decree, and has any sufficient grounds for setting it aside, his proper course is by application for review of judgment, and not by a fresh suit. Nor can he set aside orders passed by a competent Court between the parties in execution of a decree by fresh suit. The order of the High Court of the 6th July 1865, declaring the liability of the plaintiff Doorgah Lal, cannot, under the provisions of Section 11, Act XXIII. of 1861, be set aside by a regular suit ; for that was an order passed in execution of a decree, Doorgah Lal being a party thereto, and the respondent in the appeal to this Court. We think, therefore, that this part of the judgment of the Principal Sudder Ameen must be reversed, and the plaintiff's suit as against these defendants, appellants, must be dismissed with all costs.

The appeal preferred by the plaintiff, Doorgah Lal, comprises two points: *1st*, whether Suthbhama was competent to make a compromise with Rajah Neelanund Singh, the will under which she was appointed

guardian, being a forgery as alleged by plaintiff: and, 2nd, whether the will is or is not a forgery.

We think the first point may be disposed of irrespective of the second. We do not think that it is material for the right disposal of the former question, first to determine the latter. The validity or otherwise of Suthbhama's acts is a question not necessarily dependent on the question of the validity of the will.

Now, it is said, as observed by the learned Counsel, Mr. Doyne, that the plaintiff declares that Suthbhama had no authority to act as his guardian, and that all her acts for him in that capacity are void, as having been done without authority; and yet he wishes to take advantage of those acts as far as they are beneficial to him, but to repudiate them when, in his opinion, they are no longer so. We concur with the learned Counsel in thinking that plaintiff must take the act of Suthbhama in its entirety. If plaintiff wishes to take advantage of Suthbhama's act in foreclosing the mortgage, he must acknowledge that she did so in the capacity of his guardian. If he deny that she had authority to act as his guardian, then the foreclosure she made is of no benefit to the plaintiff—no foreclosure as regards his share of the property has been made—the mortgage is, as regards plaintiff, still in force, and, before he can sue for possession, he must issue fresh notice of foreclosure.

Looking, however, at the position of Suthbhama, and the conduct of the respondent Rajah Neelanund Singh, we think that he was fully justified in dealing with Suthbhama. She had been declared by the Courts entitled to act as guardian to the children of Heera Lal, and was *de facto* manager of his property on their behalf, and as such had brought the suit for foreclosure, and was the only person with whom the mortgagor could deal. It is not pretended that there was any collusion between the mortgagor and Suthbhama. So far as the mortgagor is concerned, we see nothing but fair dealing in his conduct; and, even if the compromise were detrimental to the plaintiff's interest, we think that it cannot be now disturbed as it was entered in good faith. We have been asked, in the event of our rejecting this part of the appeal, to give to the plaintiff a portion of the 51,000 rupees paid by the mortgagor on the compromise. But this is no part of his prayer in the plaint, and we think he must be restricted to what he asks for there. Besides, it is clear from the manner in which this property is described in the plaint that plaintiff considered it to be the self-acquired property of Heera Lal, and nothing to the contrary has been shown us. It is not denied that, as his own acquired property, Heera Lal might dispose of it as he pleased; and, if his will be proved, it is clear that this sum is the property of the eldest son alone to whom he left it.

On the *second* point raised in appeal as to the genuineness of the will of Heera Lal, we think the Principal Sudder Ameen has come to a conclusion without sufficient evidence to support it; and, had the question not been disposed of in another appeal No. 269 now before us, we should have been obliged to return this case for further evidence. We have, however, had appeal No. 269 before us along with this case, and in that case all the parties concerned in the present suit were before the Court and present when this question was disposed of by the Principal Sudder Ameen, and we receive the evidence taken in that case as evidence in this. We think it necessary, however, to point out to the Principal Sudder Ameen that the proceedings taken in the Act XIX. case are not evidence in this, particularly as one of the objects of the present suit is to set aside those proceedings. Nor is the letter alleged to have been written by Heera Lal to the Supreme Council, stating that he had made a will, any evidence, for that letter has not been proved in this case. The Principal Sudder Ameen should have had the will proved in the usual manner by the evidence of the attesting witnesses, and we do not understand why they were not required to attend.

We think that the plaintiff is entitled to a decree for a third of the property belonging to his father (excepting the sum of Rupees 51,000, which is the equivalent of the self-acquired property of Heera Lal devised by will to his eldest son Sunth Lal Jha) subject to an account of all disbursements made by Sunth Lal Jha for the benefit of the estate as pleaded by him in the last paragraph of his written statement, and we affirm the judgment of the Principal Sudder Ameen with this modification. The costs of this appeal will be charged to the plaintiff. The respondent, Rajah Neelanund Singh, will obtain his costs bearing interest from plaintiff, appellant.

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The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Jurisdiction—Suit to set aside compromise by legal guardian in execution of decree.

Regular Appeals from a decision passed by Moulvie Syud Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 19th April 1866.

Case No. 254 of 1866.

Soobah Pirthee Lal Jha and others (Defendants), *Appellants,*

versus

Soobah Junnuk Lal Jha and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellants.

Messrs. R. T. Allan and *C. Gregory*, and *Baboos Sreenath Doss* and *Chunder Madhub Ghose* for Respondents.

Case No. 269 of 1866.

Bissessur Narain Mohunt (one of the Plaintiffs), *Appellant,*

versus

Soobah Junnuk Lal Jha (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Mr. G. C. Paul for Respondents.

Suit laid at Rupees 24,736-11-4-10.

A person made liable under a decree for mesne-profits cannot get rid of the effect of that decree by bringing a fresh suit to set aside the compromise entered into by his legal guardian, when execution of that decree was taken out against him.

Loch, J.—THESE cases are similar to the appeals Nos. 113 and 131 which have been brought up together.

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For reasons assigned in our judgment in appeal 113 we think the appeal of Pirthee Lal Jha, No. 254 of 1866, must be decreed with costs. The plaintiff was made liable, under a decree of the High Court dated 3rd July 1863, for mesne-profits to these appellants; and he cannot get rid of the effect of that decree by bringing a fresh suit to set aside the compromise entered into by his legal guardian, when execution of that decree was taken out against him. If plaintiff is unwilling to abide by the compromise, the appellants will have a right to execute their decree in full against him; but he cannot make them parties to this suit. We, therefore, dismiss this part of his suit against the appellant in case No. 254 with costs bearing interest.

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We think that the plaintiff is entitled to a decree for a third of the property belonging to his father (excepting the sum of Rupees 51,000, which is the equivalent of the self-acquired property of Heera Lal devised by will to his eldest son Sunth Lal Jha) subject to an account of all disbursements made by Sunth Lal Jha for the benefit of the estate as pleaded by him in the last paragraph of his written statement, and we affirm the judgment of the Principal Sudder Ameen with this modification. The costs of this appeal will be charged to the plaintiff. The respondent, Rajah Neelanund Singh, will obtain his costs bearing interest from plaintiff, appellant.

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The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Jurisdiction—Suit to set aside compromise by legal guardian in execution of decree.

Regular Appeals from a decision passed by Moulvie Syud Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 19th April 1866.

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Soobah Pirthee Lal Jha and others (Defendants), *Appellants,*

versus

Soobah Junnuk Lal Jha and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellants.

Messrs. R. T. Allan and *C. Gregory*, and *Baboos Sreenath Doss* and *Chunder Madhub Ghose* for Respondents.

Case No. 269 of 1866.

Bissessur Narain Mohunt (one of the Plaintiffs), *Appellant,*

versus

Soobah Junnuk Lal Jha (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Mr. G. C. Paul for Respondents.

Suit laid at Rupees 24,736-11-4-10.

A person made liable under a decree for mesne-profits cannot get rid of the effect of that decree by bringing a fresh suit to set aside the compromise entered into by his legal guardian, when execution of that decree was taken out against him.

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We think that the plaintiff is entitled to a decree for a third of the property belonging to his father (excepting the sum of Rupees 51,000, which is the equivalent of the self-acquired property of Heera Lal devised by will to his eldest son Sunth Lal Jha) subject to an account of all disbursements made by Sunth Lal Jha for the benefit of the estate as pleaded by him in the last paragraph of his written statement, and we affirm the judgment of the Principal Sudder Ameen with this modification. The costs of this appeal will be charged to the plaintiff. The respondent, Rajah Neelanund Singh, will obtain his costs bearing interest from plaintiff, appellant.

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The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Jurisdiction—Suit to set aside compromise by legal guardian in execution of decree.

Regular Appeals from a decision passed by Moulvie Syud Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 19th April 1866.

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versus

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Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellants.

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Bissessur Narain Mohunt (one of the Plaintiffs), *Appellant,*

versus

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Mr. R. T. Allan for Appellant.

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Suit laid at Rupees 24,736-11-4-10.

A person made liable under a decree for mesne-profits cannot get rid of the effect of that decree by bringing a fresh suit to set aside the compromise entered into by his legal guardian, when execution of that decree was taken out against him.

Loch, J.—These cases are similar to the appeals Nos. 113 and 131 which have been brought up together.

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Present:

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Mr. R. T. Allan for Appellant.

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Suit laid at Rupees 24,736-11-4-10.

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Now, it is said, as observed by the learned Counsel, Mr. Doyne, that the plaintiff declares that Suthbhama had no authority to act as his guardian, and that all her acts for him in that capacity are void, as having been done without authority; and yet he wishes to take advantage of those acts as far as they are beneficial to him, but to repudiate them when, in his opinion, they are no longer so. We concur with the learned Counsel in thinking that plaintiff must take the act of Suthbhama in its entirety. If plaintiff wishes to take advantage of Suthbhama's act in foreclosing the mortgage, he must acknowledge that she did so in the capacity of his guardian. If he deny that she had authority to act as his guardian, then the foreclosure she made is of no benefit to the plaintiff—no foreclosure as regards his share of the property has been made—the mortgage is, as regards plaintiff, still in force, and, before he can sue for possession, he must issue fresh notice of foreclosure.

Looking, however, at the position of Suthbhama, and the conduct of the respondent Rajah Neelanund Singh, we think that he was fully justified in dealing with Suthbhama. She had been declared by the Courts entitled to act as guardian to the children of Heera Lal, and was *de facto* manager of his property on their behalf, and as such had brought the suit for foreclosure, and was the only person with whom the mortgagor could deal. It is not pretended that there was any collusion between the mortgagor and Suthbhama. So far as the mortgagor is concerned, we see nothing but fair dealing in his conduct; and, even if the compromise were detrimental to the plaintiff's interest, we think that it cannot be now disturbed as it was entered in good faith. We have been asked, in the event of our rejecting this part of the appeal, to give to the plaintiff a portion of the 51,000 rupees paid by the mortgagor on the compromise. But this is no part of his prayer in the plaint, and we think he must be restricted to what he asks for there. Besides, it is clear from the manner in which this property is described in the plaint that plaintiff considered it to be the self-acquired property of Heera Lal, and nothing to the contrary has been shown us. It is not denied that, as his own acquired property, Heera Lal might dispose of it as he pleased; and, if his will be proved, it is clear that this sum is the property of the eldest son alone to whom he left it.

On the *second* point raised in appeal as to the genuineness of the will of Heera Lal, we think the Principal Sudder Ameen has come to a conclusion without sufficient evidence to support it; and, had the question not been disposed of in another appeal No. 269 now before us, we should have been obliged to return this case for further evidence. We have, however, had appeal No. 269 before us along with this case, and in that case all the parties concerned in the present suit were before the Court and present when this question was disposed of by the Principal Sudder Ameen, and we receive the evidence taken in that case as evidence in this. We think it necessary, however, to point out to the Principal Sudder Ameen that the proceedings taken in the Act XIX. case are not evidence in this, particularly as one of the objects of the present suit is to set aside those proceedings. Nor is the letter alleged to have been written by Heera Lal to the Supreme Council, stating that he had made a will, any evidence, for that letter has not been proved in this case. The Principal Sudder Ameen should have had the will proved in the usual manner by the evidence of the attesting witnesses, and we do not understand why they were not required to attend.

We think that the plaintiff is entitled to a decree for a third of the property belonging to his father (excepting the sum of Rupees 51,000, which is the equivalent of the self-acquired property of Heera Lal devised by will to his eldest son Sunth Lal Jha) subject to an account of all disbursements made by Sunth Lal Jha for the benefit of the estate as pleaded by him in the last paragraph of his written statement, and we affirm the judgment of the Principal Sudder Ameen with this modification. The costs of this appeal will be charged to the plaintiff. The respondent, Rajah Neelanund Singh, will obtain his costs bearing interest from plaintiff, appellant.

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The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Jurisdiction—Suit to set aside compromise by legal guardian in execution of decree.

Regular Appeals from a decision passed by Moulvie Syud Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 19th April 1866.

Case No. 254 of 1866.

Soobah Pirthee Lal Jha and others (Defendants), *Appellants,*

versus

Soobah Junnuk Lal Jha and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellants.

Messrs. R. T. Allan and *C. Gregory*, and *Baboos Sreenath Doss* and *Chunder Madhub Ghose* for Respondents.

Case No. 269 of 1866.

Bissessur Narain Mohunt (one of the Plaintiffs), *Appellant,*

versus

Soobah Junnuk Lal Jha (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Mr. G. C. Paul for Respondents.

Suit laid at Rupees 24,736-11-4-10.

A person made liable under a decree for mesne-profits cannot get rid of the effect of that decree by bringing a fresh suit to set aside the compromise entered into by his legal guardian, when execution of that decree was taken out against him.

Loch, J.—THESE cases are similar to the appeals Nos. 113 and 131 which have been brought up together.

A recital of the subject of dispute and of the position of the litigants has been given in our judgment in Nos. 113 and 131, and it is unnecessary to repeat it here. We need only notice that the plaintiffs in this case are Junnuk Lal Jha, the second son of Heera Lal Jha, and certain parties to whom he has sold portions of his share in the property left by his father. The object of the suit in this, as in the other case instituted by Doorga Lal, is to set aside the will alleged to have been executed by Heera Lal, by which he left the whole of his property, except one village and some elephants and horses, to his eldest son Sunth Lal Jha, and appointed his wife Suthbhama to be the guardian of her two sons, Sunth Lal and Junnuk Lal, the plaintiffs in this case, and of her step-son Doorga Lal.

For reasons assigned in our judgment in appeal 113 we think the appeal of Pirthee Lal Jha, No. 254 of 1866, must be decreed with costs. The plaintiff was made liable, under a decree of the High Court dated 3rd July 1863, for mesne-profits to these appellants; and he cannot get rid of the effect of that decree by bringing a fresh suit to set aside the compromise entered into by his legal guardian, when execution of that decree was taken out against him. If plaintiff is unwilling to abide by the compromise, the appellants will have a right to execute their decree in full against him; but he cannot make them parties to this suit. We, therefore, dismiss this part of his suit against the appellant in case No. 254 with costs bearing interest.

The Principal Sudder Ameen has dismissed the plaintiff's claim to the villages in Pergunnah Dhuppa mortgaged by the father of Neelanund Singh to Heera Lal, on the ground that they were the self-acquired property of Heera Lal; that he might leave them to whom he pleased; and that plaintiff had no legal claim to them. From this judgment, Soobah Junnuk Lal Jha, the original plaintiff, has made no appeal; but an appeal has been preferred by Bissessur Narain Mohunt, to whom Junnuk Lal has transferred the whole of his rights in Pergunnah Dhuppa, and a share of his rights in the rest of the ancestral property.

The Principal Sudder Ameen has found, on the evidence of two of the attesting witnesses, that the will of Heera Lal Jha was duly executed by him; but he holds it to be inoperative as being in contravention to the principles of Hindoo Law current in Mithila. We have read the evidence of the attesting witnesses, and find no reason to distrust that evidence, which is quite sufficient to prove the execution of the will.

An objection was taken to our hearing the appeal (No. 269) preferred by Bissessur Narain, on the ground that he was not interested in the property when the suit was instituted; that the original plaintiff, Junnuk Lal Jha, subsequently transferred a part of his interest to the appellant; that Junnuk Lal is satisfied with the order passed below; but the appellant, who is a stranger, seeks to carry on the case which the original plaintiff has abandoned; that Bissessur Narain should not have been made a plaintiff by the Lower Court, or, if allowed

to be a plaintiff, the appeal should have been made in the joint names of Junnuk Lal and Bissessur, for it was impossible to say whether the appellant was not a man of straw or a speculator put forward to fight out the appeal, the costs of which he would be unable to defray if it were given against him.

Looking at the wording of Section 73, Act VIII. of 1859, and reading it with Section 337, we think that Bissessur Narain was rightly admitted as a plaintiff in the Court below, and, as his interests have suffered by the judgment of the Principal Sudder Ameen, he is entitled to be heard in appeal. We think, however, for the reasons stated in our judgment in case 113, he is not in a position to disturb the compromise entered into by Suthbhama with Rajah Neelanund Singh; that, though Suthbhama was not in that case acting for the plaintiff Junnuk Lal, who has now been declared to have a share in the paternal property, yet, as she was given out to the world as the guardian of the minor sons of Heera Lal Jha, and had been acknowledged as such by the Courts, and had, as guardian for her eldest son, to whom the whole property had been left under his father's will, brought the suit against Rajah Neelanund Singh for possession after foreclosure, Rajah Neelanund Singh was justified in dealing with her as having authority to make the compromise the good faith of which is not questioned; and that, under any circumstances, he cannot be rendered liable for the plaintiff's claim. As we do not find any sufficient reason for reversing the order of the Court below in favor of the appellant, we dismiss his appeal with costs.

The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Mesne-profits (Mode of calculating).

Miscellaneous Appeals from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 12th September 1866.

Case No. 724 of 1866.

Baboo Purmessuree Pershad Narain Singh (Decree-holder), *Appellant,*

versus

Aghur Singh and others (Judgment-debtors), *Respondents.*

Baboos Kishen Succa Mookerjee and *Mohesh Chunder Chowdhry* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Case No. 876 of 1866.

Ram Dhul Singh (Judgment-debtor), *Appellant,*

versus

Baboo Purmessureee Pershad Narain Singh (Decree-holder), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Mr. C. Gregory and *Baboo Kishen Succa Mookerjee* for Respondent.

Principle on which mesne-profits should be calculated.

Loch, J.—THERE is an error in the Principal Sudder Ameen's proceeding which we are unable to rectify, and, further, we think that the mesne-profits have been calculated on a wrong principle. The error brought to our notice is this. The area in question is 902 beegahs, of which, according to the Ameen, 214 beegahs were sand, leaving 688 beegahs cultivated or culturable. The defendant alleged that 564 beegahs were sand, but the Principal Sudder Ameen rejected his objection. The Principal Sudder Ameen then goes on to calculate the cultivated area upon which mesne-profits are to be calculated, and he accepts the defendant's account, 310 beegahs 8 biswas of ticca lands, and 184 bhowlee, total 494 beegahs, upon which he calculates the rent at an average of Rs. 1-15-4 per beegah, making a sum of Rs. 938-3-5 as the annual amount of profits, omitting altogether an area of 194 beegahs, which are included by him, neither in the sandy waste, nor in the cultivated land.

Then, again, we think he was in error in striking an average of Rs. 1-15-4, for the data on which this calculation is based, though supplied by plaintiff, were very imperfect, as the paper on which they were based related to only a very small portion of the lands in question. The mode, however, in which mesne-profits in this case have been calculated is altogether erroneous. The Ameen should have ascertained, not simply the rates at which the lands were assessed, but what were the assets of the estate, which may be done from an examination of the defendant's jumma-wasil-bakee and the receipts held by the tenants, and by examining them and the judgment-debtor on oath, and from these sources the amount actually collected from the estate, as well as what might have been collected, can be discovered, deductions from

the gross assets being allowed for ryots who have absconded or have died, and whose lands have in consequence not been cultivated during the year, and a further deduction for costs of collections. The debtor will be liable for all the collections he has made, and for all the rents which he might, with due diligence, have collected. The case is remanded to the Principal Sudder Ameen for disposal according to the above remarks.

The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation—Execution—Admission—Section 4, Act XIV. of 1859.

Case No. 808 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 23rd August 1866, reversing an order passed by the Sudder Ameen of that District, dated the 16th June 1866.

Mussamut Luchmun Koonwar (Judgment-debtor), *Appellant,*

versus

Luchmun Bhukut (Decree-holder), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

Section 4, Act XIV. of 1859, is not applicable to the execution of decrees. Thus, an incidental mention by a judgment-debtor, in a petition filed by him in another case in which another decree-holder had taken out execution, that he owed money to the decree-holder in the present case, was held not to be an admission within the meaning of that Section to keep the decree alive.

Loch, J.—THE pleader for the respondent states that he cannot sustain the order of the Judge on the grounds assigned by him for allowing the execution to proceed; but he points out sundry proceedings taken by the original decree-holder and the party to whom the decree was transferred on 23rd July 1862 as sufficient to keep the decree alive.

We have no doubt that Section 4, Act XIV., 1859, is not applicable to the execution of decrees, and the Judge is wrong in applying it to this case. The admission of the debtor, upon which the Judge relies as sufficient to keep the decree alive, appears to be an incidental mention by the debtor in a petition filed by him in another case in which another decree-holder had taken out execution, that he owed money to the decree-holder in the present case. This is not, we think, such an admission as can avail the present decree-holder.

With regard to the proceedings taken in execution, we find that something was done sufficient to keep the decree alive till 1st August 1862, when the purchaser of the decree was directed to get a certificate of his purchase from the Small Cause Court, an order with which he failed to comply. Nothing done subsequent to that date can be considered as a proceeding to enforce the decree or to keep it alive, and, therefore, we think the execution barred by limitation. We reverse the order of the Judge with costs.

The 24th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Review—Section 246, Act VIII. of 1859.

Case No. 777 of 1866.

Miscellaneous Appeal from an order passed by Baboo Mohendronath Bose, Officiating Principal Sudder Ameen of Hooghly, dated the 25th September 1866.

Mr. Cochrane (Decree-holder), *Appellant,*

versus

Heera Lal Seal (Judgment-debtor), *Respondent.*

Baboos Romesh Chunder Mitter and *Poorno Chunder Shome* for Appellant.

Mr. R. T. Allan and *Baboos Ashootosh Dhur* and *Mohesh Chunder Chowdhry* for Respondent.

A Court has power to grant a review of an order which it has passed under Section 246, Act VIII. of 1859, disallowing a claim made to property attached in execution of a decree. The order granting the review is final under Section 378.

Macpherson, J. (Loch J., concurring).—THE one question which we have to consider in this case is whether a Court has power to grant a review of an order which it has passed under Section 246 of Act VIII. of 1859, disallowing a claim made to property attached in execution of a decree. The appellant contends that there can be no review of such orders; while the respondents contend that a power of review is conferred on the Courts by the Code of Civil Procedure.

Section 246 concludes with the following clause: "The order which may be passed "by the Court under this Section shall not "be subject to appeal, but the party against "whom the order may be given shall be at "liberty to bring a suit to establish his "right at any time within one year from the "date of the order."

It is urged that the language of this Clause shows that the intention was that the order admitting or disallowing the claim should be final, except as regards the reservation of leave to bring a suit within twelve months to establish the right to the property. Further, it is argued that the language of Section 376 shews that it is only in a case in which some sort of appeal lies that a review can ever be granted; and, therefore, that, as no appeal lies from an order under Section 246, no review can be had. Section 376 says: "Any person "considering himself aggrieved by a decree "of a Court of Original Jurisdiction *from* "*which no appeal shall have been preferred* "to a superior Court—or by a decree of a Dis- "trict Court in appeal *from which no spe-* "*cial appeal* shall have been admitted by "the Sudder Court—or by a decree of the "Sudder Court *from which either no ap-* "*peal may have been preferred* to Her "Majesty in Council, or *an appeal having* "*been preferred*, no proceedings in the suit "have been transmitted to Her Majesty in "Council—and who," &c., may apply for a review of judgment by the Court which passed the decree.

The argument is that; as cases in which no appeal can be brought are not specified, they are not intended to fall within this Section.

For the respondents it is contended that under Section 376 it matters nothing whether there is or is not a right of appeal so long as no appeal is in fact preferred; that orders made in executing a decree may be reviewed under the provisions of Act VIII. of 1859, and Section 38 of Act XXIII. of 1861 (*see* also the Decision of two Judges, Morgan, J., *dissent*, Weekly Reporter, Full Bench Cases, page 66); and that there is nothing in Section 246 which expressly or impliedly takes away the power of granting a review.

It is unnecessary for me to consider what construction I should put upon Section 246, if Act VIII. of 1859 were to be read alone, or along with Section 38 only of Act XXIII. of 1861. I must consider the construction to be put upon it, reading Act VIII., together with the whole of Act XXIII. of 1861, for Section 44 of the latter Act enacts that Act XXIII. shall be read and taken as part of Act VIII. Reading the two together, it appears to me to be clearly shown on the face of the Civil Procedure Code that Section 376 is not to be read in the limited sense contended for by the appellant, and that Section 246 does not prohibit a review. Taking the two Acts together, I think that the Code contemplates the possibility of a review in a case when there is no right of appeal—and also that it contemplates a right of review even when an appeal is expressly prohibited; in other words, that the Code shows that the taking away the right of appeal does not necessarily take away the right of applying for review. Section 26 of Act XXIII. is the Section which in particular leads me to this conclusion. It is as follows: "*No appeal shall* "*lie* from any order or decision passed in "any suit instituted under Section 15 of "Act XIV. of 1859, *nor shall any review* "*of any such order or decision be allowed.*" Section 15 of Act XIV. of 1859 ends thus: "But nothing in this Section shall bar the "person from whom such possession shall "have been so recovered, or any other per- "son instituting a suit to establish his title "to such property, and to recover possession "thereof within the period limited by this "Act." When it is nowhere enacted that, where there is no appeal, there shall be no review; and when I find that the Legislature, in declaring that no appeal shall lie from orders under Section 15 of Act XIV. of 1859, expressly declares also that there shall be no right of review in such cases, it appears to me that I must necessarily hold that the taking away the right of appeal does not touch the right of review where the latter is not expressly mentioned. If in a certain Section of the Code it is enacted that *no appeal shall lie*, and if in another Section it is enacted that *no appeal shall lie, and no review shall be allowed*, the operation of the former Section must be narrower than that of the latter so long as it is not also declared that in no case shall there be a review when there is no appeal. And the argument that, because a special remedy by way of regular suit brought within one year is provided by Section 246, therefore the intention must have been that there should be no review, falls to the ground when we find that, although a similar right of suit is reserved in Section 15 of Act XIV., the Legislature

still deemed it necessary expressly to declare there should be no review.

I think, therefore, that the Lower Court had power to entertain an application for review of the order passed under Section 216. The Court having that power, the order it has made granting the review, whether it be a proper or an improper order, is under Section 378 final, and cannot be interferred with by this Court on appeal.

I am of opinion that this appeal must be dismissed, and with costs.

The 24th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Special appeal (from order refusing re-admission of appeal dismissed for default).

Case No. 1830 of 1866.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 15th May 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th August 1865.

Mussamut Bibee Haloo (Plaintiff), *Appellant,*

versus

Mussamut Atwaro and others (Defendants), *Respondents.*

Baboo Juggodanund Mookerjee for Appellant.

Mr. C. Gregory for Respondents.

A special appeal will lie from an order of a Judge rejecting an application for the re-admission of an appeal dismissed for default of prosecution, provided the order be shown to be illegal.

Kemp, J.—THE appeal was dismissed by the Lower Appellate Court for default of prosecution under Section 346. An application was made to the Judge under the provisions of Section 347 of the Code for the re-admission of the appeal which was rejected.

A special appeal will lie from an order of this description, but it cannot be clearly shown that the order was illegal; the decisions on this point go no farther than this.

In the present case we have not been shown that the order of the Judge was illegal. On the day fixed for the hearing of the appeal, neither the appellant in person nor his pleader was present, and under Section 346 the appeal was properly dismissed on default. The mere filing of a vakalutnamah is not appearing in person or by pleader.

The Judge having exercised the discretion vested in him by Section 347, and there being nothing illegal in his order, this Court, sitting in special appeal, cannot interfere with the order.

The appeal is dismissed with costs and interest.

The 24th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Right of occupancy—Sub-lease.

Case No. 1826 of 1866.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 19th April 1866, affirming a decision passed by the Officiating Additional Moonsiff of Alipore, dated the 29th July 1865.

Moulvie Abdool Jubbar (Plaintiff), *Appellant,*

versus

Kalee Churn Dutt and another (Defendants), *Respondents.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Gopal Lal Mitter for Respondents.

No right of occupancy is created by a sub-lease from a ryot having a right of occupancy.

Kemp, J.—THIS case must be remanded.

Two points have been raised in special appeal:—

1st.—That, although the special appellant, plaintiff, cannot question the finding of fact, that the mourosee title of his lessor has not been proved, he is still at liberty to fall back upon his own rights of occupancy, and to be kept in possession as long as he pays a fair and equitable rent.

2nd.—That he has laid out money in making gardens and erecting a *pucka* dwelling-house and premises with the knowledge and consent of the zemindar, Kalee Churn, and that in equity he cannot be ousted as long as he pays a fair and equitable rent.

Both these points were distinctly raised on the grounds of appeal stated in the petition of appeal to the Lower Appellate Court. The Judge notices neither point, and we have not been shown that the ap-

pellant abandoned these grounds, and went to trial solely upon the question of whether his lessor's mourosee title had been established or not. But, be this as it may, it is clear that the plaintiff's lessor has been found by both Courts to have possessed no mourosee title. All that he had was a right of occupancy as a tenant between the zemindar and the actual cultivator of the soil. Such a tenant by sub-letting does not create a right of occupancy in his sub-lessee; for the proviso to Section 6 distinctly enacts that, as respects the actual cultivator, no right of occupancy is created by a sub-lease from a ryot having a right of occupancy. The *first* ground of special appeal, therefore, fails the plaintiff.

The *second* ground has not been considered by the Lower Court, and, if not abandoned when the case was argued below, of which we are not certified, the Judge must dispose of it. Case remanded for that purpose alone. Costs to follow the result.

The 24th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mortgage-accounts—Redemption—Mesne-profits.

Case No. 288 of 1866.

Regular Appeal from a decision passed by the Judge of Patna, dated the 25th April 1866.

Syud Hashum Ali (Defendant), *Appellant,*

versus

Baboo Ramdharee Singh and others (Plaintiffs), *Respondents.*

Messrs. R. V. Doyne and *R. E. Twidale* for Appellant.

Baboos Dwarkanath Mitter and *Kishen Succa Mookerjee* for Respondents.

In the case of a usufructuary mortgage executed prior to Act XXVIII. of 1855, where the mortgagor sues for redemption on the ground that the usufruct has paid off the debt, and claims mesne-profits on the allegation that the mortgagee in possession has already collected more than his legal dues, the mortgagee is bound to produce the accounts of actual collections made by him during his possession. On the failure of the mortgagee in this respect, the mortgagor is expected to adduce some proof to justify a decree in his favor for redemption, as well as for mesne-profits.

Pundit, J.—The appellant argues that, as this action for redemption has been brought after the repeal of Section 10, Regulation XV. of 1793, the suit is not affected by that Section as far as the collections for the period subsequent to the date of the passing of Act XXVIII. of 1855 are concerned. But we do *not* concur in this view.

By the above Act of 1855, all liabilities and rights arising out of transactions commencing from a time previous to the passing of the Act are declared to remain unaffected by the new law in all respects, and to be governed only by the former enactment.

We agree with the Lower Court that the accounts produced by the defendant, appellant, cannot be relied upon. They do not show the exact state of the actual collections of the property mortgaged, and are not proved to be the real accounts kept *bond fide* of all that was collected; nor do we think (as the appellant would wish us to do) that the amount of gross produce, as recorded in the original deed of mortgage, is in this case sufficient proof of what the collections actually were, even at the time of the execution of the deed.

We hold that the sum total of collections, as entered in the deed, was a mere prepared item intended simply to fix the sum of rent which the mortgagee had to pay yearly to the mortgagor, and to show that the balance of these alleged assets was exactly sufficient to cover 12 per cent. of legal interest upon the advance made by the mortgagee.

We do not find anything extraordinary in this transaction, different from the general features of other ordinary usufructuary zur-i-peshgee leases, and we believe that the collections were misrepresented in the deed so as to enable the mortgagee to obtain as interest more than 12 per cent. upon the advance. Both parties knew, perhaps, when these arrangements were made, that the mortgagee's attempt thus to secure more than 12 per cent. interest was with reference to Section 10 of Regulation XV. of 1793 ineffectual. Still the mortgagee chose to take his chance, and he so took it by the terms of the deed and its details of the arrangement.

Had plaintiff (mortgagee) pleaded Section 9 of Regulation XV. of 1793, he might perhaps have made it a case under that Section against the mortgagees. The plaintiffs, however, had to sue for redemption; and, in

doing so, they did not plead Section 9 of Regulation XV. of 1793; and we have no occasion to go, and, indeed, should not go, beyond their plaint.

The original plaintiff asked for redemption on the ground that the usufruct has paid off the debt, and also claimed mesne-profits on the allegation that the mortgagees have already collected something over and above their legal dues.

The law and the general rules of evidence required the defendants in this case to produce the accounts of actual collections made by them as in possession, and to show what they had really collected during such possession. The accounts produced by defendants for some years are not reliable, and defendant has entirely failed to produce accounts for a larger number of years, or to attempt to give any explanation why these are not produced.

If we had believed in the genuineness of the accounts produced by the defendant, his omission to produce them for earlier years might not have been so much a matter of serious difficulty in the way of his success.

We do not at all agree with the appellant, when he argues that plaintiffs are to be bound for all the years for which accounts are necessary by the accounts for three years produced by them in the butwara case.

In addition to the reasons given by the Lower Court for overruling this plea of the defendant, we find that those papers were produced by the plaintiffs, while the defendant was in possession of the lands as their mortgagee, and so were virtually accounts supplied by the defendant for or instead of the plaintiffs, or rather produced by the defendant in their names. And we do not agree with the Lower Court in holding that, for those years for which these accounts were produced, the original plaintiffs (to whom alone mesne-profits were decreed) must admit that the collections were (for those three years) not higher than the yearly collection inserted in those papers. If these papers thus do not bind the plaintiffs at all, they would not bind them even for the years for which they purport to be.

So far we have dealt with the case of the defendant as mortgagee, and have found that he has failed to prove his case. But the failure of the defendant to produce and prove what he, under the law, was bound to do, does not, under the facts here, suffice for the case of the plaintiff. That is, only because defendant has failed to produce the accounts which he was bound to produce, and which he alone could produce, we do not hold plaintiff's claim could be decreed without any proof whatever on his part. This would not be the correct course either under the old law of 1793, or under Act VIII. of 1859.

We, however, at the same time hold that a small amount of legal proof would, in such a case as this, justify a decree in plaintiff's favor for redemption, as well as for mesne-profits.

The Ameen's report in this case is admitted by the plaintiff's pleader (with reference to what was really required to be investigated by him) not to be any valid evidence here; and the proceedings in another case for another share of this property, in which share and case the defendant was not interested or present, is not legal evidence against him. The evidence produced in that case might have been produced in this case if it had been taken in the presence of the defendant, but it was not so taken.

Consequently, under all these circumstances, it is necessary to remand the case with a direction that the Lower Court allow the plaintiff to put in such proofs regarding the amount of the yearly gross collections as they can, and also send out an Ameen with instructions to enquire, without any delay, what are the total actual collections made by the mortgagee during the last 10 or 12 years, either with regard to the proof of actual collection or on the basis of the quantity of land and the rate in kind and cash payable. This investigation may be afterwards taken as a ground for the general adjustment of accounts for all the years.

Defendant is not precluded by this order from offering evidence to rebut that which may be relied upon in favor of the plaintiffs, but he cannot be allowed to produce another set of accounts, as he has already filed all that he had to file as such.

We, accordingly, remand the case to the Lower Appellate Court to decide, with reference to the above remarks, how much has been actually collected in behalf of the mortgagee, and then to pass such orders as it may find proper regarding the claim to redemption and for mesne-profits.

The 24th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Non-production of evidence—Adjournment of case—Section 145, Act VIII. of 1859.

Case No. 267 of 1866.

Regular Appeal from a decision passed by Mr. R. J. Richardson, Judge of Behar, dated the 28th April 1866.

Moonshee Syud Ameer Ali (Plaintiff), *Appellant,*

versus

Baboo Run Rahadoor Singh and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Kalee Kishen Sein for Respondents.

Suit laid at Rupees 5,456.

Although a case may have been set down for final disposal, yet, if it be a case in which further evidence is required, the Judge is bound, under Section 145, Act VIII. of 1859, to adjourn the case, unless he is satisfied that the plaintiff has without sufficient cause failed to produce his evidence.

Markby, J.—In this case the plaintiff sued to recover Rupees 5,456 principal and interest due on a common money-bond alleged to have been executed and delivered by the defendants.

No written statement was filed by the plaintiff, and the case was fixed for final disposal on the 23rd of April.

On that day the defendants filed a written statement, admitting the execution of the bond and the delivery of it to the plaintiff, but alleging that the bond was delivered specially as a security for money, which the plaintiff was to borrow and apply to stop the sale in execution of a decree of certain land in which the defendants were interested; but, as the defendants alleged, the sale was stopped by some other means, and the money was not borrowed.

Upon the case being called on, Moulvie Abdool Kureem, who had been appointed vakeel by the plaintiff, stated that he was taken by surprise by the defence, and that he had no instruction from his client now to meet it. The Court, however, refused to postpone the case, on the ground that notice had been given that the case was set down for final disposal. The cause was heard, and a decision was given in favor of the defendants.

On the following day the vakeel of the plaintiff presented a petition asking that an opportunity might be given to the plaintiff to produce certain books of account and witnesses, in order to show that the defence set up in answer to the claim was untrue. The Judge, however, refused the application.

We are of opinion that the Judge has acted illegally. He appears to have failed to comprehend the provisions of Sections 144 and 145 of the Code of Civil Procedure, which point out when the suit may be disposed of at the first hearing. By Section 144, if it appears that there is no issue of law or fact between the parties, the Court may at once give judgment. But if, as here, the parties are at issue on some question of law or fact, the Court must frame those issues. When this is done, "if the Court shall be satisfied that no further argument or evidence than such as the parties or their pleaders can at once supply is required," the suit may be disposed of, whether the summons shall have been issued for final disposal or not: "otherwise, the Court shall postpone the further hearing of the suit." This was a case in which further evidence obviously was required, and the Judge was bound to adjourn the case, unless he was satisfied that the plaintiff had, without sufficient cause, failed to produce his evidence in accordance with the proviso at the end of the Section. This the Judge does not appear to have considered, but he refused the adjournment simply on the ground that the case was set down for final disposal. Had he considered this point, we think he must and ought to have come to the conclusion that it would be most unreasonable to expect a plaintiff to come prepared, at the first hearing, and before he has seen the defendant's written statement, with evidence to meet such a case as this.

The case will, therefore, be remanded for the Judge to re-try the issues, a day being fixed for that purpose as provided in Section 145.

With reference to the Judge's remark, that Mr. Justice Loch had condemned the manner in which cases were postponed in the Civil Court at Gya, it is clear that the kind of postponements which that Hon'ble Judge referred to were postponements made as a matter of course and without good cause shewn, and it is scarcely necessary to point out that it was not his intention that Judges should refuse to consider whether or no the justice of the case required a postponement.

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The 24th January 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Intervenors—Section 77, Act X. of 1859—Meaning of actual receipt—Bona fides.

Case No. 2795 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of 24-Pergunnahs, dated the 24th August 1866, reversing a decision passed by Moulvie Delilooddeen Ahmed, Deputy Collector of that District, dated the 28th April 1866.

Huronath Roy and others (Objectors), *Appellants,*

versus

Prannath Roy Chowdry (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Sreenath Doss* and *Bungshee Dhur Sein* for Appellants.

Mr. G. C. Paul and *Baboos Mohendro Lal Shome* and *Motee Lal Mookerjee* for Respondent.

The words "the actual receipt and enjoyment of the rent" in the second part of Section 77, Act X. of 1859, cannot mean the actual receipt irrespectively of the question of *bona fides* alluded to in the first part of the Section.

Peacock, C. J.—THE plaintiff sued for a kubooleut. His right was disputed, and the right to receive the rent was claimed by Huronath Roy, on the ground that he had actually and in good faith received and enjoyed the rent before and up to the time of the commencement of the suit. Huronath Roy was made a party to the suit under Section 77, Act X. of 1859. The only question to be enquired into as between the plaintiff and Huronath Roy, therefore, according to the strict words of the Act, was the actual receipt and enjoyment of the rent by Huronath Roy. This, no doubt, included the question of *bona fides* on his part.

It is remarkable that the words "actually and in good faith" are used in the first part of the Section, but that the words "in good faith" are omitted in the second part of it which directs what the question to be enquired into is to be. The words are: "When in any suit between a landholder and a ryot or under-tenant under this Act, the right to receive the rent of the land or tenure cultivated or held by the ryot or under-tenant is disputed, and such right is claimed by or on behalf of a third person, on the ground that such third person or a person through whom he claims has *actually and in good faith* received and enjoyed such rent before and up to the time of the commencement of the suit, such third person shall be made a party to the suit, and the question of the *actual receipt* and enjoyment of the rent by such third person shall be enquired into, and the suit shall be decided according to the result of such enquiry."

We think that the words "the actual receipt and enjoyment of the rent" in the second part of the Section cannot mean the actual receipt irrespectively of the question of *bona fides*. The Deputy Collector found that the intervenor was in the actual receipt of the rent; but he said: "The pleaders on behalf of plaintiff argue that, even if the intervenor's receipt of rent be admitted, it cannot be held to be *bonâ fide*, inasmuch as the lands were included in the decree obtained by plaintiff in 1266 against the intervenor, and the receipt was, therefore, against the order of the Civil Court, and with the perfect knowledge that he, the intervenor, had been declared to have no right to the rent. This argument would, perhaps, have held good, if the fact of the disputed lands being included in the decree had been patent on the face of the decree. But such is not the case. It cannot be known for certain from the decree, without reference to any other document, that the disputed lands are so included. Even the subsequent decision of the several Principal Sudder Ameens and other officers are conflicting. The deposition of the nazir, who executed the decree in question taken before Baboo Koylas Chunder, Principal Sudder Ameen, distinctly excludes the disputed land from the decree. Under these circumstances the Court cannot hold the plaintiff entitled to the rent until he establishes his title to it in the proper Court." He does not, as we understand, find whether the land was or was not included in the decree.

The Judge on appeal said: "It is not denied by the intervenor that such a judgment was given in favor of the plaintiff, and that the land decreed was made over to him in execution of the decree; but it is contended that the land now in question is not a part of the land covered by that decree."

It is argued by the learned Counsel for the respondent that the Judge has, in effect, found that the land was included in the decree; that possession of it was given to

the plaintiff; and that the intervenor, consequently, could not actually and in good faith have received and enjoyed the rent up to, and at the time of, the commencement of this suit. It appears to us that this by no means follows from the Judge's finding of the facts.

The case must, therefore, be remanded to the Judge to try: *1st*, whether the intervenor did actually receive and enjoy the rents of the land in question before and up to the time of the commencement of the suit; and, *2ndly*, if so, whether the intervenor was in such receipt and enjoyment of the rent in good faith; and the Judge is directed to determine the appeal according to the result of that enquiry.

The 25th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Enhancement—Resumption—Punchukee Lakheraj lands.

Case No. 1887 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 28th April 1866, affirming a decision passed by the Deputy Collector of that District, dated the 30th August 1865.

Madhub Janah and another (Defendants), *Appellants,*

versus

Raj Kishen Mookerjee (Plaintiff) and others (Objectors), *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Umbika Churn Banerjee for Respondents.

A zemindar may sue to enhance punchukee lakheraj land without first suing for their resumption.

Markby, J.—THE decision of the Lower Court is right. The plaintiff sued for enhancement of rent over a considerable area. The defendant, as to part of the land, admitted that it was rent-paying; as to another part, he alleged that it was held at a small nominal rent under a tenure called a punchukee lakheraj; as to a third part, that it was held rent-free. The only point in this appeal arises in respect of the punchukee lakheraj lands. It is contended that the zemindar cannot bring a suit to enhance the rent of the lands alleged to be punchukee, but that he must first bring a suit for resumption in respect of so much of the lands, if he denies the punchukee lakheraj title. But we are not of that opinion. We think the Lower Court had jurisdiction to entertain this suit in respect of that portion of the land which is alleged to be punchukee lakheraj, as well as in respect of that portion which was admitted to be rent-paying.

The 25th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Pre-emption—Minors.

Case No. 2464 of 1866.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 27th June 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 24th August 1865.

Meer Murtaza (Plaintiff), *Appellant,*

versus

Lalla Nursingh Suhae and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Romanath Bose* for Appellant.

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Respondents.

The right of pre-emption accruing during minority is not to be kept suspended until majority.

Pundit, J.—THE Lower Appellate Court disbelieved the allegation of the special appellant that he learnt of the sale, the pre-emption of which is claimed by the special appellant, a few days after special appellant's arriving at majority, because it had reason to infer from certain documents before it that the special appellant could not but have known of the fact before.

The special appellant contends that these documents are not legally sufficient to justify such an inference as has been drawn from them by the Lower Appellate Court.

We hold that one of these documents related to a case in which the sale in dispute was involved: the Lower Appellate Court was, therefore, justified in inferring knowledge. Further, there is no legal error in the reasoning upon which the direct testimony of the special appellant is disbelieved. It is a finding of fact, and the reasons are those on which the Lower Appellate Court might exercise its discretion in coming to such a finding.

Further, we do not see that a right of pre-emption accruing during minority is to be kept suspended, and the Courts required to take notice of only the knowledge which the minor may be shown to have acquired after his arrival at majority, even if, as here, he has been all along living with or near his own relatives, the vendors.

Seeing, then, no reason to set aside the decree of the Lower Appellate Court, we dismiss the special appeal with costs.

The 25th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Procedure (Object of new Code)—Limitation—Dispossession—Section 269, Act VIII. of 1859.

Case No. 2423 of 1866.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 21st July 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 30th December 1865.

Fidaye Shikdar and others (Defendants), *Appellants,*

versus

Ozeeooddeen and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Baboo Kishen Dyal Roy* for Appellants.

Mr. C. Gregory and *Moulvie Murhumut Hossein* for Respondents.

The object of Courts of Justice under the Code of Civil Procedure is, if possible, to decide at one and the same time all questions which can justly be so decided, and not to assist parties in unnecessarily prolonging litigation.

Section 269, Act VIII. of 1859, does not contemplate that the party in actual possession must sue regularly to get possession within one year, but that the person who is not in actual possession shall do so.

Bayley, J.—This is a case in which plaintiffs Ozeeooddeen and others sue for possession of certain ryottee lands on an alleged right of purchase at a sale in execution of the ryottee tenure of Yusoof and Abdool Sufee for arrears of rent. Plaintiffs allege they hold this right under *etmamdars* Omed and Ossman. This Omed Ali, the Judge states, and the records show, was the father of plaintiff Ozeeooddeen, and is dead. The sale took place for arrears due to this Omed Ali as etmamdar, and Ozeeooddeen took out an execution as heir to his deceased father; and then *himself* was the purchaser in execution as above stated. On the Court Ameen proceeding to put plaintiff in possession, defendant Fidaye Shikdar and an alleged ryot under him, Mynooddeen (admitted to be Fidaye Shikdar's son), opposed, and alleged that this ryottee tenure was not in Omed and Ossman's etmamdaree, but in that of defendant's (Fidaye Shikdar's). It was added that it came to Mynooddeen on relinquishment of Yusoof and Abdool Sufee. Thereupon, action being taken under Section 269, Act VIII. of 1859, the Sudder Ameen, on the 30th March 1863, overruled the objections of Fidaye Shikdar and Mynooddeen. The Judge finds as a fact, however, that "the last-named parties have, from the date of Court Ameen giving possession to plaintiff of the right, title, and interest in the land that belonged to Yusoof and Abdool Sufee, held adverse possession in spite of the decision of the Sudder Ameen of the 30th May 1863."

The first Court tried the issue of limitation and title together; and, with reference to an Ameen's report, the first Court gave plaintiff a decree for *k.* 14-12-2, and dismissed his case as to *k.* 1-12.

In appeal the Judge decides: "Now, although, as stated above, it appears to me that plaintiff is entitled to a decree for the ryottee right, title, and interest alleged to have belonged to Yusoof and Abdool Sufee in the suit in which he obtained a decree against them, and in execution of which he purchased those rights, &c., and this, if on no other ground, still on the ground of his having been put in formal possession thereof by the Civil Court Ameen, under Section 263 of Act VIII. of 1859, and of defendants Fidaye Shikdar and Mynooddeen not having sued under Section 269 of Act VIII. of 1859, and Clause 3, Section 1 of Act XIV. of 1859 (*vide* High Court's Decision of 16th January 1865, Beebee Subourn, defendant, appellant), within the prescribed limitation of one year, I nevertheless think that, as there appears to be proof on re-

cord of the existence of the ryottee right, title, and interest of Yusoof and Abdool Sufee in the land in question at or about the time of the estate, and as a brief history of the contents regarding this tenure may be of use, should there be *future litigation* between the parties, the following may be, with advantage, here recorded.

He then goes on to give a history of the case, the substance of which has been above given, and, as we read his judgment, comes to no final or determined decision on plaintiff's title. The Judge concludes as follows:—

"On the above grounds, then, *viz.*, on the ground of appellant Fidaye Shikdar being barred by limitation from opposing plaintiff's taking possession of and obtaining a decree for establishment of title to the ryottee tenure, of which possession was given him by the Civil Court Ameen under Section 263, Act VIII. of 1859, on the 30th August 1861; on the ground of its being satisfactorily proved that Yusoof and Abdool Sufee or their heirs held, under ryottee tenure, the lands in dispute; and also on the ground of Fidaye Shikdar, on his own showing in paragraph 4 of his reply in the original suit, having no further interest in the land—I dismiss his appeal with costs."

The defendant appeals specially, urging—

1st.—That the rights of the etmamdars were before the Lower Appellate Court for adjudication, and it ought to have decided them in this case.

2nd.—That the *actual* possession is with the defendant, and, the contrary not being found by the Lower Appellate Court, limitation under Section 269, Act VIII. of 1859, does not apply.

After hearing Counsel on both sides, and referring to the record, and specially considering the peculiar circumstances of this case, we think these pleas on special appeal are valid.

On the *first* plea we observe that it is clear that the sons of the etmamdars, who have been put forward as ryots, are, in *fact* (though they may not be in *name*), disputing as to whose *etmamdaree* shall be declared to contain the ryottee lands of Yusoof and Abdool Sufee. The Lower Appellate Court, in our view, clearly refrains from adjudicating *that matter*, and only really gives its decision as on the ground of limitation. Now, the object of Courts of Justice under our Code is not to assist parties who, under the name and title of ryots (not impossibly acquired by legal process) are concealing their stronger and larger rights, and are not having the adjudication once and altogether of those larger rights owing to their pleading other *inferior* rights, and thus unnecessarily prolong litigation, and shift the scene of all this fencing from Court to Court. The object of our Courts is, if possible, to decide together at one and the same time all questions which can be justly so decided. There can be no difficulty in acting upon this view in this case with perfect justice to all parties, and we shall, therefore, order it to be done.

On the *second* plea we think the Lower Appellate Court is wrong. It relies on Section 269, Act VIII. of 1859. Now that Section is as follows:—

"If it shall appear that the resistance or obstruction to the delivery of possession was occasioned by any person *other than the defendant claiming a right to the possession of the property sold* as proprietor, mortgagee, lessee, or under any other title, or if, in the delivery of possession to the purchaser, any such person claiming as aforesaid *shall be dispossessed*, the Court, on the complaint of the purchaser or of such person *claiming as aforesaid*, if made within one month from the date of such resistance or obstruction, or of such dispossession, as the case may be, shall enquire into the matter of the complaint, and pass such order as may be proper in the circumstances of the case. The order shall not be subject to appeal; but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof."

This Section in our opinion does *not* contemplate that the party in actual possession must sue regularly to get possession within one year, but that the person who is *not* in actual possession shall do so. Now, it is clear to our minds that, in this case, even upon the Judge's own record of its judgment, there is but *an order* of possession given to the plaintiff, and not *actual possession* which is with defendant. We think, then, that such defendant is not barred by limitation in this case, and, therefore, the only clear ground on which the Lower Appellate Court has decided against defendant is an erroneous ground.

Under this state of fact, we are of opinion that the case should be remitted to the first Court, where there should be tried these issues, *viz.*:

1st.—Whether the lands sued for appertain to the etmamdar of Omed and Ossman, or of defendant Fidaye Shikdar?

2nd.—Whether the ryottee rights are with Mynooddeen, and after him with defendant Fidaye Shikdar, as the latter alleges, or with Ozeeooddeen plaintiff.

The case is remanded accordingly to be re-tried, with reference to the above remarks.

The 25th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Alluvial Lands.

Case No. 2408 of 1866.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 14th August 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 11th May 1866.

Luchmee Narain Shah and others (Defendants), *Appellants,*

versus

Jutadharee Holdar and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Juggodanund Mookerjee and *Toolsee Dass Seal* for Appellants.

Baboos Dwarkanath Mitter, Luckhee Churn Bose, and *Doorga Dass Dutt* for Respondents.

The cause of action in respect of accretions accrues from their formation and delivery to the defendant.

Pundit, J.—In this case it is found by the Lower Appellate Court that the lands in dispute formed and were settled with the defendant long before 12 years from the present suit.

Even admitting that the amulnamah granted to the defendant for the lands now in dispute was the first recognized proof of the settlement with the defendant, it does not help the plaintiff, as the date of that also is beyond 12 years from the date of this suit.

There is no reason why the cause of action in the present case, which is for accretions to the 3 cottahs of land for which plaintiff, respondent, had sued before and obtained a decree in 1858, should be 24th September 1862, the date upon which the plaintiff got possession of the *uslee* lands. Nor is the date of the decree the cause of action. The real cause of action is the formation of the lands in dispute, and their being made over to the defendant, special appellant.

It is no excuse under the new Law of Limitation that, before the suit for the original lands was decided, the party could not safely sue for accretions to them.

In this view we do not see any ground upon which the bar to the plaintiff's suit can be removed.

We, accordingly, reverse the order of the Lower Appellate Court with costs, and, decreeing the special appeal with costs, uphold the order of the Court of first instance, dismissing the suit of the plaintiff with costs as barred by limitation.

The 25th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Evidence—Ejectment (under Section 15, Act XIV. of 1859).

Case No. 1848 of 1866.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 24th April 1866, affirming a decision passed by the Moonsiff of Shahzadpore, dated the 9th September 1865.

Bullubee Kant Bhuttacharjee and another (Plaintiffs), *Appellants,*

versus

Doorjodhun Shikdar and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

In a suit to establish title, evidence of the plaintiff's possession prior to the summary award under Section 15, Act XIV. of 1859, under which he was dispossessed, may be good evidence of his title, and must be considered.

Kemp, J.—This was a suit to recover possession of certain property as mâl lands belonging to the plaintiff's estate, and from which they had been dispossessed by an award under Section 15, Act XIV. of 1859. The defendants claimed them as lakheraj lands belonging to their estate.

The Judge has held that he cannot enquire into the fact of plaintiff's possession prior to the award under Section 15, inasmuch as, in a suit to establish title, the question of possession must be considered to have been conclusively determined by the summary award under Section 15, and cannot be re-opened.

We think that the Judge was wrong in refusing to consider the evidence of possession prior to the award under Section 15, tendered by the plaintiff. Such possession may be good evidence of the plaintiff's title, and this is a suit to establish his title, and must be considered. A decision of a Divisional Bench of this Court, present Justices Bayley and Shumbhoonath Pundit, Special Appeal No. 2357, has been shown to us which takes the same view of this question.

Remand for re-trial with reference to the above remarks. Costs to follow the result.

The 26th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Onus probandi—Separation of Joint Hindoo Family—Allegation of joint estate.

Case No. 2455 of 1866.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 12th July 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 15th January 1866.

Ram Gobind Koond and another (Plaintiffs), *Appellants,*

versus

Moulvie Syud Hossein Ali and others (Defendants), *Respondents.*

Baboos Kalee Kishen Sein and *Mohinee Mohun Roy* for Appellants.

Moulvie Syud Murhumut Hossein for Respondents.

After a general separation in food and a partition of estate, and after the brothers have commenced to live separately, if any one of them comes into Court, alleging that a particular portion of property originally joint continues to remain so, the *onus* of proof lies on him.

Norman, J.—We think that there are no grounds for this appeal.

The defendants are purchasers at a sale in execution of a decree of the property of one Lukhun Koondoo. In the execution-case, Ram Gobind and Radha Gobind, the brothers of Lukhun, intervened and claimed the property now in suit as having been devoted to the family idol. Their intervention was disallowed, and the property sold as that of the judgment-debtor.

The representatives of Ram Gobind and Radha Gobind now sue the auction-purchaser, alleging that the three brothers were joint in estate, and that they are entitled to 10 annas 13 gundahs, &c., of the property. The Judge, in trying the case, cast the *onus* upon the plaintiff; and, under the particular circumstances of the case, we think that he was quite right in doing so.

It appears by a certain farkhuttee, dated in 1252, which was produced by the plaintiffs in evidence in the suit, and probably also in the execution-case, that it was admitted, and therein stated, that the three brothers were carrying on trade separately and lived separately. But it appears that 34 beegahs of property which had been ancestral were reserved for the worship of the family idol, it being agreed that they were to be enjoyed jointly.

We think that, after a general separation in food, and a partition of estate, and after the brothers have commenced to live separately, if any one of them comes into Court, alleging that a particular portion of property originally joint continues to remain so, the *onus* properly lies on him.

The Judge, in trying the case, held, for reasons which appear to us satisfactory, that the plaintiffs failed to show that the property now in suit is identical with the 34 beegahs declared in the farkhuttee to be joint, and devoted to the service of the idol.

We do not express any opinion as to how the burthen of proof would have been shifted by the summary decision under Section 246 of Act VIII. of 1859.

If the plaintiffs had any reason to complain of the Judge's decision, on the ground that it proceeded upon insufficiency of evidence—if they could have adduced further evidence not brought before the Judge at the hearing—possibly the Judge might have corrected the matter on an application for review.

The appeal is dismissed with costs and interest.

The 26th January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Appeal to Privy Council—Translation of documents not evidence in the cause.

Petition of Raj Coomar Baboo Deo Nundun Singh.

Baboo Kishen Kishore Ghose for Petitioner.

Where it was impossible to say whether certain account-books and papers were material or relevant, or even were part of the evidence in the cause, the High

Court declined to put the appellant in an appeal to England to the expense of translating and transcribing them, but gave the respondent the option of translating them at his own expense, with a view to their being sent to England as an appendix to the record, leaving it to the Privy Council, in the event of the respondent being successful to make any order they pleased as to the costs of translation.

Jackson, J.—THIS is an application by the respondent in an appeal to England, and the applicant's prayer is that the Court should require the whole of certain books of account which have come up with the record to be translated at the cost of the appellant, and the translation to be printed and sent home.

It appears that the suit related to certain property in Behar, and the main question in the suit was whether the family, which was Hindoo, had been joint or separate.

The suit was commenced under the old procedure, and a number of books and papers connected with the family receipts and disbursements are produced by the defendant, respondent, with the view of proving the family to have been joint in dealings and in estate.

This Court reversed the decision of the Zillah Court, and gave judgment in favour of the defendant. An appeal to Her Majesty in Council has now been preferred by the plaintiff, who moved before the Judge in the Miscellaneous Department to strike out of the list of papers for translation the books and papers referred to, being

Mashkabar Roznamcha—24 in number.

Bohee Jumma Khuruch—3 in number.

And the respondent now asks that these should be translated entire.

It is admitted that, although these books, in some irregular way, accompanied the record, no entries from them were ever tendered to the Court in evidence; and that neither the judgment of the Zillah Court, nor that of the High Court in appeal, contained any reference whatever to these books or papers.

This being so, it is impossible for us to say that they are either material or relevant, or even that they are part of "the evidence" in the cause.

We cannot, therefore, put the appellant to the expense of translating and transcribing these papers. To do so would be an unmeaning and vexatious impediment to his carrying on his appeal.

If, however, the respondent, acting under the advice of his vakeel, should think fit to have the papers in question, translated at his own expense, they may be sent to England as an appendix to the record; and, if the respondent should be successful, the Privy Council can make such order in respect of the costs of translation as their Lordships may think fit.

We have sought, in making this order, to lay down a rule which will be applicable to similar cases which frequently occur.

If they be sent home as an appendix by the respondent, a copy of this judgment should be sent, so as to explain the reason of their being so sent.

The 26th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale Law — Under-tenures (Annulment of — by lessee from auction-purchaser) — Evidence (of confirmation).

Case No. 2127 of 1866.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 9th May 1866, affirming a decision passed by the Moonsiff of Mungulcote, dated the 11th January 1864.

Tara Chand Dutt (Plaintiff), *Appellant,*

versus

Mussamut Wakenoonissa Bibee and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

No one for Respondents.

Where an auction-purchaser did not avail himself of the power vested in him by law to avoid and annul a tenure created by his predecessor—HELD that it was not open to any person now holding his estates, and still less to a mere lessee claiming under him, to avoid the tenure.

The giving of receipts for rent, coupled with the fact of payment of rent at the old rate, down to the present time, is evidence of confirmation of the tenure by the auction-purchaser and his successor.

Norman, J.—THIS is a suit by the plaintiff claiming possession of certain aymah land under a perpetual lease, dated the 21st Bysack 1269, of which the plaintiff alleges that he has been dispossessed by the defendants.

The defendants claim as holders of a kaemee jote, a tenure which is said by them to have been created in or prior to 1213.

The Principal Sudder Ameen finds that the defendant's title as kaemee jotedars

has been established in proof, they having produced dakhilahs for rent from 1213 to 1268 B. E.

The plaintiff appeals and contends that he, being the lessee of a person who purchased the holding of the superior tenant in 1244, is not bound by the tenure created by his predecessor, and the fact that receipts for rent given by his immediate predecessor—the auction-purchaser—have been produced, does not show that such auction-purchaser confirmed the tenure.

The rights of the auction-purchaser were created by Regulation XI. of 1822, Section 30. Under the powers given by that Section, the auction-purchaser had a right to avoid and annul all tenures which originated with the defaulter or his predecessor, and there is no doubt that in 1244, or within a reasonable time, or perhaps within such time as would be allowed by the Law of Limitation after that date, the auction-purchaser might have avoided the tenure of the defendants. But, as he did not do so, as he did not avail himself of the powers which the law gave him within any such time, it is not open to any person now holding his estate, and still less to a mere lessee claiming under him, to avoid the tenure at the present day.

We have no doubt that the giving of receipts for rent, coupled with the fact that rent at the old rate had been paid down to the present time, is abundant evidence that the auction-purchaser and his successor have confirmed the tenure, if that was necessary.

The appeal is dismissed but without costs, no one appearing for the respondents.

The 26th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Municipal—Section 77, Act III. of 1864, B. C.—Notice of action against Commissioners.

Case No. 2471 of 1866.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 3rd July 1866, affirming a decision passed by the Sudder Moonsiff of that District, dated the 28th November 1865.

Abhoyanath Bose (Plaintiff), *Appellant,*

versus

The Chairman and the Deputy Chairman of the Municipal Committee of Kishnaghur (Defendants), *Respondents.*

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboo Nursing Chunder Mitter for Respondents.

A notice of action against Municipal Commissioners is absolutely necessary under Section 77, Act III. of 1864, B. C. A notice objecting to, and asking for a re-consideration of, the order complained of is not sufficient.

Norman, J.—THIS is a suit against the Chairman and Vice-Chairman of the Municipal Commissioners for the town Kishnaghur to restrain them from interfering with a road which the plaintiff declared to be his private road.

The Moonsiff dismissed the suit on the merits. The plaintiff appealed to the Judge. The defendants on cross appeal objected that, as no notice of action had been given to the Municipal Commissioners, the suit was not maintainable.

The Municipal Commissioners had declared the road to be a public road. This was an act done under the powers and provisions of the Bengal Act III. of 1864, the 77th Section of which expressly provides that no action for such a matter shall be brought until one month after notice in writing shall have been delivered at the office of the Commissioners, &c., and unless such notice be proved, the Court shall find for the defendants.

The vakeel for the plaintiff contends that a notice objecting to the decision of the Municipal Commissioners, and asking for reconsideration of the order in which the appellants were referred by the Commissioners to any civil remedy they might have, is enough. But the words of the Section are clear and imperative, and we think that the Judge had no alternative but to dismiss the suit.

The appeal is dismissed with costs.

The 28th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Estoppel—Act X. of 1859—Declaratory suit.

Case No. 1303 of 1866.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 19th January 1866, reversing a decision passed by Mr. W. Wright, Principal Sudder Ameen of that District, dated the 30th May 1865.

h

Pitambur Shaha and others (Plaintiffs), *Appellants*,

versus

Ram Joy Ghose and others (Defendants), *Respondents*.

Baboo Hem Chunder Banerjee for Appellants.

Baboos Dwarkanath Mitter and *Issur Chunder Chuckerbutty* for Respondents.

The proceedings in a suit under Act X. of 1859, in which the Collector did not finally adjudicate upon the genuineness of a pottah, although he accepted it as genuine, are no bar to a subsequent suit in the Civil Court for a declaration that the pottah is a forgery.

Where a plaint asks for more than the plaintiff is entitled to, the Court may give him such relief as is within the Court's jurisdiction, and as the Court may decree him entitled to.

Macpherson, J.—The plaintiffs in this case sued in the Civil Court for a declaration that a certain pottah pleaded by the defendants in a suit in the Collector's Court is a forgery, and for a declaration of the plaintiffs' right to assess rent (at the rates prevailing in the neighbourhood) on the lands comprised in the said pottah.

The Court of first instance, on the day the case came on for hearing, amended the plaint by striking out so much of it as prayed for a declaration of the right to assess, being of opinion apparently that, so far as the assessment of rent was concerned, the Revenue Court alone had jurisdiction. The one issue as to the genuineness of the pottah was tried, and it was decided in favor of the plaintiffs.

The Lower Appellate Court held that the Civil Court had no jurisdiction to entertain the suit as originally framed; that the Court had no power to amend the plaint as had been done; and that the plaint amended was bad, as it simply sought a declaration as to the genuineness of the pottah, while no consequential relief was sought, or, if sought, could be granted by the Civil Courts. The plaintiff's suit was, therefore, dismissed with costs.

In appeal it is contended before us that the amendment of the plaint was proper, or at any rate that, even if the plaint was bad as to so much of it as sought to declare the right to assess rent, the Court was bound to go into and decide the issue as to the pottah; and it is argued that the prayer for a declaration as to the pottah is not inconsequential, inasmuch as a declaration as to it would be most important in its immediate effects on the position of the parties.

It appears that the pottah in question was pleaded in a suit in the Collector's Court which was decided in defendant's favor, prior to the institution of the present suit in the Civil Court. But the Court in that suit does not finally adjudicate upon the issue of the genuineness of the pottah, the Collector in his judgment expressly saying that he does not do so. The proceedings in that suit, therefore, form no bar to the present suit (*see* Oomachurn Dutt *versus* Beckwith, V. Weekly Reporter 3, Act X.). Moreover, we do not think that the merely declaratory decree prayed for is inconsequential, because the relief consequential on a declaration of the invalidity of the pottah may be immediate and most substantial; and we are of opinion that it is quite a sufficient basis on which to support a declaratory decree, even though resort may eventually be necessary to another Court to enforce the consequential relief.

We further think that, even if the plaint asked for more than the plaintiffs were entitled to, the Court was right in giving the plaintiffs such relief as was within the Court's jurisdiction, and as the Court deemed them to be entitled to. It is the daily practice of every Court to give decrees in favor of plaintiffs for something less than what they may have claimed.

On the whole, we are of opinion that the case must be remanded to the Lower Appellate Court, that the question of the genuineness or otherwise of the pottah may be tried and decided.

The 29th January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges*.

Jurisdiction—Kubooleut—Fishery.

Cases Nos. 2493 and 2497 of 1866 under Act X. of 1859.

Special Appeals from decision passed by the Officiating Judge of Chittagong, dated the 8th August 1866, affirming a decision passed by the Deputy Collector of that District, dated the 26th February 1866.

Koylash Chunder Dey (Plaintiff), *Appellant*,

versus

Joy Narain Jalooah and others (Defendants), *Respondents*.

Baboos Nuleet Chunder Sein and *Bama Churn Banerjee* for Appellant.

No one for Respondents.

A suit for a kubooleut for the payment of the rents of a fishery is cognizable under Act X. of 1859.

Trevor, J.—THE plaintiffs in these cases, having, as they allege, established their right to the fisheries in question, now sue the defendants in possession of them for kubooleuts.

The first Court dismissed the plaintiff's claim, inasmuch as the fishery was situated in an arm of the sea, and the High Court has ruled that no zemindar is entitled to rents for the same.

The Lower Appellate Court considered it unnecessary to do more than declare that the plaintiff's suits be dismissed, inasmuch as suits for a kubooleut for the payment of the rents of fisheries are not cognizable under Act X.

Plaintiff now appeals specially, urging that, as the High Court has ruled—(*see* Vol. V., Weekly Reporter, page 20)—that suits for the rents and for the enhancement of the rents of fisheries are cognizable under Act X. of 1859, it follows that suits for an agreement to pay those rents are cognizable also.

We think that the contention of the plaintiff is sound, and that the cases may be remitted to the Judge for him to exercise jurisdiction, and to determine whether they are entitled to kubooleuts or not from the defendant.

The 29th January 1867.

Present :

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Enhancement—Rule of proportion.

Case No. 2201 of 1866 under Act X. of 1859

Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 30th May 1866, affirming a decision passed by the Deputy Collector of Fureedpore, dated the 25th February 1866.

Showdaminee Dassee (Plaintiff), *Appellant,*

versus

Shookool Mahomed (Defendant), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Pearee Lal Roy for Respondent.

In a suit for enhancement, where not only the value of the produce has increased, but the productive powers of the land has decreased, and the expenses of cultivation decreased, the formula to be applied in determining the rent will be as follows: The average value of the produce before the decrease in the productive powers of the land will be to the average value of the present decreased produce, *minus* the increased cost of production, as the rent previously paid will be to that which the land ought now to pay.

Trevor, J.—PLAINTIFF sued to enhance the rent of the defendant after issue of notice. Plaintiff alleges that defendants have hitherto paid only 34 rupees for 30 beegahs of land; that they have got 40 beegahs in their possession; and that, on the ground both of increase in the productive powers of the land and increase in the value of the produce, they are entitled to Rupees 182.

The defendant pleads non-liability to enhancement, as his rent is of a permanent nature from the time of the settlement.

The Lower Courts gave plaintiff a decree according to an admission made by the defendant in the course of his examination.

Plaintiff now appeals specially, urging that no enquiry has been made, nor has any decision been come to according to the principle laid down in the Full Bench case of Ranee Thakooranee.

That case is inapplicable to the present case. It applied only to cases in which the sole ground for enhancement was an increase in the value of the produce, and to cases in which the rates had not adjusted themselves to altered circumstances. In the present case it has been found below that, not only has the value of the produce increased, but the productive powers of the land have decreased, and the expenses of cultivation have increased also. It is clear, therefore, that the particular formula laid down in the case above cited will not meet the present circumstances, and, though the principle of proportion may be resorted to, it must be applied in another form. The value of the present decreased average produce per beegah, calculated on the produce of 3 or 5 years, must be found, and it must be contrasted with the average value of the produce before the decrease in the productive powers calculated in the same way, and the increased present cost of production, as contrasted with the former cost per beegah, must be ascertained also. When these data are ascertained, the formula to be applied will stand thus: The average value of the produce before the decrease in the productive powers of the land will be to the average value of the present decreased produce, *minus* the increased cost of production, as the rent previously paid will be to that which the land ought now to pay.

The Lower Court will decide the case which is now remitted to him in conformity with these remarks.

b

The 29th January 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction (of Civil Courts)—Order of Magistrate.

Case No. 2484 of 1866.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 6th August 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th May 1866.

Ram Shodoy Ghose and others (Defendants), *Appellants,*

versus

Juttadharee Holdar and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellants.

Baboos Dwarkanath Mitter, Lukhee Churn Bose, and *Doorga Doss Dutt* for Respondents.

The Civil Courts have jurisdiction to entertain a suit which, if successful, would have the effect of setting aside and rendering inoperative an order of a Magistrate declaring a road to be a public one, and directing the removal of bamboo-posts across the road as an obstruction.

Bayley, J.—THE admitted facts of this case are that plaintiff sued in the Civil Court claiming a declaration of right to a certain road as his private road on his own lands.

Defendant's case was that this same road had been declared by the Magistrate acting under Section 308 of the Code of Criminal Procedure to be a public one. The Magistrate had also ordered some bamboo-posts placed across the road to be removed as an obstruction.

The one and real question both in the Lower Courts and before us here in special appeal is admitted to be whether the Civil Courts have jurisdiction to entertain a suit which, if successful, has, in fact, the direct effect of setting aside and render inoperative the order of the Magistrate declaring the road to be a public one, and directing the obstruction of bamboo-posts to be removed.

Section 308 of the Code of Criminal Procedure does not provide specifically for any appeal.

The precedents cited to show that the Civil Courts have no jurisdiction are :—

1. Sudder Dewanny Adawlut, p. 929, 1853.
2. Sudder Dewanny Adawlut, p. 267, 1855.
3. Sudder Dewanny Adawlut, p. 938, 1858.
4. High Court, Weekly Reporter, Vol. I., p. 324.
5. High Court, Weekly Reporter, Vol. II., p. 267.
6. Marshall's Report for 1861, p. 214. or Hay's Report, Vol. II., p. 86.

None of these cases are in favor of the special appellant's plea that there is no jurisdiction *in such a case as this*, except that in Weekly Reporter, Volume II., page 267 (the 5th on the above list). Further, we would observe that, whether the facts in that case and in this were the same, is not clear from the judgment in that case.

The *first* case (of 1853), page 929, decided that no action would lie *against a Magistrate* acting under Act XXI. of 1841 in cutting a chubootur for the purpose of making a well. It was held that, as the law made no provision for an action against a Magistrate as such, a civil action would not lie.

The *second* of Sudder Dewanny Adawlut, 1855, page 269, refers only to whether the Magistrate himself was generally liable to a civil action for acts done in his judicial capacity, and it was held he was not so.

In the *third* case (Sudder Dewanny Adawlut, 1858, page 938) it was held that a Magistrate had no authority under Act XXI. of 1841 to deal with any paths alleged by plaintiff to be private, and that, until it were shown that it was public, and not private, it could not be determined whether a civil action would or would not lie.

The *fourth* case, Weekly Reporter, Volume I., page 324, cites and follows directly the preceding.

The *fifth* case, Weekly Reporter, Volume II., page 267, has already been noticed.

In the *sixth* case, Marshall's Volume I., page 214, it was held that the parties might bring a suit to obtain a declaration of their right to the land subject to a right of way declared by the Magistrate, but not a suit to contest the right of way itself so declared.

Considering the circumstances in all those cases and the circumstances of this case, we are of opinion that the only precedent which can apply in favor of special appellant is that of Weekly Reporter, Volume II., page 267, and we have shown that it is not clear what were the facts there; and, even if they were the same as those now before us, the precedent is no longer in conflict with our

opinion, as one at least of the presiding Judges thinks it was not a right decision.

We, therefore, hold that an action can lie in the Civil Courts in this case, and we accordingly dismiss the special appeal with costs.

The 29th January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Measurement—Section 10, Act VI. of 1862, B. C. —Limitation—Declaratory decree.

Cases Nos. 2185 and 2245 of 1866.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 2nd June 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 10th March 1866.

Pureejan Khatoon and others (Plaintiffs), *Appellants,*

versus

Bykant Chunder Chuckerbutty and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellants.

Baboos Dwarkanath Mitter, Kalee Mohun Doss, and *Khetturnath Bose* for Respondents.

Section 10, Act VI. of 1862, B. C., contemplates possession by the receipts of rents for those lands of which the measurement is required.

Limitation will not apply to a claim for a declaration of title, where the plaintiff is in possession of the land regarding which the declaration is required.

A declaratory decree ought only to be passed where some injury appears so probable as to lead to the conclusion that, unless stayed by the declaratory decree, the inchoate or threatened injury is inevitable.

Trevor, J.—THE plaintiff in No. 2245 sued certain ryots under Section 10 of Act VI. of 1862 (Bengal Council) for measurement of their lands. The defendants pleaded that their lands did not belong to plaintiff, but to another party who is the plaintiff in No. 2185.

The Lower Courts on enquiry found that the plaintiff had never been in possession of the lands, and, therefore, dismissed his suit.

The plaintiff now appeals specially, urging that it is not necessary, in order to give him a right to measure, that he should be in actual possession of the lands. The right to possession is quite sufficient to entitle him to obtain what he asks for.

We are clearly of opinion that Section 10 of Act VI. of 1862 contemplates possession by the receipt of rents for those lands of which the measurement is required, and, as plaintiff did not prove such possession, the Court did quite right in dismissing his suit. We dismiss the special appeal with costs.

The plaintiff in No. 2185 sues, as in possession, for a declaration by the Court, under Section 15 of Act VIII. of 1859, of his right to certain lands, his rights having been placed in jeopardy by the act of the Survey authorities who measured and demarcated it as being within the defendant's estate.

The Judge, accepting plaintiff's statement as to possession, finds that, as more than 6 years have elapsed since the act complained of forming his cause of action arose, plaintiff is out of Court under the Statute.

Plaintiff now appeals specially, urging that the Statute of Limitation will not apply to a declaratory action like the present, he being in possession of the lands and requiring no consequential relief; that the Judge should have enquired into his title and possession, and have given him a decree in accordance with his claim as proved before him.

We are of opinion that the Statute of Limitation will not apply to a claim for a declaration of title, the plaintiff being in possession of the land regarding which the declaration is required. It is competent to the Court, however, to enquire whether the act complained of is so recent and of such a nature as to entitle plaintiff to a declaratory decree, for the Court will not be put in motion under Section 15 of Act VIII. of 1859, unless some injury appears so probable as to lead to the conclusion that, unless stayed by the declaratory decree, the inchoate or threatened injury may be completely perpetrated; if the Court is satisfied on this point, it will pass a declaratory decree, otherwise it will refuse the same. The case is remitted to the Judge with direction that he will pass an order in conformity with the remarks made above.

The 29th January 1867.

Present :

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Res Judicata—Ejectment—Suit under Section 28, Act X. of 1859—Subsequent suit in Civil Court.

Case No. 2758 of 1866.

Special Appeal from a decision passed by Moulvie Anuar Ali Khan, Principal Sudder Ameen of Tipperah, dated the 5th July 1866, affirming a decision passed by Baboo Greesh Chunder, Sudder Moonsiff of that District, dated the 22nd November 1865.

Baser Mahomed (one of the Defendants), *Appellant,*

versus

Sudder Ghazee and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Nuleet Chunder Sein and *Pearee Lal Roy* for Appellant.

Baboos Onookool Chunder Mookerjee and *Dwarkanath Mitter* for Respondents.

Where a Deputy Collector declined jurisdiction in a suit for ejectment under Section 28, Act X. of 1859, and the appeal against this decision to the Judge was dismissed—HELD that that decision was no bar to a suit for ouster in the Civil Court, either in the way of *res judicata* or otherwise.

Jackson, J. (Kemp, J., concurring).—THIS was a suit by one ijaradar to oust the defendant who was holding certain land (alleged to fall within the ijarah) without payment of rent. The Moonsiff, who originally heard the case, directed the Maharajah of Tipperah who was the plaintiff's lessor to be made a party to the suit, and he was accordingly made a co-plaintiff. There had previously been an application by this ijaradar to dispossess the defendant under Section 28, Act X. of 1859, and Baboo Nuleet Chunder Sein, the vakeel of the special appellant, has addressed to us a very ingenious argument to show that, as the plaintiff had once elected his remedy under Section 28 of Act X., and had failed in that course of proceeding, he could not now be at liberty to proceed *de novo* in the Civil Court, and that, consequently, the suit as to the ijaradar of the plaintiff ought to have been dismissed, and that the introduction of the Maharajah as a co-plaintiff could not affect the capacity of the plaintiff to maintain this suit, inasmuch as the Maharajah had, during the pendency of the ijarah, no right to re-enter on the land, and, therefore, no cause of action. This would have been an argument extremely difficult to refute if the suit under Section 28, Act X. of 1859, had been disposed of on its merits. But Baboo Onookool Chunder Mookerjee for the special respondent has conclusively shown from the decision of the Deputy Collector in that suit that, so far from having decided the suit upon its merits, the Court absolutely declined jurisdiction, holding that under the allegations the plaintiff could not maintain a suit under Section 28 at all. This decision was carried in appeal to the Appellate Court, and the Appellate Court dismissed the appeal.

We are not shown that the appeal was dismissed upon any ground other than that on which the first Court had decided. The decision, therefore, under Section 28 could be no possible bar to the present proceedings in the way of *res judicata* or otherwise.

That being so, it is a simple case of an ijaradar finding the defendant a trespasser upon his land, and having recourse to an ordinary suit in the Civil Court to oust him. There is no other ground of objection raised against the decision of the Lower Appellate Court. That decision, therefore, must be affirmed with costs.

The 29th January 1867.

Present :

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Kubooleut at enhanced rate.

Case No. 2775 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. W. F. MacDonell, Officiating Judge of Nuddea, dated the 13th June 1866, affirming a decision passed by the Deputy Collector of that District, dated the 31st May 1865.

Prosunno Coomar Paul Chowdhry (Defendant), *Appellant,*

versus

Radhanath Dey Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Gopeenath Banerjee for Appellant.

Baboo Onookool Chunder Mookerjee for Respondents.

Where tenants held for some 25 years upon a rent apparently much below that payable for lands of the same description in the neighbourhood, they were held

not entitled, at the end of that long period, to allege the expenditure of their own capital and labor against the landlord's claim to a kubooleut at an enhanced rate.

Jackson, J.—THIS was a suit for a kubooleut at an enhanced rate. The defendant had previously held the land on a lease of 8 years as to part of the land, and 10 years as to the zemindar. That lease was granted in the year 1248 B. S. at a rent of 40 rupees. The claim to enhance proceeded on the ground that the tenant was paying a lower rate of rent than similar land in the like advantages in the neighbourhood.

The defendant pleaded that the lands had been brought to their present condition of productiveness by his own labor and expenditure. He also pleaded that a clause in the expired lease entitled him to a renewal at the same rates. These pleas, however, were overruled by the Deputy Collector, and the enhancement was ordered at rates found upon a local enquiry by a Ministerial Officer.

The defendant appealed to the Zillah Judge upon eight grounds, all of which were overruled, except the ground in which the defendant objected to the order of the Deputy Collector directing him to give a kubooleut for 10 years.

The points raised before us in special appeal are three:—

1st.—That, notwithstanding the plaintiff's claim for enhancement did not proceed on the increased productiveness of the land, nevertheless the defendant was entitled to plead that circumstance, and to show that he had, in fact, bestowed labor and capital upon the improvement of the land, and on showing that, to a deduction from the rates claimed by the plaintiff under Clause 1, Section 17, Act X. of 1859. It appears that the defendants have been holding this land for some 25 years. They held it for a very long period upon a rent apparently much below the rates payable for land of the same description. It does not appear to me that they are entitled now, at the end of that long space of time, to allege the expenditure of their own capital and labor against the landlord's claim.

The *2nd* point is that the Lower Appellate Court is wrong in fixing a higher rate of rent contrary to the terms of the pottah. The clause of the pottah relied upon is that, at the expiration of the period of this lease, the tenant was to give a fresh kubooleut and to receive a fresh pottah on the said jumma. It is not perfectly clear whether the word "jumma" in that place is used in the sense of rent, or in that of holding. But if it be interpreted to mean rent, then clearly the intention was that, at the expiration of the lease, the parties should enter into such a new contract.

But it appears that, in fact, since the expiration of the original pottah, the tenant has been holding for considerably more than 10 years at the old rate. He cannot, therefore, at this distance of time, claim to act upon a clause which was to take effect, if at all, from the expiration of the first lease, but is liable to be dealt with as other tenants.

The *3rd* ground is that the Lower Appellate Court was wrong in not altering the decision of the Court of first instance as to costs, inasmuch as the rates of rent claimed by the plaintiff were considerably reduced. Now, the Deputy Collector has given no express decision as to costs. But, on referring to the schedule of costs at the foot of his decree, it appears that those costs were chiefly made up of the stamp-duty which would not vary whether the claim decreed were greater or less, and of the remuneration of the Ministerial Officer who went to the spot to make the enquiry. That also would not have varied whether the amount claimed was greater or less. There may have been a small excess in the amount allowed for mooktear's fees. But the difference, if any, is so trifling that it cannot be considered any error in law justifying a special appeal on that ground. The special appeal, therefore, must be dismissed with costs.

Kemp, J.—I concur in this judgment. I will only add that, reading the whole pottah, in my opinion the words "*ukhto jummai*" refer to the tenure, and not to the rent.

The 30th January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Gift by a woman to her Mooktear—Evidence.

Case No. 197 of 1866.

Regular Appeal from a decision passed by Baboo Nurrottun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 23rd March 1866.

Ram Pershad Misser (Plaintiff), *Appellant,*

versus

Ranee Phoolputtee (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Dwarkanath Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Respondent.

Suit laid at Rupees 10,000.

Where a mooktear sued his client, a Hindoo widow, upon a *perwannah* bearing the client's seal, and purporting to give away valuable properties without any substantial consideration—HELD that the *onus* was on the plaintiff to satisfy the Court fully as to the circumstances under which the client's seal was obtained, and to prove that the gift was made advisedly.

Macpherson, J.—THIS was a suit for possession of an eight-annas share of Mouzahs Dhooria and Dumroo, and for an order to compel the defendant Ranee Phoolputtee to execute and register a properly stamped deed of gift making over the said eight annas to the plaintiff from the year 1272, "on the "ground of a certain deed executed and "sealed by the Ranee on the 6th Assar 1271 "B. S., by which she, having absolutely "gifted away the disputed property," promised to execute and register a formal deed of gift as soon as one could be prepared on paper properly stamped. The plaint went on to say that a formal deed of gift was prepared on stamped paper, and presented to the Ranee for execution, but she declined to execute it, and gave a lease of the same property to the defendant Modoo Soodun Mundur, whom she put in possession in the beginning of 1272. The plaint also prayed for the cancellation of the lease to the defendant Modoo Soodun Mundur, and for a declaration that the plaintiff was entitled to possession from the beginning of 1272.

The document, which is the foundation of the plaintiff's claim, is to the following effect:—

"To Sree Sunkur Dutt Misser, Ram Per-"shad Misser, and Jowahir Singh.—Know "this. As eight-annas shares of the mouzahs "mentioned below have been given to you "as *bukshish* on account of your *khair* "*khaye* (well-wishes), this perwannah is "therefore in the shape of a deed of *attaha-*"*namah* given to you; that you will take "possession of the mouzah from 1272 and "enjoy the profits thereof yourselves. There "being no stamp-paper in hand, this per-"wannah is written for your satisfaction. "You will proceed to Bhaugulpore and have "all three deeds drawn out upon stamp-paper, "and hand them over to me here for my seal "and signature, when they will be signed and "returned to you.

"To Jowahir Singh—8-annas share of "Mouzah Kana Kooreeanah, &c.

"To Sunkur Dutt Misser—8-annas share "of Gopee Chuck and Dilwar Chuck, &c.

"To Ram Pershad Misser—8-annas share "of Dooria and Dumroo, &c.

"Dated the 6th Jeyt 1271."

The Ranee, in her defence as set forth in her written statement, admits having put her seal to this document; but she denies that, when she put her seal to it, she knew that it was a deed of gift such as it now turns out to have been, and she denies having ever given or promised to give this property to the plaintiff. She admits that she did promise to give the plaintiff a mokurruree lease of it, and says she believes she gave him a perwannah, saying that such a lease should be given to him when stamped paper had been procured, and the amount of jumma to be paid by him had been settled; but she says she afterwards declined to give this lease, on finding that to grant it was beyond her power as a Hindoo widow having only a life-interest in the property.

The Lower Court dismissed the suit, apparently on the grounds that the sale was incomplete, as there was neither any actual deed of sale, nor any delivery of possession, and that the promise to execute a deed, and to put the plaintiff in possession, was made without any consideration, and could not be enforced.

We also think that the suit ought to be dismissed; but the reasons which lead us to this conclusion somewhat differ from those assigned by the Court below.

The Ranee is a Hindoo widow (a *purdanusheen*) in possession of estates of very considerable value. The plaintiff is a Mooktear who was employed by her in the conduct of certain suits. Such being the relative positions of the parties, the plaintiff, who comes into Court asking that effect may be given to such a document as that on which he relies, which, on the face of it, is without consideration, is bound to satisfy the Court fully as to the circumstances under which the Ranee's seal was obtained. He must show, beyond all doubt, that the Ranee knew accurately what she was about, and that she was acting advisedly and after consultation with those best able to advise her. This would be the plaintiff's position even if there were no question (as there is in this case) as to whether the Ranee, when she affixed her seal, knew what was the purport of the document (Ranee Usmut Koonwar

versus Tayler, II. Weekly Reporter 307, and IV. Weekly Reporter 86: Soonder Koonwaree Debia *versus* Kishoree Lal Sein, V. Weekly Reporter 246). We are of opinion that, even supposing that the Ranee, in fact, knew that the *perwannah* was expressed as it is, the case put forward by the plaintiff is so unsatisfactory that it is quite impossible to give him a decree. The transaction is on the face of it most suspicious. The *perwannah* purports to give away three valuable properties (the subject of the present suit alone is worth at least Rupees 10,000) for no valuable consideration to three persons of whom the plaintiff, as already mentioned, was a mooktear of the Ranee, while Sunkur Dutt Misser is a brother of the plaintiff and also a mooktear, and Jowahir Singh is a nephew of the Ranee and a tehsildar in her service. The plaintiff's own account of the matter is indistinct and quite unreliable evidently. He says that he was originally a mooktear of a Mr. Barnes on a salary of 25 rupees a month, and at the same time of the Ranee on 4 rupees a month; that, disputes arising between Barnes and the Ranee, he abandoned the service of the former, and entered the Ranee's service on the understanding that he was to receive Rupees 25 a month. "The Ranee, however," he says, "not being "able to pay me the stated salary regularly "month by month, gave me a farm of the "two disputed mouzahs for a term beginning "from 1267 and ending 1271, and gave me "to understand that the rent of the estate "will be credited to my salary. The Ranee "succeeded in a suit for possession, and a "suit for *wassilat* was compromised with "Mr. Barnes, and, as a reward for my labor "and zeal on those occasions, the Ranee "made over these mouzahs as a gift to me." In cross-examination this account varies. "I gave a loan of 5,000 rupees to the "Ranee. The pottah first was *bhurna*, and "afterwards it was given in lieu of my "salary. No document was given for the "latter transaction: the Ranee only com- "municated the particulars through Dewan "Chutturphul. The compromise with Mr. "Barnes took place after the appeal to the "High Court preferred by the Ranee was "rejected. * * * The stamp- "paper not being procurable, the names "of myself, Jowahir Singh, and Sunkur "Dutt were entered in one and the "same *perwannah*. Sunkur Dutt was "also a mooktear, and consequently a "mouzah was given him too. I cannot say "whether the reasons for giving the mouzahs "to me and to Sunkur Dutt were the same." This is all the evidence he gives—and, indeed, it is all the evidence on the record—as to the relation subsisting between the plaintiff and his client, and the reasons for her making him a present of this property. It is to be remarked that the benefits resulting to the Ranee from the services of the plaintiff do not very clearly appear. This much is certain that, if, in the suit with Mr. Barnes, the Ranee succeeded in getting possession of certain lands, she failed as to what was the most valuable part of the suit, *viz.*, a claim for wassilat to the extent of about a lac of rupees. The plaintiff called as his witness Byjnath Sahaye, the Ranee's Dewan—the person of all others who ought to have been consulted by her in a matter such as this, and who, as the head manager of her affairs, must have been at the time made aware of any such gift, if fairly and properly obtained from her. But the Dewan denies all knowledge of the *perwannah* or of its having been granted. He says, however: "In Jeyt 1271, the "Ranee consulted me privately, telling me "that Ram Pershad Misser (plaintiff) wanted "Mouzahs Dhooria and Dumroo, and asking "his (witness's) advice regarding them." This is all the Dewan deposes to, for he was not asked whether it was a gift or only a lease that the Ranee said plaintiff wanted, so that his evidence in no way advances the plaintiff's case. Various witnesses including Jowahir Singh (who is personally interested in supporting the *perwannah*) speak to the paper having been prepared by the Ranee's directions (given through the plaintiff) and to the Ranee having been well aware that by this she was giving away these properties, and that the word *attah* occurred in the paper.

We think, for the reasons already indicated, that a gift of this sort, made under such circumstances for no substantial consideration, cannot be supported or enforced by any Court of Equity.

But, further, the conclusion at which we arrive on a consideration of the whole evidence is that, at the time the Ranee affixed her seal to this *perwannah*, she did not know that its contents were such as they in fact were. As to this we have the evidence of Byjnath Jha, the Ranee's Naib-Dewan, by whom the *perwannah* was (according to the plaintiff and his witnesses) read to the Ranee before she affixed her seal. Byjnath Jha says, he, at the request of the plaintiff, took the *perwannah* to the Ranee in order

that she might seal it; that he never read the paper himself, and never read it to the Ranee; that he believed it to relate to a *mokurruree* lease which was to be given to the plaintiff, and that he told the Ranee, when she was sealing it, that it related to the plaintiffs *mokurruree*. He further says that he believed the paper related only to the *mokurruree*, because the plaintiff himself told him that such was the case, and he excuses himself for not having read what was written by saying that the plaintiff was a confidential servant of the Ranee, and, as the paper had been prepared by him, he did not deem it necessary to examine it. This witness further says that the Ranee often read papers herself, and that he supposes she did not read this one, because she knew it related to the plaintiff who was at the time a confidential servant. He further says that, when the formal deed of gift engrossed on stamped paper arrived from Bhaugulpore, and was read over to the Ranee, she tore it up as soon as she heard that in its purport it was a deed of gift.

The evidence on behalf of the plaintiff on this part of the case—as to the knowledge of the Ranee at the time she sealed the *perwannah*, that it was in the nature of a deed of gift—is very unsatisfactory, and, in many respects, contradictory; and, on the whole, we have little hesitation in finding as a fact that the Ranee affixed her seal under a misapprehension (arising from misrepresentation) as to the contents of the paper.

In coming to this conclusion, we do not treat as evidence in the cause the statements contained in the Ranee's petition (set out in page 7 of the Paper Book) which she prayed might be received as if it were her deposition given on oath. That petition cannot, save by the consent of the plaintiff, be used as evidence for the defence any more than can the written statement which the Ranee filed be used for that purpose. The proceedings of the Lower Court, as to the examination of the Ranee, were highly irregular, and conducted with great disregard of the provisions of the Civil Procedure Code. The Ranee's evidence in the suit was all important; and of this the parties seem to have been aware. The Ranee being a *purda-nusheen*, the Lower Court had no right whatever to order her personal attendance in Court, but ought to have taken care that she was properly and fully examined under commission. Instead of this, the Court called on the Ranee under Section 163 of the Code to show cause why she should not attend and be examined in Court under Section 166; whereupon she, under Section 164, put in the petition verified on oath, to which we have already referred, praying at the same time that she might not have to appear in Court, or to be further examined. That petition was legally received by the Court as showing cause against the Ranee having to appear and be examined. But it was no sufficient examination of the Ranee for the purposes of this suit, and, so far as her evidence is concerned, the case remained after she filed this petition exactly where it was before. The Court clearly was wrong in not issuing a commission, and having the Ranee examined in the usual manner.

The plaintiff has in every way failed to make out his case. No Court could give effect to an instrument obtained as this *perwannah* was. We, therefore, dismiss this appeal with costs.

It is said that only one set of costs should have been allowed. But, as the plaintiff chose to add Modoo Soodun Mundur as a defendant, and as Modoo Soodun appeared separately, and filed a separate written statement, we think he was not wrong in doing so, and a second set of costs may properly be allowed. It is true that the Ranee has, in fact, contested the suit actively, and, in so doing, did all that was necessary for the protection of Modoo Soodun. Still the course of events might have been different, and Modoo Soodun was entitled to appear and take care that his own interests were properly attended to.

The 30th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Limitation—Suit for household articles sold by retail.

Case No. 265 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 13th January 1866.

Bucha Gope (Plaintiff), *Appellant,*

versus

The Collector of Tirhoot, represented by Mr. J. Forlong, General Manager of the Raj of Maharajah Luchmessur Singh Bahadoor, Minor under the Court of Wards (Defendant), *Respondent.*

Baboos Kishen Succa Mookerjee and *Kalee Kishen Dutt* for Appellant.

Baboos Kishen Kishore Ghose and *Juggadanund Mookerjee* for Respondent.

Suit laid at Rupees 35,289-13.

A suit for the value of articles sold by retail, and supplied for household purposes, is governed by the limitation prescribed by Clause 8, and not Clause 16, Section 1, Act XIV. of 1859.

Seton-Karr, J.—THIS was a suit for the value of milk and butter, lime, and other things, supplied for the household purposes of the Maharajah of Durbangah, estimated at more than 35,000 rupees. The plaintiff filed a number of *tunkhahs* or promises to pay, covering about 17,000 rupees; the interest on these items was said to amount to more than 13,000 rupees, and, for a claim of 5,000 rupees over and above these items, certain papers existing in the office of the Court of Wards were relied on.

The Manager of the Durbangah estate, through the Court of Wards, repudiated the whole claim, and the Lower Court went into the evidence, and, rejecting by far the greater part of the claim, gave the plaintiff a decree for Rupees 508-13-9.

The plaintiff appeals to us against the dismissal of so large a portion of his claim, and the defendant, through the Government Pleader, appeals against the order decreeing 508 rupees.

The claim is divided into two portions: that for 17,000 rupees *plus* the interest; and that for 5,000 rupees. The Lower Court has treated the claim as if six years' limitation were allowed under Clause 16, Section 1 of Act XIV. of 1859; but the fact is that the claim is one for which Clauses 8 and 9 of the said Section would much more properly apply. The suit is one for the amount of bills or for articles sold by retail, as provided for by Clause 8; or, if it be thought that the claim should fall under Clause 9, as for the breach of any contract, then all we have to observe is that the *tunkhahs* for 17,000 rupees, 11 in number, bear neither the seal nor the signature of the late Maharaja; and that it is futile for the plaintiff to urge that the Lower Court should have summoned witnesses to prove the alleged signature on the *tunkhahs* of one Bhadinath Baboo. Even granting that the signature could be proved, and ought to have been proved, this would not make the Maharajah liable, nor would it enable the plaintiff to get over the delay, not of six years' limitation which the Lower Court has given him, but of three years under the Clauses above quoted, which are those which apply to the case.

Similar remarks apply to the second portion of the claim, or that for 5,000 rupees. The petition to sue as a pauper, which may be taken as the date of the plaintiff's suit, is dated the 23rd of September 1864, or the 7th of Assin 1272. The last articles claimed were delivered some time in 1268. From the end of that year to the date of suit, more than 3 years have elapsed; and, as the Clauses above quoted apply equally to this part of the claim, the whole suit is barred, and the cross-appeal of the defendant should be admitted.

Our attention has also been given to Section 4 of the Act quoted, which requires an "acknowledgment in writing" to get over limitation; and no such acknowledgment is produced in this case.

Sham Churn Lal *versus* The Collector of Tirhoot.

A case reported at page 308 of Volume I. of the Weekly Reporter seems on all fours with the present suit, and we have also considered the case of Buldeo Doss *versus* Sreenath Sein, quoted in Mr. N. Thomson's new work on Limitation, at page 49.

The whole suit may be taken to have been brought for articles sold for the use of the Maharajah, and, as such, it should have been brought within three years from the date when each article was furnished and was not paid for.

The plea that influential Natives and Rajahs in India are in the habit of not paying their bills or adjusting their accounts for a very long time is quite futile. If that be so, which we do not either affirm or deny, it was the more incumbent to bring a suit before the total had run up to such an extravagant amount, and before limitation expired.

We are not aware of the precise circumstances under which the plaintiff was allowed to sue as a pauper, it being quite clear, from his own statement, that he must have been a man of some substance; but, having not the least doubt that the whole of his extravagant claim is barred by limitation, we dismiss his appeal, and decree that of the defendant taken under Section 348 of Act VIII. with all costs.

The 30th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Res judicata—Decision in vendor's Suit.

Case No. 174 of 1866.

Regular Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 17th February 1866.

Nadiroonissa Bebee (Plaintiff), *Appellant.*

versus

Aghur Ali Chowdhry and others (Defendants), *Respondents.*

Baboo Dwarkanath Mitter for Appellant.

Baboos Juggodanund Mookerjee and *Onookool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 17,604-9-17.

A person, who buys with her eyes open *pendente lite*, cannot maintain a suit involving a revival and re-trial of the very question decided in her vendor's suit.

Seton-Karr, J.—THE plaintiff sued, alleging that a *pro formâ* defendant was owner of some 58 beegahs of land in a rent-free mehal, and that, of the remainder, one-half belonged to the ancestor of the principal defendants, and the other half to her own vendor, Dad Ali.

On the 11th of Assar 1259, or in June 1852, Dad Ali executed a mortgage in favor of the plaintiff, who issued a notice of foreclosure on the 13th of March 1854, and after the expiry of the year of grace, or after the 13th of March 1855, the plaintiff brought a suit to render the sale absolute, and obtained a decree on the 19th of August 1863.

The plaintiff's present case is, then, that the ancestor of the principal defendants had fraudulently executed a butwara, and had usurped some 122 beegahs out of the share of the vendor of the plaintiff. Dad Ali, it appears, sued for a fair and equal partition, and to obtain possession of the excess lands, by cancelment of the fraudulent and collusive butwara; but, on the 27th of July 1853, the case was compromised on the agreement that Dad Ali was to obtain a fair half of the lands. The plaintiff's contention is that, as Dad Ali had sold his share to her prior to the decree, she has a right to be heard, and to obtain at the hands of the principal defendants an equal division of the entire mouzah.

The Lower Court has dismissed the claim, holding that she is bound by the settlement of the case agreed to by her vendor; that the matter is, in fact, *res judicata*, and that Section 2 of Act VIII. of 1859 applies. The Lower Court further holds that the plaintiff herself intervened in Dad Ali's case; that she might have been made a plaintiff then; that she was aware of all the circumstances; and that, having suffered her rights to be extinguished, she cannot revive them in the present action, and so her suit must fail on this ground, if not on other grounds.

In appeal, an endeavor has been made to show that the Principal Sudder Ameen was wrong in so ruling, and the contention has been limited to this one point above.

We are clearly of opinion that the Lower Court was quite right. She bought *pendente lite* and with her eyes open. Her claim was really decided in the suit by Dad Ali. Whether the plaintiff might not have been more successful if she had sued to carry out the old decree of 1853, obtained on a compromise by her vendor, is another question. That, however, is not her suit, and she cannot be permitted to revive and re-try the very question which that suit of her vendor had actually decided.

In this view we have only to affirm the decision, and to dismiss the appeal with costs.

The 31st January 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Alluvial Land.

Case No. 276 of 1866.

Regular Appeal from a decision passed by the Judge of Dacca, dated the 21st May 1866.

Mohinee Mohun Doss (Plaintiff), *Appellant,*

versus

Juggobundhoo Bose and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Suit laid at Rupees 8,600.

Where land came up originally from the river as a small island, and gradually joined on to the plaintiff's estate after having been taken possession of by the defendant—HELD by Trevor, J., that the Government alone was entitled to the land, and not the plaintiff to whose estate the land had joined.

HELD *contra* by Glover, J., that, as the land was an accretion to the plaintiff's estate, he was entitled to take possession of it under Regulation XI., 1825, the defendant's possession notwithstanding.

Trevor, J.—IT appears to me that the Judge is quite correct in the judgment at which he has arrived. He finds that the land is contiguous to the plaintiff's estate, and it is his opinion that it did not form as a gradual accretion to the plaintiff's estate, but that it came up a small island, and afterwards was joined on to the plaintiff's estate after it had been taken possession of by defendant. The circumstances of the locality, taken together with the evidence, seem to me also to render this the probable opinion; and, as the land has thus formed, Government, and Government alone, was entitled to it, and not the zemindar of Kootubpore, to whose land it has, working from without, now in part joined. Under this view the argument of the plaintiff drawn from Regulation XI. of 1825 will not apply. The land is no accretion to his estate; it is an island taken possession of by a party who may or may not, as against the ruling power, have a valid title, but who, as against the plaintiff, is entitled to hold it, the more especially as he holds a decree of the Special Commissioner releasing to him 1,600 beegahs of land in this locality. The defendant has, it is true, more than that quantity in his possession, but this is immaterial in the view as to the mode of the formation of the land adopted by me. I would, therefore, though I have the misfortune to differ from my learned colleague, dismiss this appeal with costs.

Glover, J.—The plaintiff in this case sued to recover possession of 2,400 beegahs of land situate in the resumed island Chur Muddun Sunker as an accretion to his purchased khas mehal, Kismut Kootubpore.

It appears that plaintiff's father bought this estate from Government in 1862; before that time a considerable part of the land now in suit had accreted, and had been claimed by the defendants as belonging to their Mehal Mozufferpore.

The Deputy Collector, Baboo Ram Coomar Bose, who made a local enquiry in 1860, a few months after the chur made its appearance, recommended that the defendants should take the accretion on the ground that they were in possession, and that the alluvion was a reformation of Mouzah Mozufferpore on its original site, and that Government should not interfere as owners of Khas Mehal Kootubpore, to which estate the new land had accreted. The Collector followed this recommendation, and released the land to the defendants on the 27th August 1860.

The Commissioner, however, refused his sanction, holding that, under Regulation XI. of 1825, the land as an accretion belonged to the Government khas mehal of Kootubpore, and directed an appeal to be made to the Judge as Special Commissioner; the plaintiff, who had in the interim purchased from Government the zemindaree right of Mehal Kootubpore, taking the latter's place in that appeal as petitioner.

The Special Commissioner rejected the application, on the ground that, under the law, Government only was entitled to sue for resumption, and the plaintiff, consequently, brought his suit in the Civil Court.

The defendants replied that the disputed land was a reformation, on its original site, of chur land, which had been released to them by the Special Commissioner in 1844, as the reformation of their Mehal Mozufferpore; and that the release by Government in 1860, being prior to the plaintiff's purchase of Kootubpore, could not be affected by it—Government, the paramount holder of both estates, not being able to sell what it had already released to others.

The Judge, in a very short and by no means lucid decision, held that the land occupied the position of Mozufferpore as released after the resumption-proceedings, and that it came up originally from the river as a small island which gradually joined on to the plaintiff's estate of Kootubpore after having been taken possession of by the defendants. He dismissed the plaintiff's suit accordingly.

The plaintiff now appeals on the general issue that the Judge has misapplied the law of alluvion; and that, as the disputed land is an accretion to his estate, he is entitled under Regulation XI. of 1825 to take possession of it, the defendants' occupancy notwithstanding.

It appears to me that this contention is sound, and is in accordance with several rulings of this Court. In the case of Khetturmonee Dossee, plaintiff, appellant, *versus* Rance Monmohinee Dabee and others, 3 Weekly Reporter, page 51, it is distinctly laid down that mere proof of identity of site (without proof of ownership) is not sufficient to defeat the right by accretion which the law gives to an adjacent owner; and again in Mr. J. Kenny *versus* Bibee Sumeeroonissa, 3 Weekly

Reporter, page 68, that proof of reformation on an old site will not suffice to establish a claim under Regulation XI. of 1825. When the land has been completely diluviated, all claim to the site is gone, and all reformations are governed by Clauses 1 and 3, Section 4 of that Regulation. There are several other rulings to the same effect, and I understand this principal to be the settled law on the subject.

Now, in the present case, it is admitted that the disputed lands were completely diluviated in 1859 and 1860, and, consequently, that, even were the site completely identified, which is not the case here, the former owner would have lost his right.

But it is contended that the proceedings of the Special Commissioner in 1844 have given the defendant a special claim. I do not see the force of this argument. Granting that that officer did grant some 1,900 beegahs to the defendant on the north side of the river as compensation for their losses on the south side, a grant which appears to me to have been wholly without warrant of law, still, as these lands have since entirely disappeared, the former owner would be in no better position than any other zemindar whose estate has been diluviated, and would have no claim to the reformed lands after alluvion, unless under some special circumstances which would distinctly prove his ownership.

It may be that the plaintiff is already in possession of all that he purchased from Government, whilst the defendants have suffered a loss of their entire mouzah of Mozufferpore. Still this would not affect the former's right to take possession (under a fresh settlement of course) of any increment that the change of a river's course would join on to his parent estate.

If there were any sufficient proof of the Judge's statement, that the disputed land first made its appearance after the second diluvion in 1861, as an island in an unfordable river, then the fact of the defendant having taken immediate possession of the same would suffice to defeat the present claim, notwithstanding the subsequent accretion, as the chur would then have belonged to Government, and Government only would have had the right to sue for it. But I can find no such proof on the record. The Deputy Collector, who visited the spot within 6 months of the reformation, distinctly states that it joined on to the plaintiff's mouzah of Kootubpore—"lukt" is the word used.

The oral evidence does not establish the fact; indeed, the only thing on which the Judge has apparently gone is the report of an Ameen who visited the spot 6 years after.

The map itself does not show it. There is, no doubt, to the north-east a half dry "sotah," which is described in the evidence as a lake or pond; but there was no trace of this to the westward when the Deputy Collector visited the spot within a few months of the accretion. Nor is there anything to show that it was ever more than a local accumulation of water on the spot where the remains of it still exist.

It is further contended that, as Government was a party to the proceedings of 1844, which proceedings gave the defendant 1,900 beegahs more or less, at or about the place where the disputed lands are now situate, the appellant, who bought the Government right, is equally bound, and cannot object to a decision which only re-places the defendants in the position then given to them by the Special Commissioner.

But this argument altogether ignores the fact that, whatever rights the defendants, as owners of Mouzah Mozufferpore, once had on the opposite chur land, have been swept away by the diluvion of 1859-60, and that the appellant has now a fresh *locus standi* under Regulation XI. of 1825, which is not affected by any orders passed under a different state of circumstances.

For these reasons I think that the appellant has made good his objections to the Judge's decision, and that the appeal should be decreed with costs.

The 31st January 1857.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Kubooleut at enhanced rate—Evidence—Presumption of uniform holding from Permanent Settlement.

Case No. 2102 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 10th April 1866, reversing a decision passed by the Deputy Collector of that District, dated the 29th December 1865.

Rajah Radha Kant Deb (Plaintiff), *Appellant,*

versus

Khema Dossee and others (Defendants), *Respondents.*

Mr. W. A. Montriou and *Baboos Anund Chunder Ghosal* and *Chunder Kalee Ghose* for Appellant.

Baboo Khetturnath Bose for Respondents.

Suit for kubooleut at an enhanced rent.

HELD by Norman, J., that the Judge was not at liberty to reject, as matters which he could wholly leave out of consideration, any of the evidence before him in a case where the witnesses were unimpeached in their general character and uncontradicted by any testimony on the other side, and where there was no improbability in the facts which they related, and that the probative force arising from concurrent testimony was the compound ratio of the probabilities of the testimonies taken singly.

HELD by Seton-Karr, J., that, as there was a break of 3 years in the period of uniform payment which would give rise to the presumption of uniform holding from the time of the Permanent Settlement, the Judge, instead of accepting the dakhilas merely because they were not denied by the plaintiff, should have found whether the dakhilas were satisfactorily proved and attested, and, if so, whether they could legally support a uniform payment for 20 years.

Norman, J.—THIS was a suit for a kubooleut at an enhanced rent. The defendant answered that she held at a fixed rent from the term of the Permanent Settlement, and was protected from enhancement under Section 384, Act X. of 1859.

In order to substantiate that defence, her agent put in dakhilas from 1841, purporting to be signed by the plaintiff or his tehsildars. Gossaidoss Pal, the defendant's agent, in his examination on solemn affirmation under Act V. of 1840, stated that his client had held all along at the same rent without variation; that dakhilas had been put in for 24 years; that there had been no pottah; and that there is a house and tank on the land which had been erected by Shisteedhur, the husband of the defendant. Shisteedhur *took* the land.

The dakhilas all bear the name of Mohendro Narain.

It was stated that Shisteedhur died 13 years ago at the age of 95 or 96. Three witnesses spoke to their belief that the dakhilas were in the handwriting or resembled the handwriting of the persons by whom they purported to have been written.

The Deputy Collector rejected the dakhilas, partly because he thought the dakhilas not proved, and partly because there was a break in the series, as the receipts for 3 years were wanting.

On appeal, the Judge, as I think rightly, held that *primâ facie* proof of a holding at a fixed rent for twenty years had been given.

No doubt, it would have been desirable that the plaintiff's witnesses should have been asked whether they admitted the dakhilas or not. That might have properly been done by the defendant by way of cross-examination. On the other hand, no single witness on the part of the plaintiff came to say that they were not genuine—no question was put in cross-examination to Gossaidoss Pal to ascertain what means, if any, he had of knowing that the land had been all along held at the same rent. He was not contradicted in any way, and, in fact, the plaintiff's own case was that the defendant was holding under a pottah of 1247.

The *primâ facie* was, therefore, unanswered, and I think the Judge was perfectly right in acting upon it, and reversing the judgment of the first Court on this point.

But then comes a far more important matter.

The plaintiff alleged that Shisteedhur held under a pottah bearing date in Assin 1247, September 1840. And the first thing that strikes me is that these receipts put in by the defendant commence from Phalgoon 1247, that is to say, February 1841. The rent in the pottah is 10 rupees sicca: the rent paid all along by the defendant and her late husband as appearing from the dakhilas is 10 rupees sicca.

The plaintiff alleged that the kubooleut was lost or mislaid, but caused to be produced in Court a document purporting to be the original pottah said to have come from the custody of Radhamonee Dossee, the sister-in-law of the defendant. The Deputy Collector found that this pottah was proved by the evidence of the witnesses.

On appeal the Judge rejected the pottah as not proved.

He says Radhamonee was summoned to produce Shisteedhur's pottah of the 31st Assin 1247. She did not herself produce it, but her servant Gopeenath on the day fixed in the summons produced it in Court. Gopeenath was not examined. Radhamonee was examined, and stated that Gopeenath brought it from her papers. She could not explain how it came amongst her papers, but declared that it had long been amongst her papers.

Commenting on this, the Judge says that Gopeenath might have been examined by the plaintiff, but was not; that Radhamonee did not say that it was found amongst her papers in her presence. He notes that she cannot read or write; that it is not asserted that Shisteedhur and Radhamonee's husband were co-sharers, or had any joint interest on the property. The Judge says, it should be shown how the document disappeared from the custody of Shisteedhur's heirs; that

he is not satisfied with Radhamonee's deposition that the pottah was ever in her possession, or ever came from Shisteedhur's possession.

Rajendro Narain Deb, the son of the plaintiff, says: That this pottah was written by Brijomohun Sircar, and sealed by himself, with the seal of Mohendro Narain Deb.

The Judge comments: "The pottah could "not have been seen by the witness from its "date till filed a period of 25 years: he "thinks that it is improbable that a witness "can recollect whether a seal, said to have "been put to a paper so many years ago, had "or had not been affixed to it by himself." The Judge says he does not impute to the witness the least intentional misstatement. It is quite possible that he fully believes his statement to be true, but the Court cannot, in the face of *such a manifest impossibility*, accept as genuine a document thus attested.

Mohendro Narain Deb states that the seal on the pottah is his. The Judge says, the Court finds the seal illegible, and, therefore, considers it cannot, on such recognition, accept the deed as genuine.

Prosunno Coomar Deb recognizes the handwriting of Brijomohun Sircar as the writer of the pottah, who is, or is said be, dead.

The Judge says that that assertion is insufficient to prove that the pottah was really given to Shisteedhur.

Bhoyrub Chunder, a servant of the plaintiff, says that Koylash Chunder gave him the kubooleut out of the deed-box of the plaintiff; that he took it to Howrah, apparently for the purpose of this suit, and lost it. *Koylash* corroborates his statement by saying that he took the kubooleut out of the box, and gave it to Bhoyrub.

The Judge says, it is very easy for the two servants to say that such a deed is found and was lost; but it is too *incredible*, and the Court cannot believe them.

Of the general character of the evidence and of the plaintiff's case, the Judge says: "The Court intends no evil imputation "whatever upon the plaintiff and his family "by this decision. It is notorious that the "plaintiff and his family are most respectable; and they would not in any way "commit themselves to a fraud knowingly; "and no doubt they thoroughly believe what "they state, but they may be mistaken. If "the pottah had come out of the custody "of the plaintiff himself or of persons of his "family" (the Judge has, perhaps, introduced the word "plaintiff" by some confusion of ideas for defendant), "the Court would be in "a different position. The plaintiff has servants under him; and, though he himself "is above all suspicion, it does not at all "follow that he may not be deceived by his "servants. The Court merely considers "that the pottah is not legally proved to be "genuine, and that it is not proved that it "ever was in Shisteedhur's possession, or "that Shisteedhur ever held the land under "pottah." Consequently, he held that the presumption arising from 20 years' payment of rent at a fixed rate was not rebutted, and, accordingly, he dismissed the suit.

The case has not been properly tried. It is really an instance of the trial and decision of a case without any regard to the evidence.

The Judge is not at liberty to reject, as matters which he can leave wholly out of consideration, any of the evidence before him in a case like the present where the witnesses are unimpeached in their general character, and uncontradicted by any testimony on the other side, and there is no improbability in the facts which they relate. The value of the evidence of each witness is a different matter. If the witness *Rajendro Narain*, in whose honesty and general truthfulness the Judge places implicit reliance, had been called to say: "I sealed such and such a pottah yesterday," no doubt, the Judge would have been at once satisfied. But, speaking, as he did, of a matter which took place 25 years ago, it is at once manifest that his memory may possibly be at fault. And the Judge might fairly be justified in refusing to act on his bare statement, especially if it were inconsistent with the facts.

But the Judge cannot say, because he speaks of matters which took place 25 years ago: I will not weigh his testimony; I will not consider whether it is consistent or inconsistent with other proofs; I will treat the case as if no such evidence had been given. And yet this is the way in which he has treated the evidence of each witness in succession.

After having ascertained the value of each fact in evidence, the Judge was bound to examine the consistency of the facts as deposed to with each other, and with the case of the plaintiff. The probative force arising from concurrent testimony is the compound ratio of the probabilities of the testimonies taken singly.

Here the concurrent testimony of the witnesses and the circumstantial evidence make

a very strong case, which has never been in any way considered by the Judge. The Judge would have done well to consider what is the alternative if the plaintiff's witnesses' allegations as to the pottah are untrue.

I will not go into the evidence in detail. That is the duty of the Judge to whom the case must be remanded for a proper trial. Several difficulties are alluded to by the Judge, which I am disposed to think that a further enquiry will enable him to clear up.

Seton-Karr, J.—I concur in the order remanding this case, though not exactly for the reasons, or on the grounds stated by my learned colleague.

I hold that the Judge has not dealt satisfactorily with the dakhilas, nor, indeed, with the whole case. It was very intelligently and satisfactorily disposed of by the Deputy Collector. There is said to be a break in the dakhilas of 3 years' period, and the Deputy Collector, who decreed the claim, found this to be the case. The Judge pronounces no opinion on this point, but accepts the dakhilas, merely because they were not denied by the plaintiff. In a case like this, I think the Judge should have pronounced on the evidence of the three witnesses to the dakhilas and on the character of the documents, and should have endeavored to make out when and by whom they were given, and what they proved in law. The decision relied on by the Judge does not seem to me to apply to a strongly contested case like this.

As regards the pottah, all I would say is that the mode and spirit in which the Judge has dealt with this evidence seems to me very unsatisfactory; and, if we were sitting in regular appeal, I have little doubt as to what we might or ought to do. But we have nothing to do with the Judge's reasons as to the credibility of the evidence, nor does it appear to me that the Judge has refused to consider, or to take into consideration, the testimony tendered for the plaintiff to prove the pottah, and so to show when and how the rent had been fixed.

But the impression left on my mind by the whole case and by the arguments which have been adduced on both sides is such that I think there ought to be an entirely fresh judgment, in which the Judge should consider, first, whether the dakhilas are satisfactorily proved and attested, and next whether, if proved, they can legally support an uniform payment for 20 years. If the evidence for the defendant fails on this point, I do not see why there should not be a decree for the plaintiff, even if the Judge should not re-consider his remarkable judgment as to the pottah.

I concur in the order of remand on the above grounds only.

The 31st January 1867.

Present:

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Appeal—Distraint—Intervention—Section 140, Act X. of 1859.

Cases Nos. 2036 to 2040 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 14th May 1866, reversing a decision passed by the Deputy Collector of that District, dated the 26th February 1866.

Shadhoo Churn Berah Surhurakar (Defendant), *Appellant,*

versus

Brojo Sautra and others (Plaintiffs), *Respondents.*

Baboos Mohendro Lal Shome and *Mohesh Chunder Bose* for Appellant.

Baboos Bungsheedhur Sein, Ashootosh Dhur, and *Nil Madhub Bose* for Respondents.

No appeal lies to the Judge from the decision of a Deputy Collector in a suit brought to contest the right to distrain, for arrears of rent, property valued below 100 Rs., in which a third party intervened under Section 140, Act X. of 1859, and claimed the right to distrain on the ground that he had been actually and in good faith in the receipt and enjoyment of the rent of the land up to the time of the commencement of the suit, and in which any remarks which the Deputy Collector may have made on the evidence of title which one of the parties chose to lay before him are in no sense whatever a determination on a question of title.

Markby, J.—In this case we are of opinion that the Judge had no jurisdiction. The original suit was brought to contest the right to distrain property for arrears of rent. In that suit a person other than the distrainer intervened under Section 140 of Act X. of 1859, and claimed the right to distrain on the ground that he had been actually and in good faith in the receipt and enjoyment of the rent of the land up to the time of the commencement of the suit. The Deputy Collector, who tried the suit, it is admitted, laid down the proper issue and heard the evidence of the original

distrainer in support of his allegation that he had been in the receipt of rent. The intervenor, in answer to this case, went into evidence of his title, which the Judge remarked upon as unsatisfactory, and decided this issue in favor of the original distrainer.

The value of the property did not exceed Rupees 100, but an appeal was laid to the Judge, who reversed the decision of the Deputy Collector.

It is now objected on special appeal that the Judge had no jurisdiction. The special appellant, who is the ryot, contends that an appeal lies, because a question relating to a title to land or to some interest in land as between parties having conflicting claims thereto has been determined by the judgment of the Deputy Collector. But we are clearly of opinion that no such question has been determined. The only determination of the Deputy Collector is upon the issue before him, and any remarks which he may have made on the evidence of title which one of the parties chose to lay before him are in no sense whatever a determination on a question of title.

We consider this conclusion entirely in accordance with the Full Bench Decision reported in 3 Weekly Reporter, Act X. Rulings, page 21; it is not, therefore, necessary for us to make any observations on the other cases which have been referred to, namely, those reported in 3 Weekly Reporter, Act X., 27; *ib.* 155; and 4 Weekly Reporter, Act X., 34; but we may remark that two of them at least, if not the third, are, in our opinion, distinguishable.

We, therefore, think that the Judge had no jurisdiction to hear this appeal, and that the decision of the Deputy Collector was final, and must stand. But, as the parties did not take this objection in the Lower Court, no costs in this Court will be allowed to the appellants.

The appeals are all decreed without costs.

The 31st January 1867.

Present:

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Section 138, Act VIII. of 1859—Records of other suits.

Case No. 1968 of 1866.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 20th April 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 9th September 1865.

Heeramun Roy and others (Plaintiffs), *Appellants,*

versus

Kazee Tahoour Enam and others (Defendants), *Respondents.*

Mr. Jackson for Appellants.

Baboo Dwarkanath Mitter for Respondents.

A Judge is not *bound*, under Section 138, Act VIII. of 1859, upon the application of any of the parties to a suit, to send for the record of any other suit.

Seton-Karr, J.—We have heard Mr. Jackson, the Counsel for the appellant, at considerable length in this case.

One point much pressed on us was that the Judge should not have refused to admit, or should have sent for, certain decisions which would have shown clearly that Ram Purkash Singh, the Raja of Buxar, had a right to grant the pottah at the very time when the Judge finds that he had no such right. It is said that these decisions show that the property had reverted to him on the 19th of July 1863, and not in 1864, as held by the Judge, the pottah being granted in August 1863.

On this point we observe that, in the first place, it is not shown to us what documents were presented to the Judge, or what he was asked to receive or do. But, granting that an application was preferred before him to send for certain records in other suits, we do not think that the Judge was bound to do so under Section 138 of Act VIII. In support of the position that the Judge was bound to send for the record and had no discretion, the learned Counsel relied on a decision printed at page 70 of the Legal Remembrancer, 21st June 1864, case of Rughoonath Bose.* But we observe that only one Judge (Norman, Officiating Chief Justice) ruled that a Judge had no discretion at all, but that he was bound to exercise the power given by the Section. The other Judges (Steer and Kemp, JJ.) both were of opinion that the Court had a discretion, and was not bound to send for any such record, though Mr. Justice Steer held that, under the particular circumstances, it was but fair to the plaintiff that the evidence wanted should have been sent for.

On this point, then, we see no grounds for interference, and must hold that, if such an application was made, the Judge only exercised that discretion to which he had a right.

* *See* Sutherland's Full Bench Rulings, p. 177.

Then it is said that the Judge's opinion was warped, and his judgment wholly vitiated by the alleged error as to the time when the property reverted to Ram Purkash Singh; and that the finding as to the fraud, mainly arrived at from the mistake in the date in question, was not based on any legal evidence. But, granting that the Judge may have been mistaken as to the precise time when Ram Purkash was in a position to grant such a pottah, the judgment proceeds on several grounds as to fraud. The Judge finds that the deed was never registered; that the witnesses to the execution are not worthy of credit and give conflicting accounts; that the pottah was never produced until the defendants attempted to get possession of their purchase; and that the lease was granted at a reduced jumma for a period beyond Ram Purkash's settlement.

All the above were good and legal grounds, and were sufficient to warrant the Judge in coming to the conclusion which he arrived at; and we do not think that there is anything for which we ought to remand the case, or exercise any interference.

The appeal is dismissed with costs.

The 31st January 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Re-sale in execution of decree—Appeal—Section 254, Act VIII. of 1859—Forfeiture for default—Rights of judgment-debtor.

Case No. 665 of 1866.

Miscellaneous Appeal from an order passed by Mr. W. Ainslie, Judge of Patna, dated the 1st August 1866, modifying an order passed by the Principal Sudder Ameen of that District, dated the 22nd March 1866.

Joobraj Singh (Decree-holder), *Appellant,*

versus

Gour Buksh Lal and others (Judgment-debtors), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Chunder Madhub Ghose, Khettur Mohun Mookerjee, and *Mohesh Chunder Chowdhry* for Respondents.

An appeal lies from an order holding the first defaulting purchaser liable for the difference arising from re-sale in execution of decree under Section 254, Act VIII. of 1859.

According to that Section, the property must be put up again for sale on the purchaser failing to make deposit, and it is the deposit only which can be forfeited, and not any right which a decree-holder may have under his decree.

In the case of a re-sale, the judgment-debtor is entitled to credit for the full amount bid for his property at the time of the first sale.

Loch, J.—Ram Bhujjun and Joobraj held a joint-decree against Gour Buksh Lal, and on 15th May 1863 gave a vakalutnamah to Anwar Ally and another pleader of the Principal Sudder Ameen's Court, to carry on the execution-proceedings against the judgment-debtors, and, in the event of a sale of the debtor's property taking place, to bid for it to the extent of the amount of the decree. On 20th May 1863, one Luchmun Pershad, having previously purchased a 4-annas share of the decree from Joobraj, applied to have his name substituted for that of his vendor, which was done. Ram Bhujjun sold his half share in the decree to Dowlut Singh, and the two purchasers appointed their own vakeels to carry on execution.

The debtor's property was sold on 29th September 1863, and Anwar Ally, acting on the power given by Joobraj and Ram Bhujjun on 15th May, though he knew that the former had only a 4-annas share in the decree, and the latter none, for it was through him that the substitution of names was effected, bid for the property which was knocked down to him for Rupees 4,000; but, on his proposing to file a receipt, he was opposed by the other judgment-creditors, who informed the Court that Anwar Ally had no authority to bid for them, that they held 12 annas of the decree, and Joobraj, whom Anwar Ally represented, held only 4 annas, and they objected to a receipt being taken. The Principal Sudder Ameen did not take the receipt of Anwar Ally, but, in utter disregard of the provisions of the Code of Procedure, instead of immediately putting up the property again for sale as directed in Section 253, allowed matters to remain as they were till the 14th January 1864, on which date he cancelled the sale, as the auction-purchaser had failed to make good the price, and ordered a fresh sale to be made which realized only Rupees 2,600. The debtor then paid in Rupees 1,300, the balance of his debt, in excess of the 4,000 rupees originally bid at the sale, and asked the Court to relieve him from further liability, the decree as against him having been fully satisfied.

The first Court released the debtor and forfeited the share of Joobraj in the decree which was equal to the amount of deposit

which should have been paid by him at the time of the first sale, and declared him liable for the difference in the price between the first and second sales.

From this order Joobraj appealed. Luchmun Pershad also appealed against so much of the order of the Principal Sudder Ameen as released the judgment-debtor. The Judge, in modification of the order of the Lower Court, has held the debtor and the creditor Joobraj jointly liable for the balance of the debt, *i. e.*, the difference between the sum bid at the first sale Rupees 4,000, knocked down to Anwar Ally on account of Joobraj, and Rupees 2,600 bid at the second sale, which appears to have been conducted with due regularity, and has been confirmed.

From this order an appeal has been preferred by Joobraj, and cross-appeals are taken by Luchmun Pershad and Dowlut Singh under the provisions of Section 348. A preliminary objection to hearing the appeal of Joobraj is taken that an appeal will not lie, for he is seeking redress against his co-decree-holders to set aside an order passed in their favor. As, however, Joobraj has been declared liable to pay the difference in the price at the two sales to his co-decree-holders, which sum is under Section 254 to be levied from him under the rules for enforcing the payment of money in satisfaction of a decree of Court, we think, as was held by us in the case of Sooruj Buksh Singh, reported in 6 Weekly Reporter, page 126, Miscellaneous, that, as regards this sum, he must be considered in the light of a judgment-debtor, and, as such, has a right of appeal, and we reject the objection raised by the opposite side.

The ground on which Joobraj seeks to be released from the payment of the difference in the price bid at the two sales, and to have the order forfeiting his 4th share of the decree set aside, is that the power given by him and Rum Bhujjun, though not formally withdrawn, had been virtually cancelled by a change of circumstances of which Anwar Ally was fully aware, and that he, consequently, had no authority to bid for him, Joobraj.

In this case the late Principal Sudder Ameen has shown an utter disregard of the rules of procedure laid down in Act VIII. of 1859, and by his neglect has, in all probability, caused serious injury to some of the parties connected with the execution of this decree. It is now impossible to put back the parties to their original position, and we find it difficult to pass any order likely to prove satisfactory to them. We find that the bid of Anwar Ally at the first sale was not followed by the acceptance of his receipt on behalf of the decree-holder Joobraj; for the Principal Sudder Ameen in his proceeding of 14th January 1864 distinctly holds that Anwar Ally had not power to bid for Joobraj, and we find from the Judge's proceedings in this case that no receipt was given. Under these circumstances we do not concur with the Lower Court in thinking that the fourth share of the decree belonging to the decree-holder Joobraj, and equal to the amount of deposit which should have been made by Anwar Ally, when the lot was knocked down to him, and his receipt not accepted, is liable to forfeiture. The law is distinct on the point, and why the Principal Sudder Ameen failed to follow the course required by law to put up the property again for sale on the purchaser failing to make the deposit, we cannot discover, nor is any explanation offered. But, at any rate, no deposit was made, and, as provided by Section 254, it is the deposit only which can be forfeited, and not any right which a decree-holder may have under his decree, and which the Lower Courts, in their ideas of doing substantial justice, chose to consider an equivalent for the deposit that ought to have been made by the purchaser. We think, therefore, that so much of the order which declares Joobraj's fourth share of the decree to be forfeited must be set aside.

We next come to the authority of Anwar Ally to bid for the decree-holder Joobraj. The authority given to him had not been formally revoked; but he knew perfectly well that, when he bid at the sale, that Joobraj and Ram Bhujjun were no longer proprietors of the decree, for he had himself assisted in effecting the transfer of names in the Court of the Principal Sudder Ameen. He bid in the name of Joobraj, who had, at the time of sale, only a fourth share in the decree, but he bid as acting for all the decree-holders, though Luchmun Pershad and Dowlut Singh had given him no authority to act for them. We consider, therefore, that Anwar Ally was acting without due authority, and that his acts cannot be held to bind Joobraj.

As regards the order of the Judge making the judgment-debtor jointly liable with Joobraj for the difference between the first and second sale, for that is the only sum now due, we think the Judge is wrong. The

judgment-debtor is entitled to credit for the full amount bid for his property at the time of the first sale, and, if he pay up any balance due to the decree-holder in excess of the sum so bid, he must be considered as having liquidated his debt, and cannot be held responsible for any further sum. The difference between the first and second sale must be realized, not from the judgment-debtor, who is also an appellant in this case, but, as provided by Section 254, from the defaulting auction-purchaser. Under the view of the case taken above, we reverse the orders of the Lower Courts, but, under the circumstances, we shall leave the parties to pay their own costs.

The 15th December 1866.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Registration.

Special Appeals from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 14th April 1866, reversing a decision passed by the Second Principal Sudder Ameen of that District, dated the 12th February 1866.

Case No. 1250 of 1866.

Monmohinee Dossee and others (Defendants), *Appellants,*

versus

Bishen Moyee Dossee (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Ashootosh Dhur* and *Bykuntnath Paul* for Appellants.

Baboo Dwarkanath Mitter for Respondent.

Case No. 1434 of 1866.

Bishen Moyee Dassee (Plaintiff), *Appellant,*

versus

Mussamut Delshad Bebee (Defendant), *Respondent.*

Baboos Dwarkanath Mitter and *Khelturnath Bose* for Appellant.

Baboo Bykuntnath Paul for Respondent.

There is no provision in Act XVI. of 1864 obliging or empowering a Registrar to register a deed after the expiry of the time specified in Section 18, whether under a decree of Court or otherwise, except in cases which come under the provisions of Section 15.

Loch, J.—THE plaintiff took a putnee from the defendant Delshad Bebee on 11th Jyet 1272 (May 1865), which is the date affixed to the written lease. The defendant Monmohinee also got a putnee lease of the same property from the same zemindar, which bears date 24th Assar 1272 (June 1865) which was duly registered under the provisions of Act XVI. of 1864.

In September 1865 the plaintiff brought the present suit against the zemindar to compel her to register the lease, and to set aside the subsequent putnee lease given by her to Monmohinee. The Judge in appeal held that, as the plaintiff had not applied to the Registrar to register the deed, and had her application refused by him, he could not, as provided by Section 15, Act XVI. of 1864, direct the registration to be made, as the lessor was unwilling to have it made. He, however, remanded the case to the first Court, with instructions to the Principal Sudder Ameen to allow the plaintiff to prove the existence of the lease by parol testimony, if able so to do.

Both lessees have appealed from the order of the Judge, the plaintiff on the ground that the Judge should have directed the registration to have been made, and the defendant on the ground that, as the plaintiff's title-deed was inadmissible in evidence, the Judge was wrong in allowing her to prove the existence of the lease by secondary evidence.

It is contended before us that the Judge was wrong in supposing that he was unable to pass a decree enforcing registration irrespective of the provisions of Section 15 of Act XVI. of 1864; and we think that, had the suit been brought in time, and a decree passed within the period allowed for registration in Section 18 of the Act, *viz.*, four months from the date of execution of the deed, an order compelling the lessor to appear and register the deed might have issued; but we cannot find anywhere in the Act any provision to oblige or empower the Registrar to register a deed after the expiry of the time specified in Section 18, whether under a decree of Court or otherwise, except in cases which come under the provisions of Section 15. The terms of the Act are imperative; and, as the period for registration has long since elapsed, we can now make no order enforcing registration. It is urged that the periods fixed in Section 18 relate to cases where no dispute arises; that it might so happen that a party brought a suit to enforce registration, and that judgment was passed within three months from the date of institution, still the case might be taken

up in appeal and remain pending beyond the period provided in Section 18. If the result of that appeal were favorable to the party seeking to enforce registration, it would yet be worth nothing, if the opinion of the Court be correct, and an honest purchaser would thus be left without remedy.

The case may or may not be hard, but we fail to see that the law has made any provision for it. The law says nothing about cases where no dispute arises, and others where the assistance of the law is sought to enforce registration.

With regard to the second point, we think that the course which the Judge directed the first Court to pursue, *viz.*, to allow the plaintiff to prove her title by parol evidence, is erroneous, and utterly subversive of the object of the Registration Act. Where a party comes into Court resting his claim on a written title which the law requires to be registered, he cannot, when he has failed to register, and is in consequence unable to use his title-deed, turn round and say, I can prove my title by secondary evidence. It would be useless to have a compulsory Registration Act if such a course were open to suitors. We think, therefore, that the Judge's order of remand must be set aside, and that the plaintiff's suit must be dismissed with all costs. Order accordingly.

The 1st February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Appeal—Sale in execution—Section 270, Act VIII. of 1859.

Case No. 2275 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 9th February 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 22nd July 1865.

Raja Ram Chowdhry and others (Defendants), *Appellants,*

versus

Seetula Buksh Misser and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Mahesh Chunder Chowdhry* for Appellants.

Mr. C. Gregory and *Baboo Kedarnath Chatterjee* for Respondents.

Where a second decree-holder is himself purchaser of a property sold in execution of his own decree, and, instead of the money being deposited in Court, an order is obtained allowing the decree-holder as purchaser to pay the purchase-money by his decree being taken as a credit on account of the purchase, such order is not open to appeal under Section 270, Act VIII. of 1859.

Bayley, J.—PLAINTIFF sues as first decree-holder against the defendant as second decree-holder to recover sums of money under plaintiff's decree, and to set aside a prior miscellaneous order.

In this case the only matter really to be decided is, whether, in a case where a second decree-holder is himself purchaser of a property sold in execution of his own decree, and where, instead of the money being deposited in Court, an order is obtained that the decree-holder as purchaser may pay the purchase-money, by his decree being taken as a credit on account of the purchase, such order can be open to appeal under Section 270, Act VIII. of 1859, and the precedent of this Court,* Legal Remembrancer, 4th July 1864, page 99 (Trevor and Steer, JJ., Levinge, J., dissenting).

The following facts are admitted:—

1st.—That the plaintiff was the *first* decree-holder, and took out the *first* attachment; and that such attachment was never withdrawn by the first decree-holder.

2nd.—That the plaintiff entered no claim or protest at the time of sale at which defendant as a second decree-holder purchased.

3rd.—That, in the face of the sale-proclamation of 22nd January 1863, it was stated that the sale was to be held for the satisfaction of the decree of the defendant, *second* decree-holder.

The Lower Appellate Court decreed the plaintiff's case. His judgment is as follows:—

"It is urged that the decision of 4th July "1864 bars the suit. I think not, in this case. "The defendant paid himself, *without any* "*order of Court* determining the party en- "titled, and the sale-proceeds never came "into the Court at all."

"It is quite true that the Court sanctioned the "purchase by the decree-holder at whose suit "the property was sold, namely, the defendant, "and allowed him as usual in such cases to set "off his decree against the purchase-money; "but this was not, as I take it, an order decid- "ing between rival claimants, but rather the "defendant, whether unintentionally or by a

* Reported in Sutherland's Full Bench Rulings, p. 180.

"trick, deceived the Court into passing an "order which is constantly passed as a mat- "ter of form, and has no right to claim "under it as a bar to any suit by plaintiff. "That a deliberate order deciding between "two decree-holders, though wrong and pal- "pably wrong, may not form the ground of "suit, would appear to be the case under "the precedent quoted; but I cannot consent "to extend that ruling to every *ex parte* "miscellaneous order passed without inform- "ation, whether that be purposely or acci- "dentally withheld."

We have fully heard Counsel on both sides. It is urged for the special appellant that the *form* of payment, whether by a transfer to credit (which the Judge himself admits is usual) or by cash deposit, is immaterial; that the law and the above-cited precedent must be followed; that it is laid down in both that a first decree-holder cannot sue to recover moneys from a second decree-holder on the allegation that those moneys would have reached the first decree-holder.

On the other hand, it is contended that the law looks to the money being deposited; that this was not done here; that is, had it been according to law, the plaintiff, as first decree-holder, might have had notice, while by this paper-transfer he had none; and that this constitutes a difference which renders Section 270 and the precedent cited inapplicable to the facts of this case.

We cannot admit that the mere letter of the law, and the forms upon which the argument of respondent rests, can be our guide in deciding this case.

We cannot think that in *reality* and *substantially*, or by legal practice, the transfer on account, instead of the deposit of the money, makes the difference contended for, or makes that illegality or inapplicability of Section 270 and of the precedent cited, which are contended for by respondent.

There was *no* objection taken at the sale on behalf of the *first* decree-holder. Thus, the second decree-holder was so far the legal purchaser who paid his money in one shape instead of another, the payment, however, being full and sufficient to cover the sums due.

Can, then, such legal purchaser be proceeded against by the first decree-holder, with a view to make the former pay the latter moneys paid for the purchase?

We are of opinion, after careful consideration, that Section 270 and the precedent cited give no such remedy. The remarks of Mr. Justice Levinge are relied on by the pleader for special respondent as containing the arguments he wishes us to consider.

We have so viewed the opinion of that learned Judge, but think the opinion of the majority (Trevor and Steer, JJ.) the legally correct opinion in that case for the reasons stated by them.

Therefore, in accordance with the precedent cited, and with Section 270 on which it is founded, we decree this special appeal with costs.

The 1st February 1867.

Present:

The Hon'ble J. P. Norman and W. Markby, *Judges.*

Ryots with rights of occupancy—Creation of intermediate tenures by—Non-transferable tenures (Transfer of).

Case No. 2481 of 1866.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Hooghly, dated the 15th August 1866, reversing a decision passed by the Moonsiff of that District, dated the 28th March 1866.

Hureehur Mookerjee (Plaintiff), *Appellant,*

versus

Jodoonath Ghose (Defendant), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Khetturnath Bose for Respondent.

A tenant having a right of occupancy cannot create an intermediate tenure between himself and the zemindar.

If a ryot, not having a transferable tenure, quits possession, makes over his interests, and gives over the land to a third person, he may be treated as having abandoned all rights formerly possessed by him in the land. When a purchaser takes possession of a non-transferable tenure, and interposes himself between the zemindar and the ryots on the land, he thereby commits a wrong, and the zemindar may sue to declare that no interest is vested in such purchaser, or to restrain him from interfering with the collection of rent.

Norman, J.—In this case the plaintiff Hureehur Mookerjee, the talookdar, sued to set aside the sale of a tenure within the talook to which the defendant Jodoonath Ghose laid claim as purchaser, upon the ground that the tenure was not transferable.

The Principal Sudder Ameen, reversing the decision of the first Court, dismissed the suit, holding that the predecessor in estate of the plaintiff had recognized Jodoo-

nath Ghose as the purchaser, and entitled to the tenure in dispute by accepting rent from him. He says the defendant had "obtained dakhilas in his own name. He has "filed the dakhilas for 1266, 1267, and 1268, "in this case. They were granted by the "former talookdar from whom the plaintiff "acquired his rights by private purchase."

On this point it is objected, on special appeal before us, that the dakhilas are not proved; and, on examination of his written statement, we find that they are not distinctly alleged by the defendant to be receipts which he had obtained from the former talookdar. He merely alludes to documents put in, amongst which are these receipts. They are not shown to have been receipts signed by the late talookdar by the evidence of any of the witnesses called in the case; and it has also been pointed out by the appellant's vakeel that they purport to be given in the name of a dead man.

The Principal Sudder Ameen will, therefore, take up and try the question whether the receipts are genuine, and whether they were really given by the former talookdar, or by his authority.

It is next objected that the Principal Sudder Ameen is wrong in determining that the tenure is transferable, or at any rate that the grounds on which he has so decided are insufficient.

He says: "The possession of the tenant "has been from a great length of time, even "upwards of 30 years. Such a tenure, al"though it might not be a mourosee one, is "still transferable in these parts of the country "under local usage." He continues: "The "Lower Court has not taken evidence on the "point, but our experience from past cases "bids us so to declare."

He has, therefore, determined that local usage makes a tenure transferable simply because it existed for a period of thirty years. He certainly cannot do that in any case, without taking evidence as to the custom. In this particular case, there is nothing to show what was the real nature of the tenure. We cannot assume that the defendant had any right of occupancy under Section 6 of Act X. of 1859; there is nothing to show that the defendant's predecessors were ryots; and, therefore, it is not necessary for us to express any opinion as to whether the Court in the case of Taramonee Dossee *versus* Birressur Muzoomdar (1 Weekly Reporter, 8th September 1864, p. 86) was right in determining that a right of occupancy is a transferable tenure. But we may observe that, in the present case, the former holders were in possession of a house, and resided on the land. By selling their rights to the now defendant, who does not occupy himself, they appear to us to be endeavoring to create an intermediate tenure between themselves and the talookdar. Whatever may be the rights of a person to whom a tenant having a right of occupancy transfers his title with possession, we think that a tenant, having a right of occupancy, is not at liberty to create such a new estate.

On cross-appeal it is objected that the Principal Sudder Ameen has not determined whether the tenure was mourosee or not. It is clear that this objection on cross-appeal is well founded; and, the reasons of the Principal Sudder Ameen being insufficient to found a decree upon them, it will be necessary for him to try that question.

Lastly, it is objected on cross-appeal that the plaintiff in this suit has no right of action. We are of opinion that, assuming the plaintiff to make out the allegations in his plaint, it does not disclose a cause of action. If a ryot, not having a transferable tenure, quits possession, makes over his interests, and gives over the land to a third person, he may be treated as having abandoned all rights formerly possessed by him in the land. His position is similar to that of a tenant-at-will, whose interest and tenancy at will are determined by his quitting the land. When a purchaser takes possession of a non-transferable tenure, and interposes himself between the zemindar and the ryots on the land, he, by that act, commits a wrong; and one mode open to the zemindar to redress that wrong must clearly be by a suit to declare that no interest is vested in such purchaser, or to restrain him from interfering with the collection of rent. In this case we find the plaintiff suing for rent and intercepting money which should have come to the hands of the zemindar.

With the above remarks, the case is remanded.

The 1st February 1867.

Present:

The Hon'ble L. S. Jackson, *Judge*.

Registration.

Case No. 26 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of East Burdwan, dated the 9th January 1867.

Rashbeharee Baboo and others (Defendants), *Appellants,*

versus

Gooroo Dass Baboo and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Dwarkanath Mitter* for Appellants.

No one for Respondents.

No appeal lying against a decree made under Section 53, Act XX. of 1866, the petition was directed to be returned with a view to its being presented to the Court, if desired, by way of motion.

Deputy Registrar.—THIS is an appeal against a decree of the Lower Court made in a case under Section 53, Act XX. of 1866.

According to Section 55 of the said Act, there is "no appeal against any decree or order made under Section 53."

As this is the first appeal of the sort, I beg to submit it for the orders of the Judge presiding in the Miscellaneous Department.

Jackson, J.—The vakeel for the petitioner has not appeared. By Section 55, Act XX. of 1866, no appeal lies against a decree made under the 53rd Section. This petition, therefore, must be returned to the vakeel, who, if he thinks fit, may present it to the Court by way of motion.

The 1st February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale in Execution.

Case No. 2454 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 29th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 7th April 1866.

Munnoo Lal (Defendant), *Appellant,*

versus

Choonee Sahoo (Plaintiff) and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter, Mohesh Chunder Chowdhry, and *Kalee Kishen Sein* for Appellant.

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Respondents.

A sale in execution of a decree was set aside by a subsequent decree of 9th March 1861, but was afterwards allowed to stand by an order of 7th May 1862. As no suit was brought to set aside the latter order, it was held to be a final judicial proceeding, and the sale declared to be good and valid.

Bayley, J.—THE defendant is special appellant, and is also the purchaser from another defendant, judgment-debtor.

In this case plaintiff sued for possession of a 5-anna 4-pie share of 16 annas of Mouzahs, Therdia, Pergunnah Betya, and to be registered as proprietor, alleging his title under a purchase of the 5th March 1860, in execution of a decree obtained by Maharajah Mohun Buksh Singh.

Defendant's case is that he purchased at a sale in execution the shares of Kishen Pershad, Ramnarain Pershad, and Thakoor Pershad, in 5 annas 4 pie of the property in dispute, and that plaintiffs purchased with notice of defendant's purchase.

The first Court gave plaintiff a decree for 2-1-12 of their rights and interests sold as those of (1) Gobind Pershad Singh, (2) Rugoonath Pershad Singh, (3) Rameshur Pershad Singh, (4) Kishen Pershad Singh, (5) Thakoor Pershad Singh, with reference to an order or decision of the Zillah Judge of 7th May 1862.

It is admitted by all parties that, by an arrangement between the parties recorded in Court, this order or decision decreed that the sale was to stand which had been set aside by a previous decree of 9th March 1861.

The Lower Appellate Court held this order or decision of the 7th May 1862 to be collusive and of no effect, and that the sale had been duly set aside previously. The Lower Appellate Court gave plaintiff a decree for the whole claim.

Defendants appeal specially, and indeed their whole contention may be summed up in the plea that the order or decision of the 7th May 1862, allowing the sale to stand, is a final legal proceeding, and that the sale can no longer be held to have been set aside.

After hearing Counsel on both sides and referring to the record, we think this contention is right. The proceeding of the 7th May 1862 was a regular judicial proceeding. The admissions and compromise of the parties are in no way legally proved to be collusive or otherwise than real; plaintiff never sued to set aside the above proceeding. In this view the sale to defendant must be deemed a good sale, and the purchase of defendant is under it a good and valid purchase. Therefore, the decision of the Lower Appellate Court is reversed, and the order of the first Court affirmed. We ex-

press no opinion as to plaintiff being debarred or otherwise from taking such other action as he may be advised.

The 1st February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Mesne Profits—Pre-emption.

Case No. 247 of 1866.

Application for review of judgment passed by the Hon'ble Justices Trevor and Glover, on the 21st March 1866, in Special Appeal No. 3485 of 1865.

Emamooddeen Sowdagur (Defendant), *Petitioner,*

versus

Abdool Sobhan and others (Plaintiffs), *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Mr. R. E. Twidale and *Moulvie Syud Murhumut Hossein* for Opposite Party.

A claim to mesne-profits due before the date on which a right to pre-emption arose cannot form the subject of pre-emption.

Trevor, J.—It appears doubtful whether the Court should not have restricted the decree of the Principal Sudder Ameen to possession of the land conveyed to the plaintiff by the decree sold to him, and not have allowed him to include in it wassilat which is not the subject of pre-emption, and also whether we should not have remanded the case to the Lower Court for taking evidence on and deciding properly the plea of limitation raised as regards the land not covered by the decree. Call on the other party to show cause why a review on these points should not be admitted.

Judgment.

After cause was shown by Mr. Twidale on the part of plaintiff why a review on the points noted should not be admitted, it seemed clear to the Court that, on the first point, a review should be admitted. It was accordingly admitted and argued before us. After looking into the authorities, we are clearly of opinion that the claim for mesne-profits, due before the date on which the right to pre-emption arose, cannot form the subject of pre-emption. We, therefore, strike out of the Principal Sudder Ameen's decree the words "with waasilat," and declare the plaintiff entitled only to possession of the lands claimed. As to the sum which he must pay, we think, under the circumstances, that 400 rupees must represent the value of the land only, and this the more, inasmuch as defendant's vendor valued the land in the suit which he brought against his debtor at 450 rupees. The decree will, therefore, stand thus: Plaintiff, on the payment of 400 rupees within one month, will obtain possession of the disputed lands from the purchaser defendant.

As to the second objection, that is of no weight. The plaintiff admits that his suit is confined to the 1*d.*-8*k.*-1-1-1 of which possession was acquired by defendant; under the decree so limited as to plaintiff's claim, the defendant's objection disappears. Both parties will bear their own costs in this application.

The 2nd February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Damages—Malicious prosecution.

Case No. 2823 of 1866.

Special Appeal from a decision passed by Mr. S. DeCosta, Principal Sudder Ameen of Maunbhoom, dated the 22nd August 1866, reversing a decision passed by Baboo Nund Coomar Aykal, Officiating Moonsiff of Chowkey Satna, dated the 5th March 1866.

Ramjeebun Mookerjee (Plaintiff), *Appellant,*

versus

Wooma Churn Hajrah (Defendant), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Damages may be recovered for injury to one's reputation.

Peacock, C.J.—It is found by the Lower Court that a charge of theft was made by the defendant against the plaintiff maliciously and for the purpose of injuring his reputation, and that, in consequence of that charge,

the plaintiff's house was searched. Under these circumstances, the Lower Court awarded damages to the extent of 100 rupees.

The Lower Appellate Court held that, as no actual damage was shown to have been sustained by the plaintiff, no damages could be awarded.

On this point we think that the Lower Appellate Court was wrong, and that the plaintiff was entitled to recover damages for the injury to his reputation.

The decision of the Lower Appellate Court is, therefore, reversed with costs, and the decision of the first Court restored.

The 2nd February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale by Mother to Daughter—Fraud—Onus probandi.

Case No. 2564 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 7th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 12th December 1865.

Keshub Chunder Sein (Defendant), *Appellant,*

versus

Vyasmonee Dossia (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboo Tarucknath Sein for Respondent.

Where a mother conveyed her property to her daughter, and the property was afterwards attached in execution of a decree against the daughter—HELD that the mother could not obtain a re-conveyance of the property; on the ground that the conveyance to the daughter was for the purpose of defrauding the mother's creditors, and that the *onus* was on the mother to prove that the decree against the daughter was a fraudulent contrivance to deprive the mother of possession of the property.

Norman, J.—THE plaintiff in this case alleges that, being in possession of 12 annas of a certain talook, the defendant, having fraudulently obtained a decree against the plaintiff's daughter, attached the property. The present suit was brought to set aside an order rejecting the claim of the plaintiff in the Execution Department.

The Principal Sudder Ameen has decreed the claim; but, as it appears to us, he has wholly mistaken the nature of the issues which he had to try.

The defendant showed that, by a kubalah dated the 3rd of Chyet 1253, which was registered on the 6th of April 1847, the now plaintiff conveyed the property in suit to her daughter Suhochuree.

The plaintiff nowhere in her plaint, or by a written statement, or otherwise, alleges that the deed was not executed by her. The Principal Sudder Ameen objected that the defendant had brought a copy of the kubalah, but had not produced the original. The original is, however, probably in the custody of the debtor, and not within the reach of, or accessible to, the execution-creditor in this suit. If the kubalah was executed—and we are bound to assume that it has been, it having been registered—it lies upon the plaintiff to impeach it. As far as we can see, the only way she does that is by attempting to show that she has been always in possession of the property, notwithstanding the kubalah of 1253.

It appears, however, by the decision of the Lower Court, that Ram Judoo, the husband of Suhochuree, did at any rate collect rents from the mehal. If the deed was executed for the purpose of defrauding the creditors of the now plaintiff, it would not be open to her, in any suit against Suhochuree, to obtain a re-conveyance of the property; and we think that all the rights which Suhochuree had to resist the claim of the plaintiff, on the ground that she could not set up her own fraud, are equally open to the creditors of Suhochuree.

The plaintiff alleges that the decree sought to be executed by the present defendant, Keshub Chunder Sein, as the representative of Kishoree Mohun, the son of Beneerooj, was a fraudulent decree obtained in collusion with the husband of Suhochuree, for the purpose of depriving the plaintiff of possession of the property. If the plaintiff can prove that the decree is a fraudulent contrivance set up for this purpose, she may succeed; but the *onus* of proving such a case must be thrown on plaintiff. The *primâ facie* title was in the judgment-debtor; and, until it can be shown by clear evidence that the plaintiff has a better right by long and exclusive possession or otherwise, that title is available for the benefit of the creditors of Suhochuree.

With these remarks the case is remanded.

The 2nd February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Suit by Reversioner against Hindoo Widow (to prevent waste).

Cases Nos. 2398 and 2440 of 1866.

Special Appeals from a decision passed by the Judge of Patna, dated the 7th August 1866, reversing a decision of the Principal Sudder Ameen of that District, dated the 13th March 1866.

Chummun Mohunt and others (Defendants), *Appellants,*

versus

Rajendur Sahoo (Plaintiff), *Respondent.*

Mr. R. E. Twidale, Moonshee Ameer Ali, and *Baboos Mohendro Lal Shome* and *Romanath Bose* for Appellants.

Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, and *Mohes Chunder Chowdhry* for Respondent.

A reversioner in the position of son or step-grandson may sue in the lifetime of a Hindoo widow in possession to prevent waste.

Seton-Karr, J.—THE only point raised and argued by Mr. Twidale is that the plaintiff had no right to sue during the lifetime of his mother and step-grandmother. No precedents are quoted in support of this position, except one from 2 Hay's Reports, page 608, case of Pran Puttee Koer.

Other cases have been shown us which rule that a reversioner, such as plaintiff, may sue in the lifetime of a widow in possession, in order to prevent waste and obtain a declaratory decree. (*See* S. D. A. Rep. for 1859, page 1623, and 1 Hay's Reports, page 107, 2nd August 1862, Chutturdharee Sing *versus* Hurrocoomaree.)

But in the very case relied on by the appellants from 2 Hay's Reports, page 608, we find a passage which tells strongly against the appellants, and which gives good reasons why a plaintiff, such as the one before us, can institute a suit as reversioner.

In that case, page 611, the Court (Peacock, C.J., and L. S. Jackson, J.) say: "The plaintiff would, indeed, have a right "to sue and restrain the widow from waste; "but his right to do this arises less from "the necessity of protecting his own interests than from the function vested by "the Hindoo Law in the next male heir "of a person whose estate descends to a "female, namely, that of protecting the "estate. And it is obvious that, if heirs "in expectancy were debarred from suing "to protect waste until the succession had "actually accrued, the waste would, in most "cases, be past remedy, and the estate "irretrievably impaired."

We think that this rule so laid down is sound and quite applicable to the case before us; and though, in that case, the plaintiff, under the peculiar circumstances of his suit, was held not to have a right of action, those expressions do lay down a sound rule, and may serve as a guide and authority in the present appeal before us.

Fully concurring in that principle, we confirm the decision of the Judge, and dismiss both appeals with costs. In case No. 2440, it is immaterial whether the plaintiff was the grandson or only the step-grandson of Mussamut Patasoo. His mother was alive, and he had clearly a right to sue to protect his own interests.

The 2nd February 1867.

Present:

The Hon'ble J. P. Norman and W. Markby, *Judges.*

Registration.

Case No. 2474 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 10th July 1866, reversing a decision passed by the Moonsiff of Gopalpore, dated the 19th March 1866.

Ram Chand Koomar (Defendant), *Appellant,*

versus

Modhoo Soodun Muzoomdar (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Roopnath Banerjee for Respondent.

For the purpose of impeaching a deed of sale registered under Act XVI. of 1864, so as to prevent the operation of Section 68, it is necessary to show that the deed was fraudulently executed, and that the purchaser was wilfully and intentionally a party to the fraud of the vendor, or at least that the deed was executed without consideration.

Norman, J.—WE are of opinion that in this case the judgment of the Court below must be reversed. The 13th Section of Act XVI. of 1864 enacts that certain instruments, that is to say, deeds of gift purporting or operating to create, declare, transfer, or extinguish any right, title, or interest

of the value of 100 rupees or upwards in any immoveable property, shall not be received in evidence, unless they are registered according to the provisions of that Act.

Section 16 enacts that the following instruments may be registered under the Act:—"1. Any instrument which purports or operates to create, declare, transfer, or extinguish any right, title, or interest of value *less than 100 rupees* in any immoveable property."

Then comes Section 68, which enacts that every instrument of the description mentioned in Clauses 1 and 2 of Section 16 shall, if duly registered, *have priority* to any other instrument relating to the same property, &c.

In the present case, the plaintiff sues upon an alleged deed of sale, the consideration of which is Rupees 61, bearing date the 13th of Assar 1272 (June 1865). This deed is not registered. The defendant claims as purchaser under a duly-registered deed of the 3rd Pous 1272 (19th December 1865); the consideration expressed to be paid by him is Rupees 75. It is quite clear, under the circumstances, that the latter, being duly registered, is, under Section 68, entitled to priority over the purchase-deed of June 1865.

But the Principal Sudder Ameen says as to the kubalah of the defendant that it appears from the testimony of defendant's witnesses that the defendant is the brother-in-law of the vendor. He says: "The said "kubalah is dated posterior to the exe- "cution of the plaintiff's kubalah. *Hence* "the vendor, with a view to injure the "plaintiff's purchased rights, has, in col- "lusion with his brother-in-law, manufac- "tured a kubalah in his name."

We find that there is no evidence to warrant a finding of fraud on the part of the defendant. The substance of the Principal Sudder Ameen's finding is that the only two circumstances to impeach the kubalah of December of the defendant are that the defendant is the brother-in-law of the vendor, and that his deed is later in point of date than the plaintiff's.

But, in order to prevent the operation of the 68th Section on a deed of this kind, it is necessary, for the purpose of impeaching the deed, to show that the registered deed was fraudulently executed, and that the purchaser was wilfully and intentionally a party to the fraud of the vendor, or at least that the second deed was executed without consideration. There does not appear to be any evidence that the defendant did not purchase in good faith, and did not pay the consideration-money in full as alleged by his witnesses.

We, therefore, reverse the decree of the Lower Court, and dismiss the plaintiff's suit with all costs.

If the plaintiff has been defrauded by his vendor by the execution of the deed of sale of the 3rd of Pous 1272, he is at full liberty to prosecute the vendor, who would be liable to two years' imprisonment and fine under the 423rd Section of the Indian Penal Code, and under Section 44 of the Code of Criminal Procedure; the fine may be applied in compensating the prosecutors.

The 2nd February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Defence—Joint Hindoo Family—Bona fide purchaser.

Case No. 1861 of 1866.

Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 30th April 1866, reversing a decision passed by Mr. L. W. Hutchinson, Principal Sudder Ameen of Furreedpore, dated the 4th November 1865.

Gour Chunder Biswas (Plaintiff), *Appellant,*

versus

Greesh Chunder Biswas and others (Defendants), *Respondents.*

Baboos Kalee Mohun Dass and *Otool Chunder Mookerjee* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A defendant is not precluded from availing himself of any equity which might arise out of the facts proved at the trial, merely because he has not raised that equity on the face of his written statement.

The mere fact of the name of the managing member of a joint Hindoo family standing as the recorded proprietor of an estate is not *per se* sufficient to give title to a purchaser for valuable consideration from him, unless at the time of the purchase the purchaser was ignorant of the real state of the family, and was really led by that circumstance to believe that the recorded proprietor was the sole owner.

Markby, J.—This was a suit brought to recover possession of a half share of 12 annas of a certain talook No. 418, and to cancel a putnee pottah granted by the defendant Biswas, and also to recover possession of a half share of 6 annas of a certain

other khas talook; but, on the latter part of the claim, no question arises.

The talook No. 418 was purchased by the defendant Biswas in his own name in the year 1256, and he caused the property to be recorded in his own name as proprietor. Subsequently, he granted a putnee pottah of 12 annas of the talook to the defendant, Kalee Mohun Ghose, who is the special appellant.

It is now admitted that, at the time of the purchase, the defendant Biswas was joint in property with his uncle, the father of the plaintiff, and that the uncle was jointly interested with Biswas in this property. It also appeared that the uncle at the time of the purchase was employed permanently away from home, and that Biswas managed the household affairs and property of the family.

The uncle lived four or five years after the pottah was granted, but there is no evidence as to whether he ever expressed his assent or dissent with respect to it; nor does any enquiry seem to have been made as to how the purchase-money was appropriated. The uncle left a minor son, who, within three years of his coming of age, brought the present suit.

The defendant Kalee Mohun Ghose, in his written statement, maintained that this was the self-acquired property of Biswas, who had, therefore, a right to dispose of it as he pleased. But, when at the trial he found that it was impossible to support this plea, he nevertheless maintained that, upon the facts as they then appeared, he was entitled to succeed, inasmuch as he was a *bond fide* purchaser for valuable consideration, who had purchased from a person who was the recorded proprietor, and who was, apparently, the owner of the property, and he has obtained the decree of the Lower Appellate Court.

It has been contended now, in the first place, that the defendant Kalee Mohun Ghose cannot, having failed to establish the separate acquisition by Biswas, afterwards fall back on his right as *bond fide* purchaser; and, upon this point, the case of Dhun Kristo Roy *versus* Huro Chunder Roy, 5 Sutherland's Weekly Reporter, Civil Rulings, 197, is relied on.

But it is to be observed that the defendant does not, in this case, seek to set up any defence inconsistent with his first defence, or to add any fresh facts to those already before the Court. His argument only amounts to this: that, though the plaintiff has shown that his uncle was jointly interested in the property, yet it also appears that he allowed another person to hold himself out to the world as the sole owner, and, therefore, it is only just that his purchase should be confirmed as against the uncle and persons who claim through him.

This being an equitable defence, there might very possibly be circumstances which would preclude the defendant from relying on it; and we think it very probable that there were such circumstances in the case referred to, especially as it appears that the Court did not think that the vendee, being a near relative, could well be considered a *bond fide* purchaser at all. But we do not think the Court intended to lay down, as a general rule, that a defendant could never avail himself of any equity which might arise out of the facts proved at the trial, merely because he had not raised that equity on the face of his written statement. The present case would show the peculiar hardship of such a rule, because the very gist of the defence now under consideration is that the defendant has all along been deceived as to the real facts of the case, and it was only at the trial that he became aware that he would be driven back to this equitable answer to the plaintiff's claim. At the most, all that was required was an amendment of the issues under Section 141 which, in the present case, we think ought to have been made.

We, therefore, think that the first objection fails, and that the Lower Court was right in considering this defence.

With regard to the merits of the defence, the Judge observes that "the act of the "managing member of the family in this "case must be held to be valid. What the "result might have been, had there been any "evidence of any collusion or fraud in the "matter, it is not necessary to consider, for "none is imputed, and, Biswas having pur-"chased the talook in his own name, I do "not see that there is any evidence of any "want of caution on the part of the putnee-"dar in taking the putnee from the record-"ed proprietor."

It has been strenuously contended that the Judge, in coming to the above conclusion, has laid too much stress on the fact that Biswas was the recorded proprietor; and that he did not sufficiently consider whether the purchaser had notice of the real state of the family, and whether he was really misled by the fact that the property was recorded in the name of Biswas alone.

of the value of 100 rupees or upwards in any immoveable property, shall not be received in evidence, unless they are registered according to the provisions of that Act.

Section 16 enacts that the following instruments may be registered under the Act:—"1. Any instrument which purports or operates to create, declare, transfer, or extinguish any right, title, or interest of value *less than 100 rupees* in any immoveable property."

Then comes Section 68, which provides that every instrument of the description mentioned in Clauses 1 and 2 of Section 16 shall, if duly registered, operate as a *bond* or any other instrument relating to property, &c.

In the present case the Judge upon an allegation of which the 13th section of the Act deed is void as against claims the deed of 1865 was not paid under the circumstances in which it was executed. Whether the purchaser was induced, by the fact that the estate was recorded in the name of Biswas only, to believe that it was his separate property, or whether he had notice at the time that the estate was the joint property of Biswas and his uncle? and, secondly.—Was the purchaser at the time of the purchase aware of any circumstances which would have led a prudent man to enquire whether the estate was the sole property of Biswas, or whether other persons were jointly interested with him therein? If the Judge did consider these points and gave his decision accordingly, it will only be necessary for him to say so, and it will not be necessary to take fresh evidence. If these points have not been considered, the Judge will re-hear the evidence on these points, and decide accordingly.

The costs will abide the event.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for rent of excess land.

Case No. 2200 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 31st May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 27th January 1866.

Sham Jha (Defendant), *Appellant,*

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Defendant further pleaded payment of all rent due for the area above stated as in his occupation.

Three parties intervened, two of whom were found as a fact by the Lower Courts to be the near relatives, and the third the ploughman of defendant.

These intervenors averred that the 28 beegahs 5 cottahs were not in defendant's cultivation, but in their own.

The first Court (Deputy Collector) found upon the evidence that plaintiff was the landlord of defendant as to the whole 28 beegahs 15-1 cottahs, but that the proper rates for 31 beegahs 6 cottahs were Re. 1-12-6, and for the 23 beegahs 4 cottahs Rs. 2-8 per beegah, as stated by defendant, and for the excess, *viz.*, 28 beegahs 5 cottahs, Rs. 4 8 per beegah should be paid, as claimed by plaintiffs. Further, the first Court entirely disbelieved defendant's plea of payment.

The Judge, however, in the Lower Appellate Court, decreed the whole of plaintiff's case, and disbelieved entirely defendant's averment of payments made of such rents as were due, and discrediting the witnesses who deposed to the contrary, the Lower Appellate Court held that 28 beegahs 5 cottahs were in defendant's occupation.

Defendant appeals specially. His first plea is that no decision can be given against him by *the Revenue Courts* as to the 28 beegahs 5 cottahs held by the Lower Appellate Court to have been in his occupation without payment of rent, as in respect of them he must necessarily, under that holding, be a trespasser; and, as this Court had ruled in the case reported in the Weekly Reporter, 1866, page 5 (Act X. Rulings), that, in respect to lands occupied by one who was not occupying as a tenant, the occupation was that of a *trespasser*,

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The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mortgage—Service of notice of foreclosure under Regulation XVII., 1806.

Case No. 2383 of 1866.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 9th August 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 29th December 1865.

Meer Abbas Aly (Defendant), *Appellant,*

versus

Nund Coomar Ghose (Plaintiff) and others (Defendants), *Respondents.*

Baboos Woomesh Chunder Banerjee and *Pearee Lal Roy* for Appellant.

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Under Regulation XVII., 1806, the Zillah Judge is judicially required to see it proved before him that the notice of foreclosure has been duly served, and to record a proceeding certifying that the requirements of that Regulation have been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace.

Pundit, J.—The special appellant is the mortgagor, and was sued below by the plaintiff, respondent, together with the purchaser of the mortgaged property.

The mortgage being a conditional sale, plaintiff foreclosed under Regulation XVII. of 1806, and has, in the present suit, sued to obtain possession on the ground that he has, by foreclosure, acquired the absolute right to the property, because it was not redeemed within the year of grace.

In the foreclosure summary case, the aforesaid purchaser intervened before the expiry of the year of grace, and deposited the money borrowed but with a protest only, and nothing was done to bar the further progress of the foreclosure-proceedings.

The special appellant pleads in this case that the notice in the case of foreclosure was not served upon him in either of the two zillahs within which the mortgaged property is situated. The special appellant also gave evidence below to prove that, at the

If this be the true construction of the Judge's finding, there is no doubt that the appellants are right in their contention that the mere fact of Biswas's name standing, as the recorded proprietor is not alone sufficient to give the purchaser title, unless, at the time of the purchase, he was ignorant of the real state of the family, and was really led, by this circumstance, to believe that Biswas was the sole owner.

The respondents do not deny this proposition of law, but they contend that the Judge has viewed the matter in the proper light, and that he has decided that the defendant Kalee Mohun Ghose was a *bond fide* purchaser in the sense above stated.

As, however, the language of the Judge is not altogether clear, we remand the case to him to consider—

1st.—Whether the purchaser was induced, by the fact that the estate was recorded in the name of Biswas only, to believe that it was his separate property, or whether he had notice at the time that the estate was the joint property of Biswas and his uncle?

2ndly.—Was the purchaser at the time of the purchase aware of any circumstances which would have led a prudent man to enquire whether the estate was the sole property of Biswas, or whether other persons were jointly interested with him therein?

If the Judge did consider these points and gave his decision accordingly, it will only be necessary for him to say so, and it will not be necessary to take fresh evidence. If these points have not been considered, the Judge will re-hear the evidence on these points, and decide accordingly.

The costs will abide the event.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for rent of excess land.

Case No. 2200 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 31st May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 27th January 1866.

Sham Jha (Defendant), *Appellant,*

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Doorga Roy (Plaintiff) and others (Objectors), *Respondents.*

Baboo Toolsee Doss Seal for Appellant.

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The Revenue Courts have jurisdiction in a suit for rent in respect of lands held in excess of the lands for which the defendant has hitherto paid rent, where there is no lease or express contract limiting the lands of the tenancy.

Bayley, J.—PLAINTIFF in this case sued defendant for rents at Rs. 4-8 per beegah for 82 beegahs 15-1 cottahs as in defendant's occupation.

Defendant's answer was that he held 31 beegahs 6 cottahs at Re. 1-12-6 per beegah, and 23 beegahs 4 cottahs at Rs. 2-8 per beegah, and that he did not occupy the remaining 28 beegahs 5 cottahs.

Defendant further pleaded payment of all rent due for the area above stated as in his occupation.

Three parties intervened, two of whom were found as a fact by the Lower Courts to be the near relatives, and the third the ploughman of defendant.

These intervenors averred that the 28 beegahs 5 cottahs were not in defendant's cultivation, but in their own.

The first Court (Deputy Collector) found upon the evidence that plaintiff was the landlord of defendant as to the whole 28 beegahs 15-1 cottahs, but that the proper rates for 31 beegahs 6 cottahs were Re. 1-12-6, and for the 23 beegahs 4 cottahs Rs. 2-8 per beegah, as stated by defendant, and for the excess, *viz.*, 28 beegahs 5 cottahs, Rs. 4 8 per beegah should be paid, as claimed by plaintiffs. Further, the first Court entirely disbelieved defendant's plea of payment.

The Judge, however, in the Lower Appellate Court, decreed the whole of plaintiff's case, and disbelieved entirely defendant's averment of payments made of such rents as were due, and discrediting the witnesses who deposed to the contrary, the Lower Appellate Court held that 28 beegahs 5 cottahs were in defendant's occupation.

Defendant appeals specially. His first plea is that no decision can be given against him by *the Revenue Courts* as to the 28 beegahs 5 cottahs held by the Lower Appellate Court to have been in his occupation without payment of rent, as in respect of them he must necessarily, under that holding, be a trespasser; and, as this Court had ruled in the case reported in the Weekly Reporter, 1866, page 5 (Act X. Rulings), that, in respect to lands occupied by one who was not occupying as a tenant, the occupation was that of a *trespasser,*

not of a tenant, and therefore a suit could only lie in the *Civil* Courts.

We do not think this a correct plea, nor that the precedent cited governs this case, as the facts of this case are not the facts in the other case.

There the fact was that the lands were defined and limited by the terms of the lease, which laid down in respect to what lands the party sued was a *tenant*. It was held that, for lands taken by the tenant beyond the lands of the lease, the occupation was that of a *trespasser*, and the Revenue Courts had not jurisdiction.

But here, if the plea now set forth were admitted, the provisions of Section 17, Act X. of 1859 (enacting that an excess of area may be ground of enhancement), could never apply, or be operative at all.

The precedent cited, then, in our view, lays down that, when a party, by an *express* contract in a written lease, defines the lands to which he shall confine his tenancy, he will, if he extends it without his landlord's permission, be a trespasser, for in that case there is the contract limiting the lands of the tenancy. Here there is no lease or express contract. There may be an implied contract that the defendant will pay rent for what he does not occupy, but this is not the case contemplated by the precedent cited.

This being our opinion, we overrule this plea of jurisdiction.

Thus, there is accordingly no proper suit for enhancement or arrear, nor is there a suit to obtain a kubooleut with fixed rates, or to settle and adjust the rents of a tenant.

If plaintiff thinks he has a right to demand a kubooleut for the whole or for the lands held by the defendant in excess of the lands for which defendant, special appellant, has hitherto paid rents, the plaintiff must take his course accordingly. Or, if plaintiff thinks that defendant, appellant, has no right to hold the excess lands which were never leased to him, and which he has since held in that way, he may, if he is so advised, sue to oust the special appellant from these lands.

The appeal of the special appellant, as far as it relates to the rent of the lands admitted by him to be payable by him, and pleaded by him to have been paid by him, and which, it is found by both the Courts, were not paid by him at all, is dismissed with costs.

But we decree the special appeal with costs as to the rents decreed against special appellants for the excess lands, and, to that extent, reverse with costs the decisions of both the Lower Courts, and dismiss the suit of the plaintiff.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mortgage—Service of notice of foreclosure under Regulation XVII., 1806.

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Under Regulation XVII., 1806, the Zillah Judge is judicially required to see it proved before him that the notice of foreclosure has been duly served, and to record a proceeding certifying that the requirements of that Regulation have been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace.

Pundit, J.—The special appellant is the mortgagor, and was sued below by the plaintiff, respondent, together with the purchaser of the mortgaged property.

The mortgage being a conditional sale, plaintiff foreclosed under Regulation XVII. of 1806, and has, in the present suit, sued to obtain possession on the ground that he has, by foreclosure, acquired the absolute right to the property, because it was not redeemed within the year of grace.

In the foreclosure summary case, the aforesaid purchaser intervened before the expiry of the year of grace, and deposited the money borrowed but with a protest only, and nothing was done to bar the further progress of the foreclosure-proceedings.

The special appellant pleads in this case that the notice in the case of foreclosure was not served upon him in either of the two zillahs within which the mortgaged property is situated. The special appellant also gave evidence below to prove that, at the

If this be the true construction of the Judge's finding, there is no doubt that the appellants are right in their contention that the mere fact of Biswas's name standing, as the recorded proprietor is not alone sufficient to give the purchaser title, unless, at the time of the purchase, he was ignorant of the real state of the family, and was really led, by this circumstance, to believe that Biswas was the sole owner.

The respondents do not deny this proposition of law, but they contend that the Judge has viewed the matter in the proper light, and that he has decided that the defendant Kalee Mohun Ghose was a *bond fide* purchaser in the sense above stated.

As, however, the language of the Judge is not altogether clear, we remand the case to him to consider—

1st.—Whether the purchaser was induced, by the fact that the estate was recorded in the name of Biswas only, to believe that it was his separate property, or whether he had notice at the time that the estate was the joint property of Biswas and his uncle?

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But we decree the special appeal with costs as to the rents decreed against special appellants for the excess lands, and, to that extent, reverse with costs the decisions of both the Lower Courts, and dismiss the suit of the plaintiff.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mortgage—Service of notice of foreclosure under Regulation XVII., 1806.

Case No. 2383 of 1866.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 9th August 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 29th December 1865.

Meer Abbas Aly (Defendant), *Appellant,*

versus

Nund Coomar Ghose (Plaintiff) and others (Defendants), *Respondents.*

Baboos Woomesh Chunder Banerjee and *Pearee Lal Roy* for Appellant.

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Respondents.

Under Regulation XVII., 1806, the Zillah Judge is judicially required to see it proved before him that the notice of foreclosure has been duly served, and to record a proceeding certifying that the requirements of that Regulation have been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace.

Pundit, J.—The special appellant is the mortgagor, and was sued below by the plaintiff, respondent, together with the purchaser of the mortgaged property.

The mortgage being a conditional sale, plaintiff foreclosed under Regulation XVII. of 1806, and has, in the present suit, sued to obtain possession on the ground that he has, by foreclosure, acquired the absolute right to the property, because it was not redeemed within the year of grace.

In the foreclosure summary case, the aforesaid purchaser intervened before the expiry of the year of grace, and deposited the money borrowed but with a protest only, and nothing was done to bar the further progress of the foreclosure-proceedings.

The special appellant pleads in this case that the notice in the case of foreclosure was not served upon him in either of the two zillahs within which the mortgaged property is situated. The special appellant also gave evidence below to prove that, at the

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The respondents do not deny this proposition of law, but they contend that the Judge has viewed the matter in the proper light, and that he has decided that the defendant Kalee Mohun Ghose was a *bond fide* purchaser in the sense above stated.

As, however, the language of the Judge is not altogether clear, we remand the case to him to consider—

1st.—Whether the purchaser was induced, by the fact that the estate was recorded in the name of Biswas only, to believe that it was his separate property, or whether he had notice at the time that the estate was the joint property of Biswas and his uncle?

2ndly.—Was the purchaser at the time of the purchase aware of any circumstances which would have led a prudent man to enquire whether the estate was the sole property of Biswas, or whether other persons were jointly interested with him therein?

If the Judge did consider these points and gave his decision accordingly, it will only be necessary for him to say so, and it will not be necessary to take fresh evidence. If these points have not been considered, the Judge will re-hear the evidence on these points, and decide accordingly.

The costs will abide the event.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for rent of excess land.

Case No. 2200 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 31st May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 27th January 1866.

Sham Jha (Defendant), *Appellant,*

versus

Doorga Roy (Plaintiff) and others (Objectors), *Respondents.*

Baboo Toolsee Doss Seal for Appellant.

Baboo Anund Gopal Paulit for Respondents.

The Revenue Courts have jurisdiction in a suit for rent in respect of lands held in excess of the lands for which the defendant has hitherto paid rent, where there is no lease or express contract limiting the lands of the tenancy.

Bayley, J.—PLAINTIFF in this case sued defendant for rents at Rs. 4-8 per beegah for 82 beegahs 15-1 cottahs as in defendant's occupation.

Defendant's answer was that he held 31 beegahs 6 cottahs at Re. 1-12-6 per beegah, and 23 beegahs 4 cottahs at Rs. 2-8 per beegah, and that he did not occupy the remaining 28 beegahs 5 cottahs.

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The appeal of the special appellant, as far as it relates to the rent of the lands admitted by him to be payable by him, and pleaded by him to have been paid by him, and which, it is found by both the Courts, were not paid by him at all, is dismissed with costs.

But we decree the special appeal with costs as to the rents decreed against special appellants for the excess lands, and, to that extent, reverse with costs the decisions of both the Lower Courts, and dismiss the suit of the plaintiff.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mortgage—Service of notice of foreclosure under Regulation XVII., 1806.

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Special Appeal from a decision passed by the Judge of Backergunge, dated the 9th August 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 29th December 1865.

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versus

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Under Regulation XVII., 1806, the Zillah Judge is judicially required to see it proved before him that the notice of foreclosure has been duly served, and to record a proceeding certifying that the requirements of that Regulation have been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace.

Pundit, J.—The special appellant is the mortgagor, and was sued below by the plaintiff, respondent, together with the purchaser of the mortgaged property.

The mortgage being a conditional sale, plaintiff foreclosed under Regulation XVII. of 1806, and has, in the present suit, sued to obtain possession on the ground that he has, by foreclosure, acquired the absolute right to the property, because it was not redeemed within the year of grace.

In the foreclosure summary case, the aforesaid purchaser intervened before the expiry of the year of grace, and deposited the money borrowed but with a protest only, and nothing was done to bar the further progress of the foreclosure-proceedings.

The special appellant pleads in this case that the notice in the case of foreclosure was not served upon him in either of the two zillahs within which the mortgaged property is situated. The special appellant also gave evidence below to prove that, at the

If this be the true construction of the Judge's finding, there is no doubt that the appellants are right in their contention that the mere fact of Biswas's name standing, as the recorded proprietor is not alone sufficient to give the purchaser title, unless, at the time of the purchase, he was ignorant of the real state of the family, and was really led, by this circumstance, to believe that Biswas was the sole owner.

The respondents do not deny this proposition of law, but they contend that the Judge has viewed the matter in the proper light, and that he has decided that the defendant Kalee Mohun Ghose was a *bond fide* purchaser in the sense above stated.

As, however, the language of the Judge is not altogether clear, we remand the case to him to consider—

1st.—Whether the purchaser was induced, by the fact that the estate was recorded in the name of Biswas only, to believe that it was his separate property, or whether he had notice at the time that the estate was the joint property of Biswas and his uncle?

2ndly.—Was the purchaser at the time of the purchase aware of any circumstances which would have led a prudent man to enquire whether the estate was the sole property of Biswas, or whether other persons were jointly interested with him therein?

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The costs will abide the event.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for rent of excess land.

Case No. 2200 of 1866 under Act X. of 1859.

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Pundit, J.—THE special appellant is the mortgagor, and was sued below by the plaintiff, respondent, together with the purchaser of the mortgaged property.

The mortgage being a conditional sale, plaintiff foreclosed under Regulation XVII. of 1806, and has, in the present suit, sued to obtain possession on the ground that he has, by foreclosure, acquired the absolute right to the property, because it was not redeemed within the year of grace.

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The special appellant pleads in this case that the notice in the case of foreclosure was not served upon him in either of the two zillahs within which the mortgaged property is situated. The special appellant also gave evidence below to prove that, at the

time of the alleged service of notice upon him, he was elsewhere.

The roobakaree of the Zillah Judge regarding the foreclosure-proceedings recites the fact of the notice having been *served*, and the record of that case shows that the evidence of the peadah, who had taken the notice for serving it upon the mortgagor, and of two witnesses to the service, was taken in the zillah on the point of the aforesaid service.

The Lower Appellate Court holds that his roobakaree and evidence of witnesses afford *primâ facie* proof of service, until the contrary is shown by the special appellant who has not attempted to give any rebutting proof. That Court further remarks that the fact of the purchaser from the mortgagor depositing the money due to the mortgagee shows that he and so his vendor, the special appellant, could not but have been cognizant of the fact of the service of the notice of foreclosure. The purchaser has not appealed to this Court against the decision of the Lower Appellate Court decreeing the property to the plaintiff, special respondent. The Lower Appellate Court, when decreeing the property, overruled the objection of the special appellant regarding non-service of notice by disbelieving the evidence produced by the special appellant upon that point.

The original mortgagee, who does not deny the fact of his having sold his rights in the property in dispute to another, is the only appellant, and objects to the admission of the summary roobakaree of foreclosure as evidence, and further argues that, even if admitted as such, it does not prove the service. The Lower Appellate Court has remanded the case to the first Court for trial on the merits. The first Court had dismissed the plaintiff's suit on the ground that service of notice was not proved, and the Lower Appellate Court has held that notice was served. Now, we think the special appellant, who had pleaded below that he has not any longer any concern in the land in dispute, because he has sold it to another, has no right to appeal, and that, even if he has such a right, the pleas taken by his pleaders cannot stand.

We regret to observe that the special appellant's two native pleaders should think it seriously worth their while to argue before the Court that the word "jaree," written in the Bengalee (foreclosure) proceedings of the Zillah Judge, means no more than *issue*, or, as they state, leave the serishtah, and does not include the return, and that the Zillah Judge recorded that proceeding of foreclosure either without even enquiring whether the notice had, after its issue, been served or not, and so recorded only the fact of its issue, or that it recorded that proceeding after being satisfied that the notice in question was *never* served, but only *issued*, and so recorded the fact that the notice was only issued, but at the same time recorded the fact of the foreclosure having become completed, though it was satisfied that the notice was not served at all. Even if the pleaders had argued that the Zillah Judge recorded in his proceedings that the notice has been served, and did so without enquiry, and only on the representation of the mortgagee, who stated before him that it has been served, leaving it to be proved if denied by the mortgagor in the regular case by the plaintiff that it has actually been served, we would not have attached any weight to this argument. We hold that, under Regulation XVII. of 1806, the Zillah Judge is judicially required to see that it is proved before him that the notice has been *duly* served, and to record a proceeding certifying that all that Regulation XVII. of 1806 requires has been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace. The powers of the Zillah Judge in this case are not exactly those of a Collector authorizing zemindars to serve notice upon his putneedars under Regulation VIII. of 1819.

In this view, agreeing with the Lower Appellate Court in the admissibility of the foreclosure-proceedings as *primâ facie* proof of service, we see no reason to interfere, and dismiss the special appeal with costs.

The 4th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution of decree—Section 362, Act VIII. of 1859.

Case No. 863 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 4th October 1866.

Biroja Monee Burmonea (Judgment-debtor), *Appellant,*

versus

Wooma Moyee Burmonea (Decree-holder), *Respondent.*

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Mr. R. T. Allan and *Baboo Roopnath Banerjee* for Appellant.

Baboos Dwarkanath Mitter and *Umbika Churn Banerjee* for Respondent.

The Court of the Principal Sudder Ameen at K having been abolished after a decree was passed by it, and the case having been transferred to the Court of the Judge of the Zillah by which execution was regularly issued—HELD that the Judge's Court had jurisdiction to entertain a subsequent application for execution, though made after the re-establishment of a Principal Sudder Ameen's Court at K.

Macpherson, J.—OF the three objections taken in the memorandum of appeal to the order of the Lower Court, the second is the only one which it is necessary for us to notice. It is to the effect that the Zillah Judge had no power to entertain an application for execution of a decree passed by a Principal Sudder Ameen subordinate to him. Our decision in the case of Rajeeb Ram Doss *versus* Mahomed Hossein, VI. Weekly Reporter 51 (Miscellaneous), is referred to, in which we held that a Judge has no power to transfer the execution of his own decrees to the Court of the Principal Sudder Ameen or to any other subordinate Court.

I have no doubt of the correctness of our judgment in the case of Rajeeb Ram Doss; but it will not govern the case now before us, in which the circumstances and the question for decision are wholly different.

The original decree was passed by the Court of the Principal Sudder Ameen of Kishnaghur; and the final decree by the Appellate Court was made in September 1859. The Court of the Principal Sudder Ameen at Kishnaghur having been abolished, and there being a Principal Sudder Ameen's Court at Meherpore within the same zillah, the case was transferred to the latter Court, and certain proceedings to enforce execution were had therein, which proceedings however proved ineffectual, and the petition on which they were based was eventually struck off. We find from the records of the High Court that throughout 1862 and 1863 (save a few days at the end of the latter year) there was no Principal Sudder Ameen's Court at Kishnaghur. The suit, having been transferred to the Meherpore Court as above mentioned, remained there until that Court was abolished early in 1863. On its abolition, the case was (in May 1863) transferred to the Court of the Judge of the Zillah at Kishnaghur, there being at that time no Principal Sudder Ameen's Court there, and proceedings were had in the Judge's Court to enforce execution. Just before the close of 1863, a Principal Sudder Ameen's Court was again established at Kishnaghur. This case, however, remained on the file in the Judge's Court, and on the 30th December 1864, the application out of which the present appeal arises was made to the Judge, and was entertained by him.

The appellants rely on Section 362 of Act VIII. of 1859, which enacts that "application for execution of the decree of "the Appellate Court shall be made to the "Court which passed the first decree in the "suit, *and shall be executed by that Court,*" &c.

I am of opinion that, under the peculiar circumstances which have occurred, the Judge was competent to entertain the application for execution, and to execute the decree. The Court of the Principal Sudder Ameen at Kishnaghur having been abolished after the decree was passed, and the Court which now exists, and which was in existence on the 30th December 1864, being a new Court established long after the date of the decree, it appears to me that the decree is not the decree of the *present* Court of the Principal Sudder Ameen, and, therefore, that the present Court is not the only Court by which, under Section 362, it may be executed. The Court at Kishnaghur being abolished, the case was legally on the file of the Meherpore Court; and the Court at Meherpore being abolished, the case was legally brought on the file of the Judge's Court, and certain proceedings to enforce execution were taken in that Court. The case being thus regularly before the Judge's Court, there is, in my opinion, nothing in Section 362 which required that, on the re-establishment of a Principal Sudder Ameen's Court at Kishnaghur, the Judge should transfer the case to the new Court.

I think the appeal should be dismissed with costs.

Loch, J.—I concur generally in this judgment. It appears to me that the execution was properly taken out in the Judge's Court, there being at the time no Principal Sudder Ameen's Court in which proceedings could be taken; and that, as the execution-case was legally on the file of the Judge, and had never been removed from the file, there was nothing to prevent the decree-holder continuing to take out execution in the Court where the case was still pending.

The 4th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Kubooleut—Implied contract to pay rent.

Cases Nos. 2149 and 2150 of 1866 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of 24-Pergunnahs, dated the 30th May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 23rd February 1866.

Digambur Mitter (Objector), *Appellant,*

versus

Huro Pershad Roy Chowdhry and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Khetturnath Bose* for Appellant.

Mr. R. T. Allan and *Baboo Anund Chunder Ghosal* for Respondents.

No implication of a contract to pay rent to the zemindar on the part of the tenant can arise in a case in which the tenant has been paying rent to another zemindar than the one now suing for a kubooleut.

Trevor, J.—It appears that certain lands in the 24-Pergunnahs were formerly occupied by Government as khalaree lands; that subsequently a settlement was made for them with one Tara Pershad Chowdhry, the petition of Digambur Mitter for the settlement having been rejected. Subsequently, disputes arose regarding 41 beegahs of these lands between one Huree Narain Pookait, calling himself the tenant of the Chowdhry, and Manick Lushkur, calling himself the tenant of Digambur Mitter, and possession was awarded under Act IV. of 1840 to the latter; the former consequently instituted a suit for the reversal of the order passed in the Act IV. suit, stating that the lands belong to Tara Pershad Chowdhry, and that he was his tenant. The defendant Lushkur pleaded that he was in possession, and entitled to possession as the tenant of Digambur Mitter. Both the zemindars were defendants in the case. The Judge found that the proprietary title was with the Chowdhry, but that the right to possess as tenant was with the Lushkur. In effect, therefore, the suit of the plaintiff calling himself the tenant of Chowdhry was dismissed. A suit also was brought by the Lushkur, the so-called tenant of Digambur Mitter, for damages on account of an illegal distraint of the crops made by Tara Pershad Chowdhry, who alleged them to belong to other tenants. This suit was dismissed in the Court of first instance, but decreed on appeal.

Various suits have been since instituted by the zemindar Tara Pershad Chowdhry against Manick Lushkur unsuccessfully. At last, the present suit has been instituted by him, founded on the declaration by the Judge that the 41 beegahs belong to his estate, for a kubooleut from Manick Lushkur, not only for the 41 beegahs, but for the 37, in all for the 78 beegahs in Lushkur's possession.

The defendant pleads that he has always paid rent to the defendant Digambur Mitter, and has never acknowledged Tara Pershad as his landlord, and that, consequently, a suit for a kubooleut will not lie. The zemindar Digambur Mitter claims the lands as his own.

The first Court decreed to plaintiff a kubooleut, and on appeal the Judge affirmed the order. Both the defendants, the tenant Manick Lushkur and zemindar Digambur Mitter, appeal specially, urging that the decision of the Judge in 1858 was no valid decision as between the zemindars; that he could only enquire whether the land belonged to the plaintiff or the defendant, and that, having in effect dismissed the plaintiff's (the tenant's) suit, no adjudication between the two zemindars, co-defendants, could legitimately be passed, and, consequently, the present suit, founded upon an invalid decree, cannot be maintained.

After hearing the pleaders on both sides, and attentively considering the facts as they are before us in special appeal, we are clearly of opinion that the decision of the Judge of the 24-Pergunnahs passed in 1858, only legitimately extended to the dismissal of the plaintiff's suit; and that any question of proprietary right between the zemindars could not be decided in that case. It follows that the plaintiff's title to the land has not been adjudicated, and no suit for a kubooleut can at present lie. It may be true that, under certain circumstances, a contract to pay rent to the zemindar on the part of the tenant will be implied. But no implication can arise in a case like the present, in which admittedly, since the suit of the Pookait was dismissed in 1858, the Lushkur, the tenant, has been paying rent to another zemindar than that who is now suing for a kubooleut. The remarks above made apply to the whole 79 beegahs in the defendant's possession.

We, therefore, reverse the Judge's decision. Both parties will, under the peculiar circumstances, bear their own costs.

The 4th February 1867.

Present:

The Hon'ble H. V. Bayley, L. S. Jackson, and Shumbhoonath Pundit, *Judges.*

Costs (in suits partly decreed, and partly dismissed).

Case No. 622 of 1865.

Miscellaneous Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 29th July 1865.

Bamasoondery Debea, *Petitioner,*

versus

Mr. G. Rogers, *Opposite Party.*

Baboo Bhowanee Churn Dutt for Petitioner.

Baboo Baneenath Bose for Opposite Party.

When a plaintiff has asked for a sum which is in excess of what the Court holds him entitled to, and to which a lower rate of pleader's fee or of stamp-duty applies than to the rest of the claim, the defendant, who succeeds in that part of the case, is entitled to recover the costs applicable to that particular part of the subject-matter (Bayley, J., dissenting).

Pundit, J.—THE calculation, as made by the Lower Court, of the costs due to the defendants as pleader's fees for the portion of the claim of the plaintiff dismissed by the Court, appears to me to be right.

When, in a case above 5,000 rupees, a partial decree is given either for a sum less than or above 5,000 rupees to the plaintiff, and a portion of the claim either above or below 5,000 rupees is dismissed, the proper rule for calculating proportionate costs appears to be this: First, the entire fee of the pleaders for the whole amount of claim (which, according to the law now in force, will be at the rate of 5 per cent. up to 5,000 rupees, and 2 per cent. above it) is calculated, and then, from this total amount, the costs due to the plaintiff by this calculation for the sum decreed is given to him, and the remainder to the defendant as the costs of the portion dismissed. In order to give the costs for this dismissed portion of the claim, no new calculation is made for the defendant commencing at the above rate of 5 per cent. up to 5,000 rupees, and so forth. The entire costs of the case is to be divided, and no more than that sum should be divided between the two successful parties.

I see no reason why, owing to a partial decree of the claim and the dismissal of a portion of it, the entire costs of the case should exceed what would have been otherwise.

I would reject this application with costs. It appears, however, necessary to enquire what is the present practice in this Court regarding the calculation. Ask the Deputy Registrar to report in a day.

Deputy Registrar.—There is no rule for the guidance of the office as to the computation of costs in appeals which have been partly decreed, and partly disallowed.

The law under which costs are computed is Section 25, Regulation XXVII. of 1814, which, though rescinded by Section 6, Act I. of 1846, is still in force for the purpose of calculating the amount awarded against a party on account of fees of pleaders.

On reference to the law, it will be seen that it does not fix one set of costs in a case, but fixes the rates at which the pleaders of *each* of the parties to a case are to be remunerated.

This view of the law is supported by the practice which would appear to have prevailed before the promulgation of Act I. of 1846, which gave pleaders the liberty of settling with their clients, "by private agreement, the remuneration to be paid for their professional services," and which provided that the rule in Section 25, Regulation XXVII. of 1814, should, when costs were awarded in a case, regulate "the amount to be paid on account of fees of pleaders," *viz.*, of requiring the parties to a suit to deposit in the treasury of the Civil Court, which then existed, the fees of their *respective* pleaders, *each* calculated at the rates fixed by the said Law XXVII. of 1814. And the same practice was followed in the late Sudder Court.

Pleaders even now regulate the remuneration for their services on *each* side of a case by the rates fixed by the law of 1814.

The practice of this Court now—a practice which is almost universally followed by the subordinate Courts in cases where costs are awarded in proportion to the amount decreed and disallowed—is to give to the appellant, as against the respondent, the value of the stamp on the amount decreed, added to his pleaders' fee calculated at 5 per cent. up to Rupees 5,000, and at 2 per cent. for any sum above Rupees 5,000 up to Rupees 20,000, &c., and in like

manner to give to the respondent, as against the appellant, his pleaders' fee on the amount disallowed at the rate of 5 per cent. up to Rupees 5,000, and at 2 per cent. for any sum above Rupees 5,000 up to Rupees 20,000, &c.

The order of the 9th instant, which contains the requisition for this report, is, I presume, based on the supposition that the law fixes *one* fee in cases of the nature above referred to for the pleaders of *both the parties* to a suit; but it seems to me that the law does not fix one fee for the pleaders of both the parties to a suit, but simply *the rates* at which the pleaders of *each of the two parties* should be remunerated for their professional services; and as the parties have *each* to pay their pleaders at the prescribed rates, and the law recognizes no other rates, nor can the pleaders recover at any other rates, unless there be a contract between them and their clients, the parties may, I presume, be held to be entitled to recover, at the same rates, fees on account of their respective pleaders in a case where the Court has, in effect, ruled that each of the parties to it has acted wrong—the one for suing for more than he was entitled to and the other for disacknowledging the title of the former to that portion of the amount sued for to which he was declared entitled.

I would further, with deference, suggest whether a rule such as that now laid down, which overrides a long prevailing practice, and one, therefore, which will, no doubt, be circulated for the consent of the whole Court, would not, in some instances, operate very hardly upon the plaintiff.

Suppose, for instance, an appeal to be filed by a defendant valued at the sum for which he has been made liable by the Lower Court, say Rupees 5,000 out of Rupees 15,000, the amount of the claim. The respondent (the plaintiff) raises, at the hearing of the appeal, a cross-objection, and so opens before this Court the entire case as it originally stood before the Lower Court, and obtains a decree in modification of the decree of the Lower Court for Rupees 10,000 instead of Rupees 5,000.

According to the rule now laid down, the appellant (the defendant) would have the precedence over the respondent (the plaintiff), and would receive fees on account of his pleader as against the latter, calculated on the sum disallowed, *viz.*, Rupees 5,000, at the rate of 5 per cent.; while the respondent (the plaintiff), who is in effect declared by this Court's decree to have been wronged by the decree of the Lower Court, would receive fees on account of his pleader on the amount decreed, as against the appellant (the defendant) at the *lower* rate laid down by law, *viz.*, at 2 per cent. only.

Pundit, J.—The report called for has been received. It contains a long dissertation upon the law-point arising in this case, and many others, which I never required to be furnished. It is not at all necessary to meet the arguments of this report. I still hold that, as the plaintiff is legally assumed to have paid the *legal* fees to the extent of the entire *valuation* of the plaint to his pleaders to prosecute his case, and *not more or less*; so is the defendant supposed to have paid the same to his pleader to defend the case, *and not more or less*. Now, if a decree is given to the plaintiff for a sum exceeding 5,000 rupees, but not for the whole sum claimed, then to the extent of the valuation decreed the plaintiff is entitled to recover the costs of his pleader from the defendant, and the remainder of the fees which he has paid to his pleader over and above that sum is his loss, as he had unnecessarily paid that to his pleader. In the same manner, out of the entire fees paid by the defendant to his own pleader to the extent of the valuation of the amount decreed to the plaintiff, the defendant is not entitled to recover from his adversary any fees to the extent of the valuation decreed to the plaintiff, as the defendant was rightly sued for *it*; but, as regards the remainder of the sum paid by him to his pleader (*and that* alone *and no more*), he is entitled to see himself reimbursed from the plaintiff, as he was unnecessarily made to pay that to his pleader.

I do not understand the principle upon which the defendant is considered to be entitled to claim costs in such cases as if the sum dismissed was a separate and new *sum decreed to him*. Legally, the defendant derives a *profit* by the manner in which "the costs in proportion" are calculated now-a-days. Certainly, they were not so calculated some time ago.

The decision in the case of Loke Nath Holdar, Petitioner (*see* 23rd September 1853, p. 902), shows that up to 1853 the practice prevailing in the late Sudder Court was another erroneous one of making a decision of the whole of the plaintiff's *costs* in the case into two sums by rules of *proportions*. That case referred to the mode of calculating the costs of the portion decreed,

and not as in the case here of the "portion *dismissed*."

I am not aware that all Zillah Courts do calculate as the report would have they do; but they might, when the High Court does so.

The rule I have proposed will apply to Courts of Original Jurisdiction, as well as to Courts of Appeal. When the defendant has occasion to appeal against a decree in part, the sum for which the appeal is made is a new sum by itself, and the defendant will have to pay full costs to the respondent if he fails in his appeal; and if, in addition, the plaintiff ultimately succeeds to obtain a decree by a cross-appeal for another additional sum, it is a decree for a separate sum, for which sum he may get new and separate costs calculated afresh. When a plaintiff may appeal against a decree by which a part of the sum claimed by him is denied to him, he will, if he succeeds in his appeal for it, get for this sum full costs as for a separate sum decreed to him. If he fails in his appeal, he will pay full costs for it to the respondent; and if, by a cross-appeal, the respondent succeeds in obtaining a further deduction from the decree, he will equally get full and separate costs for the sum so decreed to him. When, by such orders in appeal, the account of proportionate costs as recorded in the decree of the first Court is amended, the amounts decreed and dismissed will, as a matter of course, be altered in the decree of the Court of first instance, and upon these altered sums costs in proportion will be re-calculated for the decree of the first Court. I would, therefore, reject the application, as I think to give more than this is beyond what the law contemplates.

Bayley, J.—The question before us on appeal is substantially whether, in a case where a portion of plaintiff's claim is decreed to him and a portion dismissed, defendant is entitled to have his costs calculated, as if a separate and new sum were decreed to him, defendant, or not.

There is no clear law on this point. The *present* practice is in favor of the answer to the question being given in the affirmative.

I am of opinion that, where a plaintiff sues, say for 10,000 rupees, and gets a decree for 7,000 rupees, it is equivalent to defendant being entitled to the same costs, as if defendant had got a decree for 3,000 rupees, that is, the order in effect runs thus: Plaintiff claims 10,000 rupees, but the Court decrees to him 7,000 rupees, and costs of the parties in proportion to the amount decreed and dismissed to the one and the other respectively; or, in other words, the Court decrees to the *plaintiff* costs in proportion to 7,000 rupees decreed, and to the defendant costs in proportion to the 3,000 rupees as to which plaintiff's claim is dismissed, *viz.*, as on a separate and distinct sum on the basis of which it is essentially ordered in the terms "*costs in proportion to the amount decreed* "*and dismissed*," that defendant's costs shall be calculated.

As I thus have the misfortune to differ from my learned colleague, let the case go before a third Judge without delay.

Jackson, J.—This matter was argued before me some time ago, in consequence of a difference of opinion between my two learned brothers, Bayley and Shumbhoonath Pundit.

The point of law on which the learned Judges differed is not specifically stated, and it seems from the judgment of Mr. Justice Pundit to be rather on a question of theory than anything else.

But the question really before the Court must be whether the Principal Sudder Ameen, in the mode in which he assessed the costs, acted contrary to law or exercised an improper discretion.

Upon this point I am of the same opinion with Mr. Justice Pundit, who, as I understand, affirms the judgment of the Court below. It seems to me that the decision of that Court was in accordance with existing practice, and, therefore, ought not to be disturbed.

Whether the principle in which costs are awarded in cases part decreed and part dismissed ought to be altered is a question which it appears to me unnecessary to raise in the present case.

It seems clear that, when a plaintiff has asked for a sum which is in excess of what the Court holds him entitled to, and to which a lower rate of pleaders' fee or of stamp-duty applies than to the rest of the claim, the defendant, who succeeds in that part of the case, is entitled to recover the costs applicable to that particular part of the subject-matter.

We are here dealing with the Court of first instance only and the costs of such Court, and also with cases where the subject-matter of the suit has depended upon a single cause of action.

When the first Court has given a decree for the whole amount in suit, and the defendant, abandoning his defence as to a part of the amount, appeals as to the remainder

and is successful, and also in cases where a decree has been passed against the defendant from which he appeals, and is partially successful in his appeal, then I think the costs to be calculated on that amount upon which the defendant succeeds should be applied (in rectification of the decree below) on the principle above stated for that Court, but otherwise as to the Appellate Court, for then the amount as to which the defendant has successfully appealed is to be taken as an amount from the payment of which he asked the Appellate Court to exempt him, and from which he has shown that he was entitled to be exempted, and consequently as to which he has properly set the Appellate Court in motion.

I refrain from expressing an opinion as to what the rule should be when the plaintiff has combined in one suit several distinct causes of action, as to one or more of which the defendant had a good defence, though the plaintiff succeeded as to some of them.

The 4th February 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal—Registration.

Petition of Rash Beharee Baboo, praying for the admission of Miscellaneous Appeal No. 26 of 1867.

Baboo Onookool Chunder Mookerjee for Petitioner.

There is no appeal from an order refusing to allow the amount due under a decree passed upon an obligation specially registered under Section 52, Act XX. of 1866, to be levied by instalments, and directing immediate enforcement of the decree.

THIS is an application by the obligor in a case of an obligation specially registered under Section 52, Act XX. of 1866.

The obligation in question was presented to the Principal Sudder Ameen of East Burdwan, with a petition on the prescribed stamp, and thereon the Principal Sudder Ameen made a decree for the sum mentioned in the petition; the obligor having also presented a petition which the Principal Sudder Ameen calls a *kuboolajowab*, admitting the amount to be due, but asking that it should be levied from him by instalments. The Court below refused to make such order, and, observing that the defendant (now petitioner) was a man of property, directed the decree to be immediately enforced.

The petitioner contends that he is entitled to appeal against such order. It is very clear, however, that his contention fails. Section 55 declares that "there shall be no "appeal against any decree or order made "under Section 53, Section 54, or this "Section."

Now, in this matter, the Principal Sudder Ameen first made a decree for the sum specified, and secondly ordered that such decree should be enforced forthwith, and the Act expressly provides that neither such decree nor such order shall be appealable to a superior Court. If it were necessary to say anything further, I should add that, in cases of this description, it would be manifestly inequitable and inexpedient to alter, by order in execution of a decree, the contract originally entered into between the parties. The obligation was one for a certain sum of money to be paid at due date, and the whole procedure provided by these Sections of Act XX. of 1866 points to a definite and final award and prompt proceedings.

It was contended by Baboo Onookool Chunder Mookerjee for petitioner that he was entitled to complain against the order made in execution which refused to direct payment by instalments.

It seems to me clear that such an order, if made at all, must, under Section 194 of the Code of Civil Procedure, be made in the decree, and that the Court executing the decree would not have the power to execute it otherwise than as directed by the decree.

On the whole, therefore, I have no doubt that this application must be refused.

The 4th February 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Jurisdiction—Powers of Superintendence of High Court.

Petition of Pearee Lal Sahoo.

Baboo Khettur Mohun Mookerjee for Petitioner.

The High Court cannot, where an inferior Court has jurisdiction to try a case, and has tried it, merely because there is an error apparent in the decision on the facts, alter that decision where the law allows no appeal.

THE petitioner was plaintiff in a case of the kind known as Small Cause Court cases, the amount in suit being under 500 rupees. The appeal lay to the Court of the Principal Sudder Ameen, and no further appeal is allowed to this Court. The petitioner's

complaint is that, when the appeal was heard, the defendant's books being tendered as evidence on his side, a certain entry was referred to, which entry the plaintiff alleged not to exist in the authenticated copy of the books previously filed, and which he, therefore, challenged as an interpolation and a forgery. On this petition, the Principal Sudder Ameen passed a routine order to the effect that it was to be filed with the record, and finally he passed no definite order upon it.

It is also alleged that, according to the defendant's own showing, as appears from the decision of the Principal Sudder Ameen, a small balance of 36 rupees did appear to be due to the plaintiff, and he complains that this amount has not been decreed to him.

This is confessedly a case in which no further appeal lies to this Court, and to which the provisions of Section 35, Act XXIII. of 1861, do not apply. But the petitioner contends that, by the powers of superintendence vested in this Court by the 18th Section of the Statute 24 and 25 Victoria, Chapter 104, the Court may send for the record, and, looking into the matter, may pass such order as it thinks fit. This, it appears to me, is carrying the meaning of the word "superintendence" far beyond what the Act intends. That expression has been held, in several instances, to give authority to this Court, where an inferior Court has declined jurisdiction, or has exercised a jurisdiction not vested in it by law, to interfere for the purpose of compelling the Court to proceed, or rescinding the act irregularly done. But it cannot, where a Court has jurisdiction to try a case, and has tried it, merely because there is an error apparent in the decision on the facts, alter that decision where the law allows no appeal.

I am, therefore, of opinion that this application must be refused.

The 4th February 1867.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Ministerial Officers—Appointment of Sheristadar in Moonsiff's Court.

Petition of Bhyrub Chunder Deb, complaining of his dismissal from his office of Serishtadar in the Moonsiffee of Nobeegunge, in Zillah Sylhet, and praying to be reinstated in his Office.

Baboo Mohinee Mohun Roy for Petitioner.

Where a Moonsiff appointed a person as serishtadar in his Court, and it did not appear that the person so appointed was in any respect disqualified for the appointment, or that his appointment was open to any sort of objection whatever, or that the Moonsiff had neglected any of the preliminary enquiries or formalities prescribed for such cases—HELD that it was not competent to the Zillah Judge, merely on the ground that in his opinion the claims of some other persons were superior to those of the person appointed to remove him from the office, and to direct the appointment of a different and specified person.

IT appears that, on a vacancy occurring in the office of serishtadar in the Moonsiffee of Nobeegunge in Sylhet, the petitioner Bhyrub Chunder Deb, who had for some years been a mohurrir in that establishment, and who was then acting as serishtadar, was a candidate for the vacant appointment. The Moonsiff, acting, as it appears, in strict conformity with the Circular Order of this Court, dated the 24th August 1865, and having taken into consideration the claims of all the candidates for that post, appointed the petitioner. Thereupon, one Gopal Kishen Shome, one of the defeated candidates, who had previously filled the office of serishtadar in another Moonsiffee of the same district which has been abolished, made an appeal to the Zillah Judge alleging his own claims to the post, upon which the Judge recorded the following order: "I am of opinion that "the petitioner has a decided claim to the "post, and I desire the Moonsiff will appoint "him thereto, unless any reason exist which "I am not aware of."

This order appears to me to be beyond the Judge's jurisdiction, and irregular for several reasons.

In the first place, the Zillah Judge, upon application from Gopal Kishen Shome, proceeds of his own authority to appoint him to a situation which was not in the Judge's gift, and which was not then vacant.

By law, namely, Act XXV. of 1837, Section 12, which is still in force, and which has always been kept in view in the Circular Orders issued by this Court, the appointment of Ministerial Officers in the Courts of Moonsiffs is vested in the Moonsiffs themselves, the Zillah Judges and the Superior Court retaining a power of supervision and control which has always been interpreted to mean that those authorities are to take care that the Moonsiffs, in making such appointments, do not appoint persons who are disqualified for the situation. Upon such an appointment being made by a subordinate Judge, and reported to the Zillah Judge for his information, it is, no doubt, competent to the Zillah Judge, if he finds

that a person, whose employment as Ministerial Officer, either generally or in the Court of the particular Moonsiff who has appointed him, is open to valid objection, to refuse his sanction thereto, and to require the Moonsiff to choose a candidate to whose appointment there is no objection. But, previously to making such an order, it is always proper for the Zillah Judge to allow the person, whose appointment is objected to, to show cause against his being removed.

In the present instance, the Judge appears to have made his order in the absence of the petitioner, and without his having been previously heard. It does not appear that the petitioner was in any respect disqualified for the appointment, or that his appointment was open to any sort of objection whatever, or that the Moonsiff had neglected any of the preliminary enquiries or formalities which are prescribed by the Circular Orders.

Under these circumstances it was not competent to the Zillah Judge, merely on the ground that in his opinion the claims of some other officer were superior to those of the petitioner, to remove him from the office to which he stood lawfully appointed, and to direct the appointment of a different and specified person.

The order of the Zillah Judge is, therefore, set aside, and the petitioner will be reinstated in the post to which the Moonsiff has appointed him.

The 6th February 1867.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Jurisdiction of Collector—Breach of contract.

Case No. 327 of 1866 under Act X. of 1859.

Regular Appeal from a decision passed by Baboos Gobind Chunder Bose and Juggobundhoo Sein, Deputy Collector of Tipperah, dated respectively the 26th June and 28th July 1866.

Ram Coomar Bhuttacharjee (Defendant), *Appellant,*

versus

Ram Coomar Sein, agent of Rughoonath Pershad Tewaree (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee, Dwarkanath Mitter, and *Romesh Chunder Mitter* for Appellant.

Mr. R. V. Doyne and *Baboos Sreenath Doss* and *Mohinee Mohun Burdhun* for Respondent.

Suit laid at Rupees 35,602.

The Collector, when he has to enquire into contracts between the parties, and to determine whether breach of any such contract has been committed, cannot, upon supposed considerations of equity, set aside that which the parties have deliberately agreed upon between themselves, and substitute further terms of his own.

Jackson, J.—We think that in this case the Deputy Collector has miscarried. The plaintiff was an ijaradar of certain mehals, and granted a dur-ijarah to the defendants (4 persons) at a jumma of 33,984 rupees for the years 1273 and 1274 Tipperah era, and a jumma of Rupees 35,602 for years 1275 to 1279 of the same era. A pottah and kubooleut were interchanged between the parties, and it appears that the defendants made default in the payment of rent for 1273. The plaintiff thereupon sued them and obtained a decree altogether for Rupees 12,592 including interest. He was about to execute that decree by ejecting the defendants, when the defendants, on the 1st Srabun 1274, executed, in consideration of the stay of proceedings, an ikrar by which they agreed that, on breach of certain conditions therein specified, their lease might be cancelled. The plaint expressly alleged that the several conditions of that agreement had been broken by the defendants, that their lease was consequently under the ikrar liable to be cancelled, and it expressly asked that the lease should be cancelled, and the defendants ejected accordingly. That allegation and that prayer are distinctly repeated in the oral examination of the plaintiff's naib, dated 15th May 1866.

The defendants contended that, according to the terms of their kubooleut, they were not liable to be ousted. They denied that the ikrar could be legitimately enforced in the Collector's Court. They denied also the breaches of that ikrar; and they asserted that their lease could not be cancelled.

Upon these allegations the Deputy Collector, it is difficult to understand how, came to the conclusion that "all that the plaintiff "wishes is that the defendant should pledge "proper security for the future punctual "payment of rent, and I think the plaintiff's "request is not an unreasonable one." He then goes on to lay down a rule that, "where money-compensation is a sufficient "remedy, forfeiture should not follow;" and he thinks fit to make a decree that the defendant's lease should be forfeited unless, within 15 days from the date of the decree,

they should lodge an amount of security equal to that alienated; and he further directs that each party should bear his own costs.

After that decree was made, it appears that security was tendered by the defendants. That security came before a different Deputy Collector, and he, after considering the objections offered by the plaintiff to the security, declared it to be insufficient, and directed that the decree should be executed. Against these decisions of the two Deputy Collectors, an appeal has been preferred by the defendants, and a petition of objection under Section 348 of the Procedure Code has been tendered by the plaintiff.

It appeared to us, in the first instance, that the second order of the Deputy Collector rejecting the security was not an order properly appealable to this Court. It was not a decree, but, as it appeared to us, an order made after decree, and relating to the execution thereof. It was an order, therefore, of the description which, under Section 151, Act X. of 1859, is not open to appeal or revision.

We have only, therefore, to consider the decision of the Deputy Collector, dated the 26th June 1866.

It may be as well perhaps to take the objection of the plaintiff in the first instance, because our decision upon that objection will probably make it unnecessary for us to consider the appeal of the defendants. The plaintiff has two principal grounds of objection: *1st*, that the Court below was wrong in making the order for cancelment of the lease conditional, and ought to have made it absolute as provided by the ikrar; *2nd*, that there was no ground whatever for making the plaintiff pay his own costs, and that, consequently, this part of the decree should be set aside.

It appears perfectly clear, and, in fact, it is not denied, that the defendants did execute the ikrar of 1274, by which they agreed that, on breach of the conditions therein specified, the lease might be cancelled at the will of the lessor. This was clearly such a contract as might, and necessarily would, be the subject of a suit in the Collector's Court under Clause 5, Section 23, Act X. of 1859. It is also clear that there is abundant evidence which has not been displaced or controverted by the defendants, that breach of the conditions has been committed.

It was contended by Baboo Dwarkanath Mitter for the defendants that some at least of these conditions were such that the breach of them would really be of no detriment to the plaintiff; and that the Collector ought, as a Court of Equity, to enquire into the nature of those conditions whether they were or were not reasonable, and, if not reasonable, the Court ought not to enforce the penalty.

We are of opinion that these conditions are by no means fanciful or unsubstantial conditions. They are conditions, the breach whereof would inflict on the plaintiff a certain amount of injury and inconvenience; and we are also of opinion that, in cases of this description, where the Collector's Court, being a Court of limited jurisdiction, has to enquire into contracts between the parties, and to determine whether breach of any such contract has been committed, it would be extremely dangerous if the Collector, instead of enforcing the contract, were, upon supposed considerations of equity, to set aside that which the parties have deliberately agreed upon between themselves, and substitute fresh terms of his own.

The Deputy Collector appears to have dealt with this case as if it were governed by Section 78, or by a certain analogy to that Section of Act X. of 1859. It is hardly necessary to observe that the Section does not apply.

We think, therefore, that the Deputy Collector had no discretion, and no authority to introduce that condition that the defendants should be at liberty within 15 days from the date of his decree to put in a new security; and that he has also omitted to advert to the real character of this plaint, which is not a plaint for the purpose of taking a new security, but a plaint calling for the infliction of the penalty of forfeiture to which the defendants had subjected themselves.

We are of opinion that the decree in this case ought to have been a decree for the cancelment of the lease and for the ejectment of the defendants; and, moreover, we can have no doubt that, in such a case, the defendants ought to have paid their own costs, and the costs of the plaintiff in this suit. The Deputy Collector's decree will be amended, and a decree made for the ejectment of the defendant and the cancelment of the lease with costs in both Courts.

The 6th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Adjustment of decree—Section 206, Act VIII. of 1859.

Case No. 681 of 1866.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 16th August 1866, reversing an order passed by the Moonsiff of that District, dated the 12th June 1866.

Bhyá Bhoopnath Sahee (Decree-holder), *Appellant,*

versus

Kunwan and others (Judgment-debtors), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Nil Monee Sein for Respondents.

Under Section 206, Act VIII. of 1859, a Court cannot recognize any adjustment of a decree, unless made through the Court, or notified to the Court by the person in whose favor the decree has been made, or to whom it has been transferred.

Macpherson, J.—THE judgment of the Lower Court is reversed with costs. Section 11 of Act XXIII. of 1861 must be read along with Section 206 of Act VIII. of 1859, which expressly enacts that no adjustment of a decree in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court, or be notified to the Court by the person in whose favor the decree has been made, or to whom it has been transferred. Here the adjustment now pleaded was not made through the Court, or notified in the manner provided: therefore, it cannot be recognized by the Court (*see* IV. Weekly Reporter 11, Miscellaneous).

The Lower Court says of Section 206 of Act VIII. of 1859 that, "owing to the extreme ignorance of the bulk of the people "of the district, this law has never been "rigidly enforced, and it has been the cus- "tom of our Courts to entertain objections "of this nature," and to recognize payments not made through or notified to the Court in the prescribed manner. We have only to remark that the provisions of the Code of Civil Procedure are imperative on the point, and that any Court, which, from motives of expediency, advisedly adopts and recognizes a procedure which is forbidden by the Code, is guilty of a serious breach of duty. It is the business of Courts to administer justice according to the law such as it is, not according to the Judge's idea of what the law ought to be.

The 3rd December 1866.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation—Dispossession—Minority.

Cases Nos. 160 and 162 of 1866.

Applications for review of judgment passed by the Hon'ble Justices Trevor and Campbell, on the 11th January 1866, in Special Appeals Nos. 678 and 679 of 1865.

Gobind Coomar Chowdhry and others (Defendants), *Petitioners,*

versus

Huro Chunder Chowdhry (Plaintiff), *Opposite Party.*

Baboos Kalee Kishen Sein and *Hem Chunder Banerjee* for Petitioners.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Opposite Party.

Limitation begins to run against a mother on her succeeding to a family estate as the heir of her son and under no disability, and cannot be stopped by any subsequent disability under Section 11, Act XIV. of 1859.

A dispossession by a stranger to a family of a portion of the family estate is only one cause of action to the family arising on the date of dispossession; and though, in consequence of the minority of a certain member of the family living at the time, the period of limitation may under the law be enlarged, still no new cause of action accrues to a subsequently born son at the date of his birth, so as to enable him to postpone again the period of limitation which has begun to run against the family.

Trevor, J.—THE other side must be called upon to show cause why, as the plaintiff comes into Court, on his own showing, more than 12 years after his alleged cause of action, he is, under the circumstances of the case, entitled to any privilege under Section 11 of Act XIV. of 1859, and is not, by the operation of the ordinary rule of limitation, barred.

After hearing the plaintiff show cause, we were of opinion that the review should be admitted. Having admitted the review, we proceeded to hear arguments, and, having considered them duly, we postponed judgment. That judgment we now deliver.

In our former judgment we remarked as follows: "As to plots 4 to 42 in appeal 87,

"it appears that, when the dispossession by "defendants took place in 1254, plaintiff's "mother was in possession as the guardian "and manager of her minor adopted son "Juggut Chunder, who was adopted on the "12th Falgoon 1250, and died in 1257. It "appears, moreover, that the plaintiff was "adopted in 1258, and brings his present "suit in 1270, he having reached his major-"ity in 1268 Mughee, or 1861.

"Now," we proceeded, "it seems clear "that plaintiff is not the heir either of his "adopted brother, who died in infancy, or of "his mother. Consequently, when the cause "of action arose, and previous to his adop-"tion, no one, through whom he claims, was "in possession of the property of which the "lands are said to form a portion. It follows "that limitation did not begin to run against "him until his adoption, but he was a minor "from that time 1258 to 1268, and has "brought his suit within 3 years from the "time when the disability ceased. He is, "consequently, as to these lands, within time, "and his claim to them must be enquired "into. The same reasoning applies to plot "2 of appeal 28. Taramonee was dispos-"sessed of it in 1262, when, acting as the "guardian of her first adopted son and until "plaintiff's adoption, no one through whom "he claims possessed the property in virtue "of which he brings the present action."

It has been urged in review that, as the estate of the late Gobind Chunder Chowdhry vested in Juggut Chunder on his adoption, and, after his death, in his mother who succeeded him by right of inheritance, and, as she was then under no disqualification to sue, no time can be allowed on account of the disability on the part of the plaintiff under Section 11 of Act XIV. of 1859, but he is out of Court under the Statute of Limitation; and, secondly, that no new cause of action arose to plaintiff on his birth. The cause of action to the family arose on the date of dispossession, and then only; and though, in consequence of the minority of the son then living, limitation did not run, still, on the mother succeeding as his heir, limitation began to run against her, which could not be subsequently defeated by the birth of a son not in existence when the cause of action accrued.

At the date of the dispossession alleged by the plaintiff, when the real cause of action to the family arose, his mother was in possession as the guardian and manager of her first adopted son, who had succeeded by right of inheritance. Whether limitation should be counted from that date of dispossession, the son being then under disability, may admit of question. We think, however, that, immediately on the mother succeeding to the property as the heir of her son and under no disability, limitation began to run against her, and that it could not be stopped by any subsequent disability of any party under Section 11 of Act XIV. of 1859. Moreover, we think that a dispossession by a stranger to a family, of a portion of the family-estate, is only one cause of action to the family, and that that cause arose on the date of dispossession; and though, in consequence of the minority of a certain member of the family living at the time, the period of limitation may, under the law, be enlarged, still no new cause of action accrues to a subsequently born son at the date of his birth, so as to enable him to postpone again the operation of the Statute of Limitation which, as in the present case, has begun to run against the family.

On this view of the case, we consider, as to the portions of the plaintiff's claim embraced in this review, that he is out of time. We, therefore, on these portions, reject his special appeals with costs in the same way as we have rejected his special appeals on the remaining portions of his claim.

The 10th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Presumption under Section 4, Act X. of 1859—Forged pottah.

Case No. 3067 of 1864.

Special Appeal from a decision passed by Mr. H. B. Lawford, Officiating Additional Judge of Jessore, dated the 13th August 1864, reversing a decision of Mr. L. W. Hutchinson, Sudder Ameen of that District, dated the 28th December 1861.

Gopal Chunder Roy (Defendant), *Appellant*,

versus

Gooroo Doss Roy (Plaintiff), *Respondent*.

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboos Sreenath Ghose and *Kishen Kishore Ghose* for Respondent.

The question, whether a party, who has propounded a forged pottah, could have the benefit of the presumption arising from paying a fixed rent for 20 years, was held not to arise in a suit brought before Act X. of 1859 came into operation, Section 4 applying only to suits commenced under the provisions of that Act.

This case was referred to a Full Bench by Bayley and E. Jackson, JJ., with the following order:—

Referring Order.—THE first point arising in this special appeal is whether, where a pottah purporting to be of a date anterior to the Decennial Settlement is filed, and is found as a fact to be a forgery, the party propounding such forged pottah can have the benefit of the presumption arising from paying fixed rents for 20 years under Section 4, Act X. of 1859.

We find that Mr. Justice Morgan and Mr. Justice Pundit held, on the 21st September 1864, that such party could have the benefit of the presumption, and that Mr. Justice Steer and Mr. Justice Levinge held, on the 8th June 1864, in the case of Omesh Chunder Biswas, that he could not.

With this conflict of decisions by Division Benches before us, we think it right to refer the case to a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Peacock, C.J.—It being admitted that this suit was brought before Act X. of 1859 came into operation, the question does not arise whether a party who has propounded a forged pottah could have the benefit of the presumption arising from paying a fixed rent for 20 years, Section 4, Act X. of 1859, applying only to suits commenced under the provisions of that Act. Therefore, the point which has been referred to us does not arise.

The case will go back to the Division Bench which referred it.

The 11th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution—Joint Decree-holders.

Case No. 626 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 16th June 1866.

Mr. J. P. Wise and others (Decree-holders), *Appellants,*

versus

Moulvie Abdool Ali and others (Judgment-debtors), *Respondents.*

Messrs. R. V. Doyne and *C. Gregory*, and *Baboo Kishen Kishore Ghose* for Appellants.

Messrs. A. T. T. Peterson and *R. T. Allan*, and *Baboos Kalee Mohun Doss* and *Bhowanee Churn Dutt* for Respondents.

A plaintiff who had obtained a decree having died, and the defendant in the suit being one of the representatives of the deceased plaintiff, and as such entitled to succeed to a share in his estate—HELD that the mere fact of the defendant being one of the representatives of the deceased did not debar the other representatives from executing the decree according to their rights.

Macpherson, J.—THE Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under Sections 102 and 103, and Section 208 of Act VIII. of 1859, the case may, so far as anything has been shown to us to the contrary, be perfectly well disposed of without a separate regular suit. The Court must enquire properly and fully into the matter, and decide whether all or any of the parties, who now seek to issue execution, have a right to do so. We express no opinion as to whether they have or have not that right; but we are clear that, even if it should appear that the principal defendant has (as one of the representatives of his son) an interest as one of the decree-holders, that fact will not bar execution being issued by other decree-holders according to such rights as they may be able to prove.

As an appeal to the Privy Council has been admitted in this suit, the Lower Court must dispose of this application for execution, with reference to the decision of a Full Bench of this Court in the Case of Wise *versus* Raj Kishen Roy, VI. Weekly Reporter, page 84, Miscellaneous.

Mr. Allan for Barry, and Baboo Kalee Mohun Doss for a female defendant Kurumoolnissa, appear and dispute the right of the applicants to issue execution against them under any circumstances. These objections must be disposed of by the Lower Court at the proper time. If the Court shall be of opinion that execution should issue at all, it must also decide against what persons in particular it is to issue. At present all that we decide is that the appellants have a right to have their application disposed of on its merits.

Remand accordingly.

The 11th February 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Maintenance.

Case No. 2483 of 1866.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 19th June 1866, affirming a decision passed by the Additional Principal Sudder Ameen of that District, dated the 5th September 1865.

Narain Doss (Plaintiff), *Appellant,*

versus

Maharajah Mahatab Chund Bahadoor (Defendant), *Respondent.*

Baboo Nobo Kishen Mookerjee for Appellant.

Baboo Juggodanund Mookerjee and *Moonshee Ameer Ali* for Respondent.

The fact of *A* having been long supported by *B*, or of his having been purchased either as a slave or as a "*chella*," will not entitle him to claim perpetual maintenance for himself and his heirs, especially where *A* does not show that he has been deprived of ordinary means of livelihood which he might otherwise have commanded.

Pundit, J.—We hold that the plaintiff, special appellant, does not in this case show any legal ground for a decree being given against the defendant, the Maharajah of Burdwan.

The fact of the special appellant having been long supported by the Maharajah before his ceasing to be so, or the fact of the special appellant having been purchased either as a slave, or as a "*chella*," as he says, will not justify a decree in plaintiff's favor for perpetual maintenance for himself and his heirs at the rate that he has asked, or even for maintenance *as a servant.*

The application of the special appellant to examine the Maharajah was to prove a contract which plaintiff has failed to establish, and which, if made out, would not bind the Maharajah for the purpose of this suit. It may be added that the very contract is admitted to have been made during the Maharajah's infancy. The examination of the Maharajah, therefore, was, we think, rightly refused by the Lower Appellate Court. Nor can special appellant be allowed to examine the Maharajah upon the new plea that the Maharajah ratified the previous contract, as there is no proof either of the original contract or of its details, or any allegation of the contract having been ratified by any act, but only by the Maharajah having hitherto maintained the special appellant. This might have been done before and after the infancy of the Maharajah by him voluntarily, and would not, in that view, afford a ground for decreeing plaintiff's present suit.

It is not even set forth that, by the alleged taking up by the Maharajah of plaintiff as a chella, the special appellant has been deprived of those means of procuring his livelihood which he might have otherwise commanded.

The application of the special appellant to examine a female relative of high rank of the Maharajah's has been properly held by the Lower Appellate Court to have been inadmissible under the circumstances of this case and the discretion vested in our Courts.

We, accordingly, see no reason to interfere, and reject the special appeal with costs.

The 11th February 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Judgment of Lower Appellate Court—Oral evidence.

Case No. 2395 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 30th June 1866, affirming a decision passed by the Additional Moonsiff of that District, dated the 31st July 1865.

Mussamut Rajoo and others (Plaintiffs), *Appellants,*

versus

Raj Coomar Singh and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Respondents.

A plaintiff is entitled to some opinion by the Lower Appellate Court upon the oral testimony on his side. The mere affirmance of the decision of the first Court which considered the oral evidence in detail does not involve the adoption by the Lower Appellate Court of the first Court's view of the oral testimony.

Pundit, J.—The pleas taken by the pleader before us in this special appeal are—

I.—That the Lower Appellate Court erred in law in not passing any opinion as to the oral evidence adduced by plaintiff, special appellant, and to which opinion plaintiff (special appellant) was by law entitled.

II.—That proper effect was not given to the kubooleut of Issree Pershad, and to the ikrarnamah and the written statement of plaintiff.

We observe that plaintiff in this case sued for possession of certain lands and for malikana and mokurruree rights under alleged deeds of sale of 25th March and 20th November 1860 from one Kulabooddeen.

The first Court held that plaintiff had not proved, either by his oral or documentary evidence, the fact of his vendor's possession, and dismissed plaintiff's suit.

The Lower Appellate Court, giving its reasons in detail for considering plaintiff's *documentary* evidence not to prove his vendor's possession, but *not* giving an opinion *at all* as to the oral evidence which the first Court had considered in detail, affirmed the first Court's decision.

The plaintiff appeals specially on the grounds before stated.

We think that the *first* plea is a valid one. The special appellant has a right to the opinion of the Lower Appellate Court on his *oral* evidence. It is pleaded, on the other side, that, as the Lower Appellate Court has affirmed the decision of the first Court, it thereby adopted the view of the first Court as to the *oral* testimony referred to. But this is not a necessary consequence, though it may be possibly the fact. However, the plaintiff is entitled to some opinion by the Lower Appellate Court upon the oral testimony on his side, and we are accordingly necessitated to remand the case to the Lower Appellate Court for its opinion on this point.

The *second* plea is quite untenable. In the *first* place the words "legal effect" have been ingeniously adopted in the pleading to avoid what is, in fact, the proper term, *viz.*, "weight due to evidence," which the pleader knew would not justify a special appeal in law. In the *second* place, the Lower Appellate Court has decided the case as on the weight it thought due to that evidence, on which point no special appeal lies.

The special appeal is remanded on the first plea only, and it is dismissed on the *second* plea.

The 11th February 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Section 246, Act VIII. of 1859—Section 5, Act XIV. of 1859—Priority of bona fide purchase—Fraud—Benamee transactions.

Case No. 2393 of 1866.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 9th August 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 23rd February 1866.

Kalee Mohun Paul (Plaintiff), *Appellant,*

versus

Bholanath Chakladar and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

Mr. R. E. Twidale and *Baboo Mohinee Mohun Roy* for Respondents.

The limitation contemplated by Section 246, Act VIII. of 1859, is applicable only to an *order* passed under that Section, or to a suit brought to set aside an *order* passed under that Section.

Section 5, Act XIV. of 1859, does not apply to a case of priority of *bond fide* purchase.

There is no fraud in a purchaser securing the assent both of the ostensible and beneficial owners to his purchase, so as to acquire a good title.

Benamee transactions are a custom of the country, and must be recognized till otherwise ordered by law. Meanwhile, the extent of their compatibility with an honest purchase depends upon the peculiar circumstances of each case.

Bayley, J.—This case has been very clearly and properly pleaded before us for the plaintiff, special appellant.

Plaintiff Kalee Mohun sued in 1272 for possession on an alleged purchase of the land in suit from one Dinonath by a registered deed of sale, dated 3rd Pous 1266. This deed of sale was witnessed by one Bistoo Ram. Bistoo Ram was the original proprietor of 199-5 land. In the first instance, Bistoo Ram sold to Chundee Doss and Dinonath. Subsequently, one Luckhee Debee and Bholanath Chakladar, decree-holders (the former not related to any party in the suit, but the latter the husband of one of the defendants), attached and sold the property (alleged by plaintiff to have been sold to him by Dinonath) as that of Bistoo Ram. Dinonath and Chundee Doss claimed it. Their claims were rejected. They were rejected under the old law, that is, with no reference

being made to Section 246, Act VIII. of 1859. The money due was deposited by Bistoo Ram in Court.

The next thing we see is that Kalee Mohun (plaintiff), having a money-decree of 1,481 rupees against Buloram, purchased Dinonath's half share, making Bistoo Ram a witness to his purchase as before noticed. The consideration was the value of the decree taken at 1,200 and 800 rupees in cash, or 2,000 rupees in all. Bistoo Ram admitted this sale.

Defendants allege their purchase of the same property of Bistoo Ram under 3 deeds of sale, all of which were of date 4 or 5 years after plaintiff's deed, and two of which were *not* admitted by Bistoo Ram, and were *not* registered, and one of which *was* admitted by Bistoo Ram, and *was* registered. These deeds the defendants set up, when plaintiff sought for possession under his purchase. Plaintiff, being unable to obtain possession, sued defendants for possession and declaration of title under his alleged prior purchase.

The first Court held that, as plaintiff did not sue to set aside a sale under Section 246, Act VIII. of 1859, as was clear from a special appeal having been admitted in the suit, which could not have been the case had the suit been one under Section 246, Act VIII. of 1859, and further, as that law was not in force at the time of the transaction, plaintiff was *not* bound by a special Law of *Limitation* under that Section.

On the *merits*, the first Court held that plaintiff had proved his prior title; that it was not in fraud; and that defendants had withheld rightful possession from plaintiff.

The first Court, therefore, decreed the plaintiff's suit.

The Lower Appellate Court held that Section 246 did apply, and that the plaintiff was barred by that Section; and, *on the merits*, that plaintiff could not recover, his case being in fraud and no real purchase, but a nullity and void.

The Lower Appellate Court having, therefore, dismissed plaintiff's suit, plaintiff appeals specially, urging—

1. That Section 246, Act VIII. of 1859, does *not* bar the suit.

2. That the plaintiff's purchase was not in fraud, and that the Lower Appellate Court has erred in law in holding, on the grounds stated by it, that it was so. Further, that, even if the original vendor Bistoo Ram sold to Dinonath in fraud, it would not affect plaintiff, who was an innocent purchaser for value; and that plaintiff, having a prior registered deed of sale admitted by his vendor Dinonath, and witnessed by Bistoo Ram, has priority of title over defendant's subsequent deed.

There is a cross-appeal by defendant under Section 348, Act VIII. of 1859, to the effect that Section 5, Act XIV. of 1859, governs the case.

On the *first* plea of the plaintiff, special appellant, and on the cross-appeal of defendant, special respondent, we are of opinion that no special limitation, under either of the laws cited, bars the plaintiff's suit.

The Principal Sudder Ameen enquired and heard witnesses, and ruled that the sale was an attempt by Bistoo Ram to evade his debt under a decree, by transfer to relatives, and that, therefore, in effect this was an order under Section 246 of Act VIII. passed in the execution of a decree, though that decree was given under the earlier Law of Procedure. The Lower Appellate Court's judgment is as follows:—

"I cannot see that Dinonath is protected "by Section 387, because at the time the "suit had been decided, Dinonath was "no party to that suit, and the order did "not deprive him of his right to appeal or "to bring a suit. He did appeal, and he "might have brought a suit within a year. "Plaintiff claims through Dinonath; and, "though this is not brought as a suit to re-"verse the Principal Sudder Ameen's order, "it is an attempt to avoid his decision "against Dinonath, and to act upon Dino-"nath's title. If, however, plaintiff was a "*bonâ fide* innocent purchaser, and his title "is good, the suit is not barred to him, "whatever it may be with reference to "Dinonath."

Now, there is in fact here, in our opinion, no suit to set aside any order passed under Section 246, Act VIII. of 1859. The order that was passed and is above treated as an order under Section 246 was, in fact, an order under the old law, without any reference to Section 246; and the suit was brought before Act VIII. of 1859 was in operation. If, then, the order is not one under Section 246, *nor* the suit one brought to set aside an order under that Section, the limitation contemplated by that Section is not applicable. This view is supported by the decision

of this Court, 3 Sutherland, page 62, 27th May 1865 (case of Luckhun Roy).

In respect to the cross-appeal, we do not see that Section 5, Act XIV. of 1859, applies to the facts of this case, which is one simply of priority of *bonâ fide* purchase.

On the *merits*, we are clearly of opinion that the Lower Appellate Court has erred in law in *assuming fraud* on the part of plaintiff, on the grounds it takes. The facts above stated clearly show that all motive of fraud was absent in plaintiff. His natural object was to make a good title. He saw an ostensible title in his vendor Dinonath, behind which there was a beneficial title in Bistoo Ram. His purchase was necessarily from Dinonath, the ostensible proprietor; and, in order to make secure his conveyance, he made Bistoo Ram, their vendor's vendor, a witness to the deed, and so a consenting party, and thus secured himself against any revival of title in Bistoo Ram as against him, plaintiff. Plaintiff's deed is a *registered* deed, and *admitted*. It is allowed to be of *long prior* date. The only flaw which appears doubtful in plaintiff's conduct is that for 5 or 6 years he delayed to seek possession through the Courts. But this *of itself* is not, in our view, a sufficient cause to set aside a title otherwise good. The decree that passed, as consideration, showed purchase for value, and, indeed, plaintiff would otherwise have been throwing away his own decree, which he could have sold anywhere for its market-value. Nor is there any connection shown between the parties or their transactions, evidencing collusion on the part of plaintiff in favour of Bistoo Ram or Dinonath, or plaintiff's knowledge of anything beyond this, *viz.*, that to acquire a good title, he (plaintiff) had to deal with both, an ostensible and possibly a beneficial owner behind. He, therefore, secured the assent of both to his purchase. In this state of facts, we see no fraud, as in this case.

Benamee transactions are, as laid down by the Privy Council in the Gosseins and other cases, a custom of the country, and must be recognized till otherwise ordered by law. Till then, how far they may be compatible with an honest purchase, and how far not so, must depend upon the peculiar circumstances of each case. Here the facts prove no fraud and no collusion in the purchase.

We, therefore, reverse the decision of the Lower Appellate Court, decree the appeal, and affirm the decision of the first Court with costs.

The 11th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Mesne-profits—Local investigation.

Case No. 884 of 1866.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Purneah, dated the 5th September 1866.

Karoo Lall Thakoor (Judgment-debtor), *Appellant,*

versus

Mr. A. G. Forbes (Decree-holder), *Respondent.*

Baboo Tarucknath Sein for Appellant.

Baboo Umrit Nath Bose for Respondent.

A judgment-debtor, who fails to appear before an Ameen deputed to make a local enquiry as to mesne-profits, is not precluded from objecting to the Ameen's report on the ground that the investigation was erroneous.

A plaintiff is bound by his own assessment of mesne-profits.

Loch, J.—In this case an Ameen was deputed to make local enquiry as to the mesne-profits, and, as the judgment-debtor failed to attend, the Ameen very properly made an *ex-parte* enquiry. Certain objections were raised to this enquiry by the judgment-debtor; but the Principal Sudder Ameen, on the authority of two precedents of the High Court, *viz.*, 1st August 1866. Volume II.,* page 132, Civil Reports, and page 1, Special Number of Weekly Reporter for 1862, held that the objector having failed to appear before the Ameen could not be allowed to object to his report. We have not been able to find the first quoted precedent, but, in the second, we find nothing to support the view taken by the Principal Sudder Ameen. If a defend-

* A mistake for Vol. VI., p. 130.

ant fails to appear before the Ameen, the investigation is made in his absence and perhaps to his detriment, and he cannot merely, on the score of absence, ask for further investigation or impugn the propriety of the enquiry merely on the score that it was *ex parte*. But, if there is anything in the investigation which is erroneous, there can be no reason for refusing to listen to the defendant's or debtor's objection to it in order that the Court may do justice. Execution-cases are in general very carelessly tried by the Lower Courts. They seem to think that the debtor, having had a fair trial, and having a decree existing against him, can have no just grounds for opposing measures taken in execution; but, as the enquiry into mesne-profits is frequently very imperfectly performed by the Lower Courts, and the principle on which the enquiry is based is not unfrequently erroneous, it is quite necessary that objections taken by debtors should be carefully listened to and thoroughly sifted. In the present case, the debtor raises what appears to us a valid objection to the assessment. He objects to the rates adopted by the Ameen, *viz.*, Rupees 1 and 1-4 per beegah, because he says the plaintiff in his claim only asked to recover mesne-profits at 10 annas and 11 annas a beegah, that being the proper rate for the land according to the plaintiff's own showing. If this be so, plaintiff has knowingly assessed the lands, and cannot be entitled to a higher rate in execution. However, we have not the plaint before us to verify the truth of the appellant's assertion. It is true that the decree directed that mesne-profits were to be ascertained in execution, and, had plaintiff estimated them in his plaint in a general way, with the view of determining the value of the suit, he would have been entitled to recover whatever sums had been realized or were capable of being realized by the defendant; but, when he comes into Court, and knowingly fixes the rates of each beegah of land, we think he is bound by his own assessment. There were, however, items of mesne-profits which required to be investigated at the time of execution, and this has now been done by the Ameen, and we think the appellant's objections regarding *tayer*, *i. e.*, the value of fruit from certain trees appropriated by defendant, are untenable. We remand the case to the Lower Court for an examination of the plaint, and directing the Principal Sudder Ameen to give the mesne-profits according to the rates assessed by the plaintiff if these are distinctly mentioned in the plaint.

The 12th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and L. S. Jackson, *Judge*.

Evidence—Copy of translation of Magistrate's supposed English order under Act IV. of 1840—Hindoo Law—Joint heirs—Widow.

Case No. 2647 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. R. P. Jenkins, Additional Judge of Tirhoot, dated the 18th July 1866, modifying a decision passed by Mr. F. W. V. Peterson, Assistant Collector of that District, dated the 4th August 1865.

Ramjee Lal (one of the Defendants), *Appellant*,

versus

Mr. George Anderson, Acting Manager-General of the Raj of Durbhangah, on behalf of the Court of Wards (Plaintiff), and another (Defendant), *Respondents*.

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellant.

Baboos Kishen Kishore Ghose and *Mohinee Mohun Roy* for Respondents.

A copy of a translation of what a Magistrate is supposed to have said in English in a proceeding under Act IV. of 1840 is no evidence of an admission.

It was held impossible under the Hindoo Law that the widow and the defendant in this case could both be heirs.

Peacock, C.J.—We think it quite clear that a copy of a translation of what the Magistrate is supposed to have said in English in a proceeding under Act IV. of 1840 is no evidence of an admission which could bind the defendant, special appellant. We do not think that there was any evidence adduced against this defendant to prove that he was the heir. On the contrary, the plaintiff recovered against the widow in another suit upon the allegation that she was the heir. Notwithstanding that in this case he says that the defendant and the widow were joint heirs. It is impossible, however, that they could be both heirs, whether under the Mitakshara or the Dyabhaga.

We think, therefore, that there is no evidence against the defendant that he was the heir, and consequently no evidence that he was liable for the rent due to the plaintiff.

The appeal is decreed, the decision of the Lower Appellate Court reversed, and the decision of the first Court affirmed with costs. But, as the widow appeared without necessity, we do not think that she is entitled to her costs.

The 12th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Specific performance of contract—Damages.

Case No. 2516 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 14th August 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 24th April 1866.

Bal Gobind Muhtoon (Plaintiff), *Appellant,*

versus

Meer Lutafut Hossein and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Mohesh Chunder Chowdhry* for Appellant.

Mr. R. E. Twidale and *Moonshee Ameer Ali* for Respondents.

Held, under the circumstances of the case, that there was not such a contract, on consideration received, as to make this a case when a suit for specific performance, rather than a suit for damages, should be held to be the correct form of action.

Bayley, J.—In this case the admitted facts are these:—

The plaintiff sued for specific performance of an alleged contract to give him a lease. Plaintiff applied by petition to the proprietors of the village for the lease, and tendered payment in advance, but payment was not received. These proprietors, however, wrote upon the petition their approval by the word "munjoor." Subsequently, one of the proprietors, who represented $\frac{4}{16}$ths of the property, instead of giving plaintiff a lease of that portion, renewed the old lease of the previous lessee.

The first Court held that the writing of the assent on the plaintiff's petition by the proprietor of the $\frac{4}{16}$ths and the tender of the money constituted such a contract that specific performance should be decreed, and the first Court decreed accordingly.

The Lower Appellate Court holds that the circumstances do not show such a contract that specific performance should be decreed, and that defendant is not in a position to perform his alleged contract after he has renewed the lease to his old lessee. The Lower Appellate Court recorded that, whether plaintiff has a right of action for damages or not, is not now in question.

The special appeal is on the grounds, *1st*, that the Lower Appellate Court has not gone on defendant's own plea, which was that it was for plaintiff's fault that the contract was not carried out; *2nd*, that the correct view was not that defendant could not fulfil his contract, because he had renewed the lease to the former lessee; but that the former lessee should not have the renewed lease recognized, but that, instead of that, plaintiff should obtain such lease under defendant's assent to the contract.

We are of opinion, under the state of facts above given, that there was not such a contract, on consideration received, as to make this a case where a suit for specific performance rather than a suit for damages should be held to be the correct form of action.

The cases which have been cited in support of the special appeal, 3 Weekly Reporter, page 64, and Sudder Dewanny Adawlut, 1859, page 1446, do not, in fact, support the special appeal; and, on the other hand, in the cases with similar surrounding circumstances, we find specific performance not to have been decreed.

In this view we dismiss the special appeal with costs.

The 12th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Execution—Ejectment.

Case No. 2134 of 1866.

Special Appeal from a decision passed by Baboo Kadarnath Banerjee, Additional Principal Sudder Ameen of East Burdwan, dated the 17th May 1866, affirming a decision passed by the Moonsiff of that District, dated the 19th April 1865.

Nubo Kishen Mookerjee (Plaintiff), *Appellant,*

versus

Hurish Chunder Banerjee (Defendant), *Respondent.*

Baboo Tarucknath Sein for Appellant.

No one for Respondent.

Receipt of rent subsequent to a decree for ejectment under Section 78, Act X. of 1859, from a tenant against whom the decree was passed, renders execution of the decree impossible.

Trevor, J.—PLAINTIFF, special appellant, in November 1864, sued the defendant, a purchaser, for possession of a jote formerly belonging to one Nuddea Chand Goopto, against whom he had obtained a decree for ejectment under Section 78 of Act X. of 1859, on the 16th June 1862.

The defendant, a purchaser, pleads that the sale and purchase of such jotes was customary in the villages in which the lands were situated; that plaintiff had never executed his decree, but had received the rent for the same subsequently; that, consequently, he was not now entitled to eject the tenant from the land, notwithstanding his decree.

The Lower Courts both dismissed the plaintiff's claim for reasons into which it is unnecessary to enter at length.

Plaintiff now appeals specially, urging that the Lower Court was in error in not giving effect to the previous decree of the Deputy Collector, dated 18th June 1862, which awarded possession of the disputed lands to him; and, *2nd*, that, as the defendant's vendor did not pay the rent decreed against him within 15 days from the date of the decree, that decree has become final, and defendant cannot dispute its validity.

The Lower Court has found that plaintiff has received the rents subsequent to the decree from the tenant against whom the decree was passed. Under these circumstances, execution became impossible, however legal it might have been under other circumstances. We dismiss the appeal with costs.

The 12th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution—Principal and Agent—Substitution.

Case No. 575 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 20th July 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 19th May 1866.

Bhobo Tarinee Dossia and others (Judgment-debtors), *Appellants,*

versus

Madhub Chunder Dutt (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboo Otool Chunder Mookerjee* for Appellants.

Baboo Juggodanund Mookerjee for Respondent.

When a plaintiff sues as agent, and the suit is dismissed on the ground that it should have been brought in the name of the principal, execution for costs, &c., cannot be issued against the principal, his name not appearing in the decree, and there being no evidence that the suit was instituted or prosecuted by his directions.

Macpherson, J.—GOKUL CHUND DOSS, styling himself gomashtah of Koylashnath, obtained a decree against the respondent for a certain sum of money. The decree being appealed against, the Lower Appellate Court summoned Koylashnath as a witness. He failed to attend, and, therefore, the Court fined him 500 rupees, and, treating him as the person really interested in the suit, reversed the order of the Court of first instance, and dismissed the suit of Gokul Chund. This decision was confirmed in special appeal by this Court—the Court declaring also that the suit was wrongly brought in Gokul Chund's name, as Gokul Chund's whole case was that he was suing merely as agent for and on behalf of Koylashnath. The decree of the High Court states that Gokul Chund Doss is appellant (nothing being said in the decree as to his being agent, &c., of Koylashnath): his appeal is dismissed: and "it is "ordered and decreed that the plaintiff, "appellant, do pay to the defendant, re-"spondent, the sum of Rupees 83," being the costs of the appeal.

It is alleged that, pending the appeal to the Lower Appellate Court, the decree of the first Court was executed, and either the amount due under the decree was realized, or certain timber, the subject of this suit, was recovered from the judgment-debtor.

Under and in execution of the decree of the High Court, the respondent has now applied for execution against the present appellant, who is the widow and representative of Koylashnath, who is now dead. The ground of the application is that she is, or ought to be made, liable in the room of Gokul Chund, inasmuch as Koylashnath in his lifetime and the appellant since his death are the persons who, although appearing under the name of Gokul Chund, were really before the Court

in the original suit. The appellant contends that, inasmuch as no decree was ever passed either for or against Koylashnath or herself, she cannot be made liable under decrees on which Gokul Chund alone is liable; and she further urges that, if the respondent desired to have made Koylashnath or the appellant liable, he ought to have had them added as parties in the original suit, and ought to have had his decree drawn up so as to include them. We think the appellant is clearly right; and that, whether she or her husband were or are beneficially interested in the suit, execution cannot issue against her under the circumstances. As the case stands, there is absolutely nothing on which to base the application to make the appellant liable, save the one fact that Gokul Chund was the agent or servant of Koylashnath. There is no evidence that Koylashnath was the person really suing, or that the suit was brought by his directions. We reverse the order of the Lower Court with costs.

The 12th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Sale in execution—Joint family property—Minor brother's share—Parol evidence (to alter or explain written contract).

Case No. 2510 of 1866.

Special Appeal from a decision passed by Baboo Luckhee Narain Mitter, Additional Principal Sudder Ameen of Mymensingh, dated the 9th July 1866, reversing a decision passed by Baboo Mothooranath Ghose, Moonsiff of Nettrokonah, dated the 24th August 1865.

Ram Lochun Shaha (Defendant), *Appellant.*

versus

Unnopoorna Dossee (Plaintiff), *Respondent.*

Baboos Otool Chunder Mookerjee and *Anund Chunder Ghosal* for Appellant.

Baboo Taraprosunno Doss for Respondent.

A minor brother's share in a joint family estate was held not liable under a sale advertisement which referred solely to the rights aud interests of his elder brothers who did not represent him.

Extrinsic evidence is not admissible to alter a written contract, or to show that its meaning is different from what its words import. Where there is a latent ambiguity in the wording, parol evidence is admissible to explain it.

Glover, J.—This was a suit by the special respondent to recover possession of a 2½-gundahs share for herself, and of a 3-cowrees 1 krant share for her minor son, of a certain talook under the following circumstances:—

She alleged that she and her husband's brother, Ram Gunga, jointly purchased a 5-gundah share of the property; that, on Ram Gunga's death, her three sons, Joy Kisto, Pran Kisto, and Ram Coomar, succeeded to his share, taking 3 cowrees 1 krant each, and that, in execution of a decree against her two elder sons, Pram Kisto and Joy Kisto, who are majors, the judgment-creditor attached and caused to be sold the entire estate, and that thus the auction-purchaser dispossessed her of her 2½ gundahs, and her minor son Ram Coomar of his 3-cowrees 1-krant share.

The defendant (special appellant) purchased at auction on the 5th January 1863. He avers that the entire 5 gundahs belonged under a deed of sale to four persons, Ram Gunga and the three sons of the plaintiff: and that the decree which was against the estate of Ram Gunga and against Pran Kisto and Joy Kisto themselves, and as representatives of their minor brother, Ram Coomar, was effectual against the entire 5-gundahs share, which was, therefore, properly sold in satisfaction of the judgment-creditor's decree.

The first Court held that the property was purchased by Ram Gunga, Unnopoorna, Joy Kisto, and Pran Kisto; that neither Unnopoorna's share nor Ram Gunga's were sold in execution; and that plaintiff was, therefore, entitled to recover one-fourth, or 1-gundah 1-cowree share for herself, and a 1-cowree 2-krants share for her minor son Ram Coomar, as joint heir of Ram Gunga. He allowed execution to proceed against Joy Kisto and Pran Kisto in respect of their shares both by purchase and inheritance.

But the Judge, on appeal, considered that the sale was made to Ram Gunga and Unnopoorna alone, that the plaintiff was entitled to one-half, and that Ram Gunga's share was not sold in execution, but only the elder son's portion of it. He gave a decree, therefore, to the plaintiff for her entire claim.

The defendant now appeals specially, urging that the Judge has misunderstood the effect of the execution-sale, and that he has misconstrued the deed of conveyance in supposing that the property was bought by Ram Gunga and Unnopoorna. Special

appellant adds that the oral evidence of Joy Kisto was not admissible to vary the express terms of the kubalah.

With regard to the first objection, we think that the Lower Court was right. The decree might have been passed against all the family; but, in this particular case, we have to do with the sale "ishtahar" only, and to see from that what was the interest sold. This "notice" contains the names of Joy Kisto and Pran Kisto only; there is no mention of their minor brother Ram Coomar, nor of the interest formerly held by Ram Gunga. The thing sold was the right and interest of the two major brothers, neither more nor less.

In support of special appellant's contention, that the mention of their names really included the whole family, inasmuch as the elder brothers represented, not only their own purchased shares, but also that of their minor brother, as well as the estate of Ram Gunga, we have been referred to the case of Ishan Chunder Mitter *versus* Buksh Ali (I. Marshall 614), where property belonging by inheritance to a minor son was sold in satisfaction of a decree against the widow of his father, the deceased obligor, although the sale advertisement described the property as belonging to the widow.

We do not see any analogy between the two cases. The widow had no personal interest in the property, the right to which was in her minor son, and the entry of her name in the sale advertisement could not mislead any one. The sale of the property was made in the widow's name, not personally, but in her character of representative of her minor son's interest in the property of the deceased obligor.

In the present case, the interests of the major and minor brothers were distinct and separate, both in respect of their own shares and of what they succeeded to as joint heirs of Ram Gunga. For instance, Joy Kisto, Pran Kisto, and Ram Coomar, held a certain share by purchase, and a further share of one-third each as heirs of their uncle; and it would be highly improper to declare the minor brother's share liable under a sale advertisement, which referred solely to the rights and interests of the two elder brothers, inasmuch as they did not necessarily represent him.

We are clearly of opinion, therefore, that the rights and interests of Pran Kisto and Joy Kisto only were sold, and that the execution-sale cannot affect the right of either the special respondent or her son.

But, on the second point, we think that the Judge has unmistakeably misconstrued the deed under which special respondent claims.

It is a conveyance to Ram Gunga—Unnopoorna, widow of Ram Gunga, as mother and guardian of Ram Coomar—Joy Kisto and Pran Kisto—to the uncle and three nephews that is. There cannot be the slightest doubt as to the meaning of the Bengalee words. The sale is made to the four persons above enumerated, and the special respondent's name is entered simply as being mother and guardian of Ram Coomar. The Principal Sudder Ameen has chosen to alter the plain meaning of the conveyance on the strength of Joy Kisto's evidence, which is to the effect that Ram Gunga and Unnopoorna were the sole purchasers.

Now, it is a rule of law that extrinsic evidence is not admissible to alter a written contract, or to show that its meaning is different from what its words import. Where there is a "latent" ambiguity in the wording, parol evidence is admissible to explain it. But, in this case, the wording of the kubalah is perfectly clear, and under it the widow takes nothing.

Our order on this special appeal will, therefore, be that the plaintiff's suit to recover what is alleged to be her own share, *viz.*, 2 gundahs 2 cowrees, be dismissed, which is equivalent to decreeing this special appeal as against her with costs on special respondent, and that the share of Ram Coomar as purchaser under the kubalah and as joint heir of Ram Gunga be excluded from the operation of the judgment-creditor's decree, and so far the special appeal is dismissed with costs.

The 12th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Pleadings—Proprietary rights.

Case No. 2994 of 1866.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 9th August 1866, modifying a decision passed by the Assistant Commissioner of Lohardugga, dated the 22nd August 1865.

Pandey Bishonath Roy (Plaintiff), *Appellant,*

versus

Bhyrub Singh (Defendant), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

No one for Respondent.

A party may have subordinate rights awarded when they arise out of the principal right which he pleads. But when a defendant pleads distinctly a jageerdar's proprietary right against a malik's proprietary right, a Court cannot award a subordinate right of occupancy in no way arising out of a jageerdar's proprietary right, but out of a ryotee right never pleaded by the defendant, and in fact incompatible with his case.

Bayley, J.—PLAINTIFF in this case sues for certain lands as his, on his proprietary right of malik, and which lands plaintiff alleges defendant occupied as plaintiff's lessee, but subsequently set up an adverse proprietary title, *viz.*, as jageerdars.

Defendant pleaded that they as jageerdars had the *proprietary* right. They did not allege any *ryotee* or lessee's rights or of occupancy arising from them.

The first Court held that plaintiff's case was fully proved; that defendant showed nothing to rebut it by any evidence of his own *jageer* title; and it accordingly decreed plaintiff's suit.

In appeal the Lower Appellate Court affirmed this decision, but added: "Since the defendant had *admittedly* been in possession of "a portion of the land, if not the whole, from "1909 S., he has acquired a right of occu- "pancy, and he must retain possession, pro- "vided he pays rent at the village rates."

From that portion of the judgment of the Lower Appellate Court cited in inverted commas, plaintiff appeals specially, urging that, as defendant never pleaded a ryotee title, or any right of occupancy under such a title, or appealed from the decision of the first Court on such a plea, and plaintiff never admitted such a title, and defendant's sole case was that his *jageer title*, as an adverse *proprietary one*, should prevail against that of plaintiff as malik, defendant cannot now have any benefit of a right of occupancy attaching only to those who plead ryotee tenures.

After hearing Counsel and referring to the record, we consider this objection a valid one. There is no admission of any right of occupancy. There is only an allegation by plaintiff that defendant alleges a false proprietary right.

A party may have subordinate rights awarded when they *arise out of the principal right which he pleads*. But, when a party pleads distinctly a jageerdar's proprietary right against a malik's proprietary right, a Court cannot award a subordinate right of occupancy which in no way arises out of a jageerdar's proprietary right, but out of a ryotee right never pleaded by defendant, and in fact incompatible with defendant's case. This is not deciding what had to be decided, *viz.*, whether it was plaintiff's malikee or defendant's jageer land, but another matter which was not in the pleadings. A case in point was decided by this Court on 5th January 1865. We, accordingly, decree this special appeal with costs.

The 13th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Hindoo Law — Sale by daughter — Legal necessity — Sradh by mother.

Case No. 2539 of 1866.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 3rd July 1866, reversing a decision passed by the Moonsiff of that District, dated the 27th January 1866.

Raj Chunder Deb Biswas (Plaintiff), *Appellant,*

versus

Sheeshoo Ram Deb and others (Defendants), *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

No one for Respondents.

According to Hindoo Law, the *sradh* of a mother is not a legal necessity, as that of the father is, to justify a sale by a daughter to the prejudice of the daughter's son.

Pundit, J.—THE special appellant represents the rights of a daughter's son.

The plea in special appeal is that the Lower Appellate Court has wrongly given a decree to the plaintiff against the special appellant (a purchaser from the daughter in possession of her father's estate), because it holds that the special appellant's failure to show anything to the contrary of what the plaintiff has shown supports the evidence produced by the plaintiff, which (it is stated by special appellant) the Lower Appellate Court had otherwise held to be weak and unsatisfactory.

After hearing Counsel and referring to the record, we do not find anything wrong in law in the decision of the Lower Appellate Court. It has rightly thrown the *onus* upon the purchaser defendant, and when the

case made out by him was required to be disproved by the special appellant, and the Lower Court found that the latter could not show anything towards such disproof, it felt itself justified in giving a decree to the plaintiff.

The special appellant further argues that, of the three necessities for sale by the daughter pleaded by the defendant and found by the Lower Appellate Court in his favor as proved, one, *viz.*, the *sradh* of the mother (the widow), is not a legal necessity, as that of the father is, to justify the sale by the daughter to the prejudice of the daughter's son.

We agree with the Lower Appellate Court in its view of the Hindoo Law. Accordingly we reject the special appeal without costs, as nobody appears for the respondent.

The 13th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Appeal—Witnesses—Section 162, Act VIII. of 1859.

Case No. 1969 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 10th May 1866, affirming a decision passed by the Deputy Collector of Howrah, dated the 22nd September 1865.

Neem Chund Dey (one of the Defendants), *Appellant,*

versus

Anund Coomar Roy Chowdhry and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Roopnath Banerjee for Respondents.

Though there is no appeal against an order of a Judge refusing to comply with an application under Section 162, Act VIII. of 1859, requiring the attendance of a party to a suit as a witness, yet the Judge is bound to exercise the discretion vested in him by that Section upon a correct assumption of the facts. This not having been done in the present case, the case was remanded to the Judge.

Kemp, J.—This was a suit for a kubooleut at an enhanced rate of rent. The defendant pleaded that he held the lands at a fixed rate of rent which had not been changed from the time of the Permanent Settlement, and filed dakhilas or receipts for rent covering a very long period, upwards of twenty years before the commencement of the suit.

The Judge decreed the plaintiff's suit, and fixed 3 rupees as a proper rate, observing that not only were the receipts not attested, but some of them have been repudiated and sworn to be spurious by the grantor; that, under such circumstances, it was unnecessary to summon the talookdar to prove receipts which his agent repudiated.

In special appeal it is contended that the Judge should have summoned the talookdar.

The application requiring the attendance of any party to the suit as a witness must be made under the provisions of Section 162 of Act VIII. of 1859; it must be a special application, and sufficient grounds must be shown to the satisfaction of the Court, otherwise summons shall not issue.

There is no appeal against an order of a Judge refusing to comply with such application. *See* Weekly Reporter, Volume I., page 83, Baboo Ram Surn Singh, defendant, appellant, *versus* Baboo Gooroo Dyal Singh. When a Court exercises its discretion under the above quoted Section, it is bound to exercise such discretion upon a correct assumption of the facts of the case. In the present instance we find that the Judge has wrongly assumed that the agent pronounced the receipts to be spurious. He did nothing of the kind. Some of them he admitted to be in his handwriting, some he was doubtful about; as to those in the alleged handwriting of his father, a former agent, he said some were written in a handwriting like his father's, some in a handwriting unlike his father's. It is, therefore, clear that, when the Judge refused to comply with the application of the defendant to summon the plaintiff, he was under the impression that the agent had distinctly sworn that the receipts were spurious, and that, therefore, the ends of justice did not require the attendance of the principal. We have shown above that this impression was a wrong one; and, as it is very probable that the Judge would not have refused the application had he not been under this error, we remand the suit to enable the Lower Court to exercise the discretion vested in it by Section 162, simply remarking that this is a suit in which it appears to us very desirable that the plaintiff should be examined.

The 13th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Enhancement — Section 17, Act X. of 1859.

Case No. 2126 of 1860 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 30th May 1866, affirming a decision passed by the Deputy Collector of Magoorah, dated the 28th November 1865.

Nubo Coomar Biswas (Defendant), *Appellant,*

versus

Mr. Thomas Oman (Plaintiff), *Respondent.*

Baboos Khetturnath Bose and *Kedarnath Chatterjee* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

With reference to the first ground specified in Section 17, Act X. of 1859, it is not sufficient to find that the enhanced rent claimed is the same as that in an adjoining village, but it is also necessary to enquire whether that rent is paid by the same class of ryots, or whether the land is of a similar description, or whether it possesses similar advantages.

Markby, J.—This case must be remanded for the Judge to enquire, in accordance with Section 17 of Act X. of 1859, whether the rent claimed is at the rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. That is the rent to which the plaintiff is entitled; but the Lower Appellate Court finds only that the rent claimed is the same as that in an adjoining village, without any enquiry, as far as we can see, into the true question, whether that rent is paid by the same class of ryots, or whether the land is of a similar description, or whether it possesses similar advantages. All these points must be enquired into, otherwise the fair rent of the lands in question cannot be ascertained.

The case is, therefore, remanded as above directed, with reference to these remarks.

The 13th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Confirmation of possession — Lakheraj — Onus probandi.

Case No. 2073 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 27th June 1866, affirming a decision passed by the Moonsiff of that District, dated the 24th February 1866.

Baboo Purseedh Narain Singh and others (Plaintiffs), *Appellants,*

versus

Bissessur Dyal Singh and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee, Anund Gopal Paulit, and *Bhowanee Churn Dutt* for Appellants.

Baboos Dwarkanath Mitter, Mohesh Chunder Chowdhry, and *Chunder Madhub Ghose* for Respondents.

In a suit for confirmation of possession of certain lands sold in execution of a decree as lakheraj, the *onus* was held to lie on the plaintiff to prove his title, notwithstanding the defendant's admission that the lands in question were within the boundaries of the plaintiff's zemindaree.

Markby, J.—This was a suit for confirmation of possession brought by the plaintiff in consequence of certain land within his zemindaree having been sold in execution of a decree as lakheraj land.

At the trial the Lower Appellate Court was of opinion that the plaintiff had failed to prove his possession, and, therefore, dismissed the suit.

The plaintiff now contends that, as the land was admitted by the defendants to be within the boundaries of his zemindaree, that was sufficient to entitle him to a decree, unless the defendants could prove their further allegation that they held this land as lakheraj.

We are of opinion that this contention is unfounded, and that the decision of the Lower Appellate Court is right. If it were otherwise, no zemindar would ever bring a suit for resumption of lakheraj lands, in which it is admitted that he must show receipt of rent, but would always sue nominally for confirmation of possession.

The next point is that the Lower Appellate Court has not considered the depositions before the Ameen who made the first local enquiry and his report; but we do not think

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that such is the fact, because we find the deposition of one of the witnesses specially referred to.

With regard to costs, the first Court was clearly wrong in giving pleader's fees for each defendant in respect to the value of the whole 60 beegahs. Under Rule 7 of the Rules made by the Court in respect of pleader's fees, the fee for each defendant should be calculated with reference to the value of the separate interest of each defendant. We think we ought to correct this plain violation of the Rule; and in this respect, therefore, we order the decree of the Lower Appellate Court to be amended. In all other respects the decree will be affirmed, and the appeal dismissed with costs.

The 13th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Onus Probandi—Suit to reverse decision under Section 77, Act X. of 1859.

Case No. 2521 of 1866.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 30th August 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 16th January 1866.

Rungo Monee Dossee (Defendant), *Appellant,*

versus

Unnopoorna Debia (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Sreenath Doss for Respondent.

The onus of proving title is on a plaintiff seeking to oust a person formally declared by a decree under Section 77, Act X. of 1859, to be in the enjoyment of the rent of disputed land, and consequently in possession.

Glover, J.—THIS was a suit to recover possession of a putnee talook by reversing certain decrees passed under Section 77, Act X. of 1859, in favor of the defendant. The plaintiff (special respondent before us) alleges that her husband got the putnee from Gunga Moyee, the zemindar, in 1258, and held it till dispossessed by the defendant, who, in collusion with the ryots, managed to get sundry suits brought under Act X. decided in her favor. She further states that the defendant, Rungo Monee's husband, Ram Narain, predeceased Gunga Moyee, and that the widow is no heir, and has no claim.

The grantor of the putnee and the defendant are, as appears from the record, sisters-in-law.

The defendant, Rungo Monee, denied the gift of the putnee, and also Gunga Moyee's right to grant it, she being a childless Hindoo widow, and having at best only a life-interest in the estate. She claims the estate on the ground that her husband survived Gunga Moyee, and was himself the reversioner.

Both the Lower Courts decreed the plaintiff's claim; the Judge considering that, as plaintiff was in possession, the defendant, who sought to disturb that possession, must prove her title which she had failed to do. He found also that Ram Narain, the defendant's husband, had predeceased Gunga Moyee, and that the defendant had in consequence no right as heir.

It is contended in special appeal that, as the defendant is in possession under decrees of Court, the plaintiff seeking to oust her is bound to prove her own title, and that the Judge has consequently misplaced the "*onus*," that he has also given no opinion as to the genuineness of the putnee.

We think that this objection must be allowed. The special appellant has been formally declared by a decree under Section 77, Act X. of 1859, to be in the enjoyment of the rent of the disputed land and consequently in possession. It was, therefore, incumbent on the plaintiff, seeking to oust her, to prove her title, in other words, to establish the *factum* of the putnee. Because, if she fail in that, the special appellant, who is admittedly in possession, although not as heir, will have a good title against any one not coming into Court in that capacity. If the putnee, on the other hand, be proved, then, as against Rungo Monee, who by the Judge's finding is held to be a stranger to the estate, she will be in a position to hold the grant until some reversioner chooses to come forward and contest it on the ground that Gunga Moyee's power to grant a putnee only extended to the time of her own life. We remand the case, therefore, to the Judge, with reference to the above remarks.

Costs will follow the result.

The 13th February 1867.

Present:

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

Registration (Act XVI. of 1864).

Case No. 1868 of 1866.

Special Appeal from a decision passed by Baboo Ram Taruck Roy, Principal Sudder Ameen of West Burdwan, dated the 4th May 1866, affirming a decision passed by Baboo Judoonath Roy, Moonsiff of Burjorah, dated the 30th December 1865.

Oojul Mundul (Plaintiff), *Appellant,*

versus

Herasutoollah Mundul and others (Defendants), and others (Objectors), *Respondents.*

Baboo Juggodanund Mookerjee for Appellant.

No one for Respondents.

Under Act XVI. of 1864, a decree to enforce registration cannot be passed in respect of a deed presented for registration 4 months after the execution of the deed.

Trevor, J.—THE plaintiff in this case, special appellant before the Court, sued to have a kubalah registered after adjudication of title. He alleges that defendants, Herasutoollah Mundul and others, sold the land in suit to him for 200 rupees, that he is in possession thereof, but that, defendants refusing to register, he has brought the present action to enforce registration.

The main defendant did not appear, but one Juddo Bibee intervened, stating that she had a share in the property covered by the deed of sale.

Both the Lower Courts dismissed the plaintiff's suit, mainly on the ground that, as plaintiff had not applied to the Registrar and been refused registration, the suit does not fall under Section 15 of Act XVI. of 1864; adding that, as the Civil Courts are by Section 13 of the Act prohibited from receiving in evidence the document pleaded by plaintiff, plaintiff's suit must necessarily be dismissed.

Plaintiff has now appealed specially, urging that his suit is cognizable by the Civil Courts irrespective of Section 15 of Act XVI. of 1864, and that it should be remanded for re-investigation.

This suit was instituted during the time Act XVI. of 1864 was in force; and we find that this Court* has lately ruled that, if a suit be brought in time, and a decree be passed within the period allowed for registration in Section 18 of the Act above cited, *viz.*, four months from the date of the execution of the deed, a decree compelling the registration might be issued, and this notwithstanding that the provisions of Section 15 of the Act had not been carried out. In the present case the decree of the Court of first instance was passed in December 1865, or Pous 1272, more than 4 months after Assar 1272, in which month the deed propounded was executed.

Following, therefore, that decision, as the time within which the Registrar is under the law authorized to register a deed had expired before the decree of the Court of first instance, nothing remains for us but to dismiss this special appeal with costs.

* Bisso Moyee Dossia, Plaintiff, Appellant.

The 13th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Pre-emption—Co-sharers—Neighbours.

Case No. 2018 of 1866.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 15th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 19th January 1866.

Roshun Mahomed and others (Defendants), *Appellants,*

versus

Mahomed Kuleem and others (Plaintiffs), *Respondents.*

Baboo Greesh Chunder Ghose for Appellants.

Baboo Debendro Narain Bose for Respondents.

One of two joint sharers has no preferential title to the right of pre-emption in his capacity of neighbour, but is equally entitled with his co-sharer to the privilege of pre-emption without regard to the extent of their shares.

Kemp, J.—THIS was a suit founded on a right of pre-emption. The plaintiff in the

suit, the vendor, and the vendee, are admittedly co-sharers in the property sold, which is a joint undivided estate.

The plaintiff claims in two capacities, as co-sharer and as a neighbour. The defendant, the purchaser, raises two points in his answer: *first*, that he, being a co-sharer, is entitled equally with the plaintiff; and, *secondly*, that the plaintiff did not comply with the requisitions of the Mahomedan Law, and that, consequently, his right of pre-emption is lost to him.

The Lower Appellate Court finds in a somewhat general way that the plaintiff had done all that the law required him to do, and gave him a decree for the whole of the property claimed.

In special appeal it is contended that, admitting that, on the face of the finding of the first Court, the requisitions of the Mahomedan Law have been complied with, it is hopeless to contend against such finding in special appeal, still the defendant has an equal right with the plaintiff, and a decision published in Volume III., Weekly Reporter, page 71, is quoted.

We are of opinion that, unless it can be shown that the right of a neighbour overrides that of a co-sharer, the plaintiff is not entitled to a decree for more than one-half of the property claimed.

On turning to the Hedaya, Volume III., Book 38, Chapter 1, page 562, we find that the right of shuffa or pre-emption appertains, *1st*, to a partner in the property sold; *2nd*, to a partner in the immunities and appendages; *3rd*, to a neighbour; and the order in which the persons entitled to the right is founded on a precept of the prophet. A partner in the thing itself has a superior right to either of the other classes, page 566.

The plaintiff, therefore, has no preferential title as a neighbour, and, being one of the body of co-sharers with the defendant, he and the defendant are equally entitled to the privilege of shuffa or pre-emption without regard to the extent of their shares. (*See* page 566 of the Hedaya, and the Decision quoted by the special appellant, Volume III., Weekly Reporter, page 71.)

We, therefore, amend the decision of the Lower Court. The plaintiff is entitled to a decree for only one-half of the property claimed, with costs of all the Courts in proportion; excess of costs to be borne by the plaintiff, special respondent.

The 13th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Limitation—Clause 5, Section 1, Act XIV. of 1859.

Case No. 2561 of 1866.

Special Appeal from a decision of the Judge of Sarun, dated the 24th of August 1866, affirming a decision of the Principal Sudder Ameen of that District, dated the 14th September 1865.

Mussamut Oleo-unissa (Plaintiff), *Appellant*,

versus

Buldeo Narain Singh and others (Defendants), *Respondents*.

Baboo Kalee Kishen Sein for Appellant.

Baboo Nuleet Chunder Sein for Respondents.

The final decision, award, or order contemplated by Clause 5, Section 1, Act XIV. of 1859, is a final decision of the Court which has competent jurisdiction to determine the case finally, and not the order of a Court superior to such Court dismissing an appeal from the decision of such Court for want of jurisdiction.

Peacock, C. J.—We think that the Judge was quite right in this case. The question turns on the construction to be put upon Clause 5, Section 1, Act XIV. of 1859. It says that the period of limitation applicable "to suits to alter or set aside summary "decisions and orders of any of the Civil "Courts not established by Royal Charter, "when such suit is maintainable," is "one "year from the date of the final decision, "award, or order in the case."

It is contended that the order of the High Court, in which it was held that no appeal would lie from the summary order of the Principal Sudder Ameen, is the final order. It appears to us that the final decision, award, or order in the case intended by the 5th Clause of Section 1 is the final decision of the Court which has competent jurisdiction to determine the case finally. Consequently, the order of the Principal Sudder Ameen, against which no appeal would lie to this Court, was the final order in the case; and therefore the period of limitation dates from the time when that order was passed,

and not from the time when the High Court passed an order declaring that an appeal would not lie from that order of the Principal Sudder Ameen.

We would add that, if the order of the High Court in this case was the final order, any order of the High Court which may hereafter be made in similar cases, dismissing an appeal for want of jurisdiction, would be the final order.

The decision of the Lower Appellate Court is affirmed with costs.

The 13th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Ejectment (of tenant holding over)—Acquiescence of landlord—Notice to quit.

Case No. 2520 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 24th of July 1866, affirming a decision of the Sudder Ameen of that District, dated the 16th September 1865.

Ram Khelawun Singh (Plaintiff), *Appellant*,

versus

Mussamut Soondra and others (Defendants), *Respondents*.

Baboo Dwarkanath Mitter for Appellant.

Mr. R. T. Allan and *Baboo Kally Kishen Sein* for Respondents.

A landowner who, after the expiration of a lease, continues to receive rent for a fresh period, must be considered to have acquiesced in the tenant continuing to hold upon the terms of the original lease, and cannot turn out the tenant, or treat him as a trespasser, without giving him a reasonable notice to quit.

Peacock, C. J.—We think that the decision of this Court (dated 27th May 1864, Ramkurun Sing *vs.* Sheo Surun Sing), which is referred to by the Principal Sudder Ameen, is correct in law.

The father of the defendant in this case held under a lease from year to year. Upon his death, the son continued in possession at the same amount of rent which was paid under the lease by the father. Under these circumstances it seems to be clear that there was an implied agreement between the landowner and the son that the son should hold upon the terms of that original lease, namely, that he should hold from year to year at the rent reserved by the original lease. If this were not so, a landowner might, under similar circumstances, receive several kists of rent from a ryot, and, when his crops were ready to be reaped, might turn round and tell the ryot that he was a trespasser, and must quit immediately, instead of allowing him to continue until the end of the year, and reap the crops. That would be unjust.

According to English Law, and according to the general principles of justice, if, after the expiration of a lease, a landowner continue to receive rent for a fresh period, he must be considered to have acquiesced in the tenant's continuing to hold upon the terms of the original lease, and cannot turn out the tenant, or treat him as a trespasser, without giving him a reasonable notice to quit.

It is not necessary to determine in this case what length of notice is necessary in this country. It is sufficient to say that, as no notice was given, and no demand for possession made, the landholder cannot treat the son as a trespasser.

The decision of the Lower Appellate Court is affirmed with costs.

The 13th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Limitation—Section 77, Act X. of 1859.

Case No. 2572 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 4th August 1865, affirming a decision of the Moonsiff of Jenidah, dated 6th July 1865.

Hurronath Roy and others (Defendants), *Appellants*,

versus

Srishteedhur Doss (Plaintiff), *Respondent*.

Baboo Bungsee Dhur Sein for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

The limitation prescribed by the proviso to Section 77, Act X. of 1859, is applicable only to suits by persons having the legal right or title to the rent which formed the subject of the suit in the Revenue Court, to establish their title to such rent. It was not the object of that Section to prevent the party who has the right to the land to bring his action to try his title to the land within 12 years from the date of dispossession.

Peacock, C. J.—THE whole foundation of the plaintiff's claim is a pottah and a *likhun*. The defendant said that these were forgeries, and the Principal Sudder Ameen held that it was unnecessary to try whether they were so or not.

If those documents were the foundation of the plaintiff's claim, it *was* necessary to ascertain whether they were genuine or false. Therefore the case must be remanded to the Principal Sudder Ameen to try whether they are forgeries or genuine documents.

With regard to the question of limitation, it appears to us that the Principal Sudder Ameen was right in his construction of the law, and that the suit was not barred by limitation. It appears that the defendant in this suit sued to recover rent at an enhanced rate. The plaintiff intervened, and the defendant obtained a decree. The plaintiff now sues to establish his right to the land. It is said that he is bound to prove that he sued within one year from the decision in the rent case in which he intervened.

Section 77 says: "Provided always that "the decision of the Collector shall not "affect the right of either party who may "have a legal title to the rent of such land "or tenure to establish his title by suit in "the Civil Court, if instituted within one "year from the date of the decision." That is to say, the person who has the legal right or title to the rent which formed the subject of the suit in the Revenue Court may sue to establish his title to such rent. If this were not so, a trespasser, who gets into possession of land, might let it to a ryot, and receive the rent from him; and, if the real owner of the land should intervene in the rent-suit and fail, he would have to bring a suit to try his title to the land within one year from the date of the decision. It is clear that it was not the object of that Section to prevent the party who has the right to the land to bring his action to try his title to the land within 12 years from the date of dispossession.

The 14th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Relinquishment of land.

Case No. 2107 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 28th June 1866, reversing a decision passed by the Moonsiff of Burjorah, dated the 3rd March 1866.

Nuddear Chand Poddar and others (Defendants), *Appellants,*

versus

Modhoo Soodun Dey Poddar (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellants.

No one for Respondent.

Non-payment of rent, coupled with the fact that the plaintiff was for 5 years out of possession, was held to amount to a relinquishment of land.

Kemp, J.—THIS is a suit to recover possession of a moiety of a jote alleged to have been held jointly with the defendant, and from which plaintiff avers that he was ousted by the co-tenant in 1267.

The defendant admits that he joined the plaintiff in taking the lease, but that the plaintiff relinquished his share, and for many years, or from 1262, the rent has been paid by him, the defendant, alone.

The superior landlord was cited and examined. He supports the contention of the defendant.

The Principal Sudder Ameen disbelieves the oral evidence as to the relinquishment by the plaintiff, and adds that, even if it be admitted, for the sake of argument, that since the year 1262 the defendant was in possession of all the lands covered by the lease, still the plaintiff would not be deprived of his rights.

In another portion of the judgment, the Principal Sudder Ameen states that the evidence shows that the defendant has alone paid the rent since 1267.

The lease was a verbal one, and not for any fixed term. It is admitted that, for five years prior to suit, the plaintiff had not paid a pice of the rent, which was wholly discharged by the defendant. Such non-payment of rent, coupled with the fact that the plaintiff was for five years out of possession, amounts, in our opinion, to a relinquishment of the land, and is independ-

ent of the oral evidence to the fact of the relinquishment which, as the Principal Sudder Ameen has chosen to discredit it, we cannot receive, sufficient proof of the relinquishment.

We reverse the decision of the Principal Sudder Ameen, and restore that of the first Court, dismissing the plaintiff's claim with costs of all the Courts, including costs of this Court.

The 14th February 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Sale of land for Revenue—Separate Shares.

Case No. 2619 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 14th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 20th September 1865.

Maharajah Rajendro Kishore Narain Singh Bahadoor (Defendant), *Appellant,*

versus

Mussamut Doorga Koonwar (Plaintiff), *Respondent.*

Moonshee Ameer Ali and *Baboo Romanath Bose* for Appellant.

Mr. C. Gregory and *Baboo Sreenath Doss* for Respondent.

Section 13, Act XI. of 1859, does not say that, when an *application* has been made for a separate account, but when a Collector shall have *ordered* a separate account, that he is to put up to sale only the share in respect of which an arrear of revenue may be due.

Bayley, J.—We think that this decision of the Lower Appellate Court must be reversed. That Court has ruled that the sale held under Act XI. of 1859 for arrears of Government revenue, by which the plaintiff's share of a certain mehal passed to another party as purchaser, must be set aside, because, although there are not any irregularities in the processes or conduct of the sale itself, still, as there was an *application* by plaintiff for a separate account to be kept of her share, the Collector should not have sold, and that, it being the fault of the Collector's amlah that the application was not timely brought to the Collector's notice, it would be wrong that plaintiff should suffer the loss of her share of her estate.

The special appellant, defendant, urges that no portion of the enactment which governed the sale, *viz.*, Act XI. of 1859, warrants the Lower Appellate Court's decision, and we think this a valid plea, for that law in Section 13 does *not* say that, "when an application has been made for a separate account," but says: "When the Collector shall have *ordered* a separate account," the other shares only shall be sold. Now, as there was no such order in this case, the Lower Appellate Court was not right in law.

We, accordingly, reverse this decision, and decree this appeal with costs.

The 14th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Right of action—Hoondees (Bills of exchange).

Case No. 2163 of 1866.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 19th July 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th March 1866.

Ram Lal Sircar (Defendant), *Appellant,*

versus

Gopal Doss (Plaintiff), *Respondent.*

Baboo Greesh Chunder Ghose for Appellant.

Baboos Ashootosh Dhur and *Obhoy Churn Bose* for Respondent.

Where on account of a loan of 800 rupees the borrower gave the lender two hoondees for 1,500 rupees, and took away Rupees 693-7 as discount for 700 rupees, and the lender, being unable to discover the drawer of the hoondees, sued the borrower, not on the hoondees, but on two alleged loans of Rupees 800 and Rupees 693-7 respectively—Held that the only right of action left to the lender was on the hoondees themselves.

Markby, J.—In this case the plaintiff left to the defendant a sum of Rupees 800. Subsequently, the defendant brought the plaintiff two hoondees amounting to Rupees 1,500, which he endorsed to the plaintiff, and took back the balance Rupees 693-7 after deducting Rupees 6-9 as discount (hoondeana) and Rupees 800 on account of the loan. The notes were payable 21 days after demand; but the plaintiff, not having been able to discover the drawer of the hoondees, has sued the defendant, not on the hoondees, but on two alleged

loans of Rupees 800 and Rupees 693-7 respectively.

These facts are found by the Court of first instance and adopted by the Lower Appellate Court.

We think that these facts constitute, not a loan of two sums of Rupees 800 and Rupees 693-7 as contended by the plaintiff, with an endorsement of the notes as collateral security, but that there was one loan only of Rupees 800. We think that there was no second loan, and that the notes were discounted, and not deposited as security. There was, therefore, a payment by which the first loan was extinguished, and the only right of action left to the plaintiff was on the hoondees themselves.

He has, therefore, mistaken his cause of action, and, if he wishes to enforce payment of the hoondees, he must bring a fresh suit for that purpose.

The plaintiff has attempted to show that the defendant, when he endorsed these hoondees over to the plaintiff, knew them to be worthless; but no such fact is found by either of the Lower Appellate Courts, and it is, therefore, unnecessary to say how far it would have enabled the plaintiff to maintain the present suit.

The decision of the Lower Court, therefore, will be reversed, and the appeal allowed with costs.

The 14th February 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Jurisdiction—Mesne Profits and Possession.

Case No. 2069 of 1866.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 6th June 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 17th March 1866.

Peer Mahomed and another (Plaintiffs), *Appellants,*

versus

Chundrabutty Chowdhrain, guardian of Tarinee Pershad Roy, minor, and others (Defendants), *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Taruck Nath Sein for Respondents.

Civil Courts have jurisdiction where a claim for wassilat and as to dispossession by parties with various rights is conjoined with a claim for possession.

Bayley, J.—This case must follow the cases decided by this Court, and cited from Weekly Reporter, Volume I., page 139 and page 161, in which it is clearly ruled that the Civil Courts have properly jurisdiction where, as here, a claim for wassilat and as to dispossession by parties with various rights is conjoined with a claim for possession. The special respondent's pleader states that there is a decision to the contrary, but does not show this to be the case.

In this view we decree the special appeal, and remand the case for re-trial, with reference to the above remarks.

The 14th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Cattle Trespass.

Case No. 242 of 1866.

Regular Appeal from a decision passed by Baboo Juggobundhoo Banerjee, Principal Sudder Ameen of Nuddea, dated the 28th March 1866.

Mr. James Hills (Plaintiff), *Appellant,*

versus

Sree Huree Roy and others (Defendants), *Respondents.*

Baboo Dwarkanath Mitter for Appellant.

Baboos Romesh Chunder Mitter and *Sreenath Doss* for Respondents.

Suit laid at Rupees 7,407-8.

A Magistrate cannot, under Section 13, Act III. of 1857, punish except for an act of forcible opposition to the seizure of cattle-damage feasant.

Kemp, J.—This was a suit for the recovery of Rupees 7,407-8, being the value of 38 maunds 29 seers and 7 chittacks of indigo, after deducting cost of manufacture. It is alleged in the plaint that the cattle of the principal defendants, Sree Huree Roy and others, destroyed 250 beegahs of indigo belonging to the plaintiff, which would have yielded at the market-rate of the day the above sum.

The defendants had been previously convicted and fined by the Magistrate under the provisions of Section 13, Act III. of 1857.

The answer is briefly that the area of indigo cultivation has been overstated; that the indigo that was grown was not in due season; that cattle do not eat indigo; and, lastly, that the suit has been brought from motives of enmity.

The Principal Sudder Ameen of Nuddea dismissed the suit. He distrusted the evidence, and remarked that the witnesses for the plaintiff state that the damage of the indigo lasted for six days continuously, or from the 30th of Srabun to the 4th of Bhadro 1272 last; but that, on referring to the almanac, the Principal Sudder Ameen found that the month of Srabun of that year contained 32 days, and that, therefore, from the 30th of Srabun to 4th of Bhadro comprised a period of seven days, and not of six days. He also remarked upon the absence of any disinterested evidence on the part of the plaintiff, and adverted to the omission of any other date than that of the 4th of Bhadro in the petition presented to the Magistrate by Aslut Sheikh, the servant of Mr. Hills.

This case must be decided upon the oral evidence alone. The plaintiff, who has verified his plaint, examined his Dewan and other servants. It was not to be expected that he would be able to produce any of the ryots of the village who are all under the influence of the zemindar, the defendant Sree Huree Roy. After hearing the evidence, we think there can be no doubt that trespass did take place, and that damage was done to the indigo by the cattle of the defendant, Sree Huree Roy, and others.

Before the Magistrate, it was obviously unnecessary to state more than the facts of the rescue of the cattle on the 4th of Bhadro which had been seized damage feasant, and were on their way to the pound. The Magistrate could not, under Section 13 of Act III. of 1857, punish except for an act of forcible opposition to the seizure of cattle-damage feasant; allusion to former acts of trespass was quite uncalled for.

It is true that the period from the 30th Srabun to 4th Bhadro is seven, and not six days; but this fact alone does not, in our opinion, destroy all credibility in the evidence of the plaintiff's witnesses. They may have exaggerated the time over which the damage continued and the extent of such damage, but that some damage was done we entertain no doubt.

The witnesses for the defence do not tell us where the cattle of the principal defendant Sree Huree Roy were on the days of the alleged damage, and the story they set up is quite inconsistent with that adopted by the defendants in their written statements.

The witnesses say that 150 beegahs of land were under indigo; that the crop was an indifferent one; that Mr. Hills cut the indigo on the high land; and that the rest on the low land was destroyed by the water inundating it.

In the written statement we are told that all the indigo that grew, some 50 beegahs was cut in due season; it is not stated that any was destroyed by an inundation.

We are unable to assess the damages ourselves, as we have not the materials for doing so. The suit must, therefore, be remanded. The Principal Sudder Ameen will assess the damages, and, in doing so, he will decide what area of indigo plant was destroyed, the value thereof, and the respective parts taken by the several defendants in such destruction.

The 15th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Agreement—Decree—Co-sharers.

Special Appeals from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 26th July 1866, affirming a decision passed by the Deputy Collector of that District, dated the 22nd December 1865.

Case No. 2508 of 1866 under Act X. of 1859.

Mirza Nowab, for self and as Mooktear of Musst. Allah Bandee (Defendant), *Appellant,*

versus

Shaikh Bahadoor Ali (Plaintiff) and others (Objectors), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Case No. 2972 of 1866 under Act X. of 1859.

Sham Lal and others (Objectors), *Appellants,*

versus

Shaikh Bahadoor Ali and others (Plaintiffs), *Respondents.*

Mr. C. Gregory for Appellants.

No one for Respondents.

If a plaintiff sues upon an ikrar, he is not entitled to a decree contrary to its terms. Thus, if the ikrar makes each of several shares severally liable, all the co-sharers cannot be made jointly liable.

Trevor, J.—PLAINTIFF sues three defendants, the heirs of one Shah Baz Beg, for the rents of 1270, 1271, and 1272. He alleges that he is the purchaser from parties who claim one-fifth share in an estate; that within that estate there is a mokurruree with a rent of 1,200 rupees; that consequently he is entitled to 240 rupees annually from them, and he, therefore, sues for that amount during three years, or for 720 rupees.

The defendant before us pleads, admitting that the jumma of the mokurruree is 1,200 rupees. He objects, however, to have been made jointly liable with his co-sharers to the suitor for the whole 720 rupees, and urges that he is only liable severally to plaintiff for one-fifth of the 400 or 80 rupees per annum, and that his co-sharers should be liable severally also to that amount, instead of jointly for 240 rupees. He pleads also that, of the 80 rupees due by him on the share of Tarab Buksh, the plaintiffs are only entitled, as the purchasers from the two sons of Golzaree Begum, daughter of Tarab Buksh, to one-third of that sum, and that the other two-third is due to Khootab Buksh, the son of Tarab Buksh and his representative, and that, as he, defendant, has paid to them the share of the rent and also to plaintiff his share, his present suit should be dismissed.

The representative of Munsoor Buksh, the son of Tarab Buksh, intervenes under Section 77 of Act X. of 1859.

Both the Lower Courts rejected the intervenor's claim, and gave plaintiff a decree.

Two special appeals have been preferred to this Court; one by the intervenor, the other by the defendant in the suit. It is urged on behalf of the intervenor that his claim has not been properly enquired into; but, on turning to the decision of the Lower Court, we find that the intervenor gave no evidence that any rents had been collected by her in past years; so we see no reason for interfering with the Lower Court's order as regards him.

It is urged by defendant, special appellant, that, as plaintiff sues on the ikrar, he is not entitled to a decree contrary to its terms; that consequently he is not entitled to a joint decree against himself and his co-sharers. This point does not seem to have been noticed below; but, on the perusal of the ikrar executed by the three sharers under one or other of whom the defendant claims, *viz.*, Roshun Beg, Alif Beg, and Ameer Beg, it clearly makes each of them liable to the zemindar for Rs. 400 of the mokurruree rent yearly, 1,200 rupees in all. With this several liability, the plaintiff, who represents an owner of one-fifth of the estate, will be entitled to 80 rupees from each defendant yearly, or for three years embraced in the suit, to Rs. 240 from each set of defendants severally, and not jointly and severally to Rs. 720 from all. We, therefore, so far modify the decree as to make the representative of each of the three persons who executed the ikrarnamah propounded by plaintiff liable severally for 80 rupees yearly, or Rs. 240 for 1270, 1271, and 1272, with interest and costs. The costs of the special appeal will be borne by each party.

The 15th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Limitation—Amended plaint.

Case No. 2094 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 8th June 1866, affirming a decision passed by the Moonsiff of that District, dated the 30th August 1865.

Greesh Chunder Singh (one of the Defendants), *Appellant.*

versus

Pran Kishen Bhuttacharjee and others (Plaintiffs), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Nil Madhub Sein for Respondents.

A suit must be considered to have commenced when the original plaint was filed, and not when it was returned after amendment.

Kemp, J.—THE point of limitation now taken was not raised below, and, even if admissible, is untenable, for the plaint was not rejected, but returned for amendment.

The suit was, therefore, commenced when the original plaint was filed, and not when it was returned after amendment. In this view, which is in accordance with several rulings of this Court (Volume V., Weekly Reporter, page 207, quoted), the suit was in time.

The appeal is dismissed with costs.

The 15th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Case No. 2195 of 1866.

Suit for possession (against zemindar).

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 9th June 1866, affirming a decision passed by the Moonsiff of Naraingunge, dated the 29th April 1864.

Mookta Keshee Dossia and others (Plaintiffs), *Appellants,*

versus

Pearee Chowdhrain and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Bungshee Dhur Sein* for Appellants.

Baboo Kalee Mohun Doss for Respondents.

No suit for possession will lie against a zemindar or any one holding a title under the zemindar, until the plaintiff has been recognized by the zemindar as tenant, or has been registered as such in the zemindar's serishtah.

Markby, J.—This case was remanded for the Principal Suder Ameen to try fully what relation the plaintiff, who alleged that he had purchased an under-tenure, held in respect of the zemindar—in other words, whether the zemindar had in any way recognized him as tenant. The plaintiff relied on certain dakhilas to prove that the zemindar had accepted rent from him, but the Principal Sudder Ameen has found that the dakhilas are not proved, and, as there was no other proof that the zemindar had recognized the plaintiff as his tenant, dismissed the case.

The appellant now contends that the Principal Sudder Ameen ought not to have entertained any question as to the genuineness of the dakhilas, because no objection was taken to them by the defendant. But we find that such was not the fact. The defendant called upon the plaintiff to prove his dakhilas, when they were first produced, which was not till a late stage in the case. The latter fact was not brought to the notice of the Court, when this suit was last remanded, which explains why the Court directed the Principal Sudder Ameen not to take up any objections to the dakhilas not put forward by the defendant.

The plaintiff also contends that he is entitled to succeed, because he was ousted from possession by means of a fraudulent suit for ejectment for arrears of rent brought by the zemindar against the plaintiff's vendor. But we have nothing to do with any proceedings between the zemindar and his former tenant. The plaintiff cannot sue the zemindar or any one who holds a title under the zemindar for possession until he has himself been recognized as tenant, or has been registered as such in the zemindar's serishtah.

The appeal therefore must be dismissed with costs.

The 15th February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Enhancement—Alluvial Land—Amulnamah.

Case No. 2250 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 14th June 1866, modifying a decision passed by the Deputy Collector of Fureedpore, dated the 22nd February 1866.

Puddo Monee Dossia and another (Plaintiffs), *Appellants,*

versus

Puromanund Sein and another (Defendants), *Respondents*

Mr. R. T. Allan and *Baboo Romanath Bose* for Appellants.

Baboo Sreenath Doss for Respondents.

An amulnamah, by which the defendant, for clearing and cultivating *chur* land, was to pay no rent for the first three years, and then a low rate of rent gradually rising till it reached a certain rate, no period being fixed for the duration of such last-mentioned rate, was held to be no bar to the plaintiff's right of enhancement.

Seton-Karr, J.—In this case the real point which fairly arises on the decision of

the Judge in appeal has not been properly taken in the written grounds of appeal which are confined to the question of the authority of the naib of the plaintiff to grant such an amulnamah as that relied on by the defendant.

The amulnamah has been proved to be genuine, and the point really is not whether the naib had authority to grant it, but whether, taking everything to have been regularly done, and the defendant to be in possession by virtue of the amulnamah, the said deed can be a bar to the plaintiff's right to enhancement.

The Judge says that he will not consider the rates fixed by the Ameen, because he considers the rates sufficiently determined by the amulnamah. But he does not say that the amulnamah is a bar to enhancement, and certainly the terms of the amulnamah would not warrant any Court in deciding that the rent was fixed in perpetuity, and that the plaintiff was prevented from enhancement. By the amulnamah, the defendant, for clearing and cultivating the land which is chur land, was to pay no rent for three years, then 4 annas per beegah for one year, 6 for another, and 8 for a third, until the rent, from 1267, reached the rate of 10 annas, at which it was to remain. But no period is fixed for the duration of this rent of 10 annas a beegah, and it is quite clear to us that, even on the finding of the Judge as to the genuineness of the amulnamah, and even admitting or assuming that it was quite competent to the naib to grant the same, there is nothing whatever to prevent the plaintiff from putting in force any claims to an enhanced rent which Act X. of 1859 may confer on him.

The Judge's decision is set aside, and the case is remanded to him for a decision as to whether the plaintiff is entitled to a kabooleut at enhanced rates, according to his plaint, on any of the grounds which he may put forward under the law. The defendant will, of course, have an opportunity of urging any pleas as to the land having been improved by his agency alone. In short, the Judge must decide the case on the merits, and on the understanding that enhancement is *not* barred by the amulnamah.

Norman, J.—I entirely concur. If the amulnamah amounted to a mourosee jungleburee pottah, as it was treated in the Court below, the point made in the grounds of appeal would have fairly arisen.

The 15th February 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Costs.

Case No. 2244 of 1866.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 9th June 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st August 1865.

Luchmun Chunder Geer Gossain and another (Plaintiffs), *Appellants,*

versus

Ram Joy Mozoomdar and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondents.

An order for full costs was disallowed in a case where the parties were only entitled to costs in proportion to the value of their separate interests in the suit.

Norman, J.—This case must be remanded in order to try the plaintiff's title to plots from 1 to 4, and plot 5.

As regards plots 1 to 4, the Judge finds that there can be no reasonable doubt whatever that Bromo Moyee is holding them under a *bond fide* title acquired from Indro Chund Baboo; and as to plot 5, that it was purchased by Shama Churn Mozoomdar from Eusuf Khulifah and Phulan Bibee. But he does not pronounce any opinion as to whether the vendors of the defendants had any power to convey those jotes, or whether they themselves possessed any transferable jotedaree rights or interests.

The case must, therefore, be remanded for a distinct finding on this point.

The second point taken in special appeal is that Bromo Moyee and Shama Churn have obtained an order for costs in full. But this is contrary to Rule 7 of the Rules of Practice of this Court, published in Volume V. of the Weekly Reporter, page 17. They are only entitled to costs in proportion to the value of their separate interests in the suit.

The 15th February 1867.

Present:

The Hon'ble C. B. Trevor and W. S. Seton-Karr, *Judges.*

Limitation—Non-suit—Dismissal for want of jurisdiction.

Case No. 1619 of 1866.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 24th March 1866, affirming a decision passed by the former Additional Judge of that District, dated the 8th July 1865, and reversing a decision passed by the Principal Sudder Ameen of that District, dated the 8th July 1864.

Dhun Monee Chowdhrain and others (Defendants), *Appellants,*

versus

Brindabun Chunder Sircar Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Dwarkanath Mitter and *Anund Chunder Ghosal* for Appellants.

Baboos Mohendro Lal Shome, Tarucknath Sein, and *Umbika Churn Banerjee* for Respondents.

No deduction can be made from the computation of the period of limitation of the time of pendency of a suit wrongly non-suited on a point unconnected with jurisdiction; but a deduction is allowed, under Section 14, Act XIV. of 1859, of the time of pendency of a suit dismissed for want of jurisdiction.

Trevor, J.—This suit was remanded by the High Court on the 20th December 1865, with the following remarks: "This case "has been very much confused owing to "the singular conduct of a former Principal "Sudder Ameen, who, on appeal, after hear-"ing a suit for the property now in dispute, "seems to have decided the issue both of "limitation and right in favor of plaintiff, "yet went on to nonsuit him on most frivol-"ous and ridiculous grounds. Plaintiff did "not appeal against the order, but acquiesced "and brought a fresh suit. Defendant ap-"pealed specially, thinking the judgment as "regards limitation injurious to him, but "his appeal was disallowed, it being observ-"ed that plaintiff, who might have appealed, "did not do so, and that a fresh suit was al-"ready pending. That fresh suit is the "present, and on it the Judge, whilst ex-"pressing an opinion in plaintiff's favor on "the merits, with respect to limitation, "treats the former decision as conclusive. "No doubt, the case ought to have been "decided on the former occasion; but, as it "was suffered to be re-opened by a fresh suit, "we do not see for what purpose it could be "re-opened, except to try the question already "put in issue, but over-passed by a nonsuit. "We must consider the former proceeding "ending in a nonsuit as of no effect, and, "therefore, direct the Judge to decide the "question of limitation himself. If that is "found in favor of plaintiff, the order of "the Court will stand."

On the 24th March 1866, the Judge found that plaintiff was in time, and affirmed his former judgment on the merits.

Defendant now appeals specially, urging that, deducting the period during which plaintiff's suit in the Nuddea Courts, which was dismissed for want of jurisdiction, was pending, the present suit, brought for the reversal of an Act IV. award, is beyond three years, and is, therefore, barred by limitation under the provisions of Clause 7, Section 1 of Act XIV. of 1859.

It appears that the date of the final order in the Act IV. case was the 29th of September 1858. Plaintiff then sued on the 1st July 1859, and on the 22nd February 1862, the Principal Sudder Ameen nonsuited plaintiff, because the date of dispossession had not been clearly given. Plaintiff then brought a fresh suit on the 19th May 1862, which was dismissed for want of jurisdiction on the 9th May 1863. He, then, on the 18th February 1864, instituted the present suit for possession. The plaintiff having, however, wrongly in the first suit, been nonsuited on a point unconnected with jurisdiction, he is not entitled to have the time during which that suit was pending deducted. He might have petitioned for a review of judgment, or have appealed specially against it; but, not having done so, but having acquiesced in it, he must suffer all the inconveniences of that acquiescence; he is entitled, however, under Section 14 of Act XIV. of 1859, to the period during which the suit, which was dismissed for want of jurisdiction, was pending, *viz.*, from 19th May 1862 to 9th May 1863; but, even with this deduction, his suit is brought beyond the period of 3 years from the final order in the Act IV. case, and it is, consequently, under Clause 7, Section 1 of the Act above cited, out of time. Nothing, therefore, remains for us but to reverse the order of the Judge, and to dismiss the plaintiff's claim with costs of all Courts.

The 15th February 1867.

Present:

The Hon'ble C. V. Trevor and F. A. Glover, *Judges.*

Declaratory decree — Unsuccessful claimant to attached property.

Case No. 2549 of 1866.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 10th July 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 14th April 1866.

Golam Mahomed Shaha and another (Plaintiffs), *Appellants,*

versus

Mookta Keshee Dabee and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Doorga Doss Dutt for Respondents.

An unsuccessful claimant to property about to be sold in execution of a decree is entitled, in a suit brought for the purpose, to a declaratory decree to the extent of his rights and interests in the property, notwithstanding that the property may be joint-family property, and that the plaintiff has asked for more than he is entitled to.

Trevor, J.—PLAINTIFFS in this case allege that they purchased on the 6th August 1855 the whole of a certain property from Judoonath Sandyal; that they have ever since been in possession under that title; that lately the defendant, Mookta Keshee Debee, has procured the advertisement for sale of the rights and interests of Judoonath and Kunuk Monee, his mother, in the property; that they put in a claim to the property; but an investigation into their claim was disallowed under Section 247. They, therefore, being damnified by that disallowance, bring the present suit for a declaration of their title to the property.

The defendant answers that the property was not Judoonath's alone, but joint-family property; that, previous to the date of the alleged sale to the plaintiff, a decree had been obtained by Kunuk Monee against Judoonath and others, and their rights and interests were purchased by her; that consequently, even if plaintiff did ostensibly purchase certain rights of Judoonath, he had no rights really existing at the time of the purchase, and the sale was void and of no effect.

The Lower Courts found that the property was joint and did not belong to Judoonath alone, and that plaintiff was not entitled to what she asked for. They, therefore, dismissed the suit.

The plaintiff now appeals specially, and urges that, granting that, in her suit for a declaration of her title as from Judoonath, she can only obtain a declaration of that which she has obtained from him, still, whether that be, more or less, the whole of her claim or not, she is entitled to a declaration to that extent, and her suit should not have been dismissed *in toto* as it has been by the Courts below.

We think that the contention of the plaintiff is good, and that the Lower Courts were bound to declare what Judoonath's rights and interests were on the 6th August 1855, the date of plaintiff's purchase, and to give plaintiff a declaratory decree to that extent. Both the Lower Courts have already found that the property did not belong to Judoonath alone; it only, therefore, remains for them to find, *1st*, what originally was Judoonath's share of the property; and, *2nd*, whether that share had been attached in February 1855, and purchased by Kunuk Monee in an execution-decree in the same year. If the attachment had taken place *bond fide*, the property was in *custodia legis*, and no sale to the plaintiff during that custody could be valid; and if the sale in execution had taken place, and the rights and interests of Judoonath had been purchased by Kunuck Monee, the plaintiffs could clearly have taken nothing by their purchase of August 1855. The Lower Courts will investigate these points, and pass a decree according to the result of their enquiries.

The 16th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Jurisdiction—Reversal by Judge of former Acting Judge's order—Limitation—Minority—Suit by mother and guardian—Mesne-profits—Cause of action.

Case No. 274 of 1866.

Regular Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 5th May 1866.

Ram Chunder Roy and others (Defendants), *Appellants,*

versus

Umbika Bossia, mother and guardian of Busunto Coomar Roy, minor, and others (Plaintiffs), *Respondents.*

Baboo Dwarka Nath Mitter and *Mohinee Mohun Roy* for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

Suit laid at Rupees 20,936-14-8.

A Judge has no power to reverse a former Acting Judge's order.

A mother and guardian of a minor is entitled to a deduction from the computation of limitation of the period of the minor's legal disability.

The cause of action in suits for mesne-profits arises from the date when they became annually due.

Glover, J.—THIS was a suit to recover Rs. 20,936-14-8 as mesne-profits of certain mouzahs from which plaintiff, representing her minor son, had been dispossessed by a Magistrate's order under Act IV. of 1840.

Plaintiff succeeded in reversing that order by a regular decree of the Civil Court, and now claims wassilat from the date of dispossession, *viz.*, the 19th of Jyet 1251 B. S.

The defendants admitted the claim to recover mesne-profits, but objected to the amount. They applied Clause 16, Section 1, Act XIV. of 1859, and under it urged that "wassilat" for six years only can be recovered. They added that the calculation of profits had been erroneously made.

The suit came in the first instance before the Officiating Judge, Mr. Craster, on the issue of limitation, and he decided that the plaintiff was "debarred by the Law of Limit-"ation from recovering mesne-profits for "any period more than 6 years antecedent "to the date of the institution of the suit."

He considered that the mother and guardian, suing in her own name, was not entitled to the special indulgence allowed to minors, although she was prosecuting the latter's interest.

Mr. Craster did not decide the other issues, which were heard and determined by the substantive holder of the Judge's office, Mr. Belli, nearly a year after.

That officer reversed his predecessor's finding on the issue of limitation, and gave plaintiff a modified decree. She claimed wassilat for 19 years from the date of dispossession in 1251. The Court allowed mesne-profits for 11 years only, from the date of the minor's rights accruing, that is, with interest and costs.

Against this decision the defendants appeal to this Court, urging—

1. That the Judge had no power to reverse his predecessor's finding on the issue of limitation.

2. That his finding on that issue is contrary to law; and

3. That the amount of wassilat has been improperly calculated.

On the first objection we have no doubt that the appellants must succeed. An Officiating Judge has by law precisely the same powers in the district to which he has been temporarily appointed as the permanent holder of the office, and we are at a loss to understand the reasons on which Mr. Belli based his opinion. He does not record any in his judgment, contenting himself with stating that he "certainly has the power of reversing the Acting Judge's order"

This contention is altogether groundless, and the Judge's interference with his predecessor's decision on the issue of limitation illegal.

But it has been intimated to us that, on this finding by the High Court, the respondent desires to file a cross-appeal against the Officiating Judge's order on the issue of limitation; and, that being so, we can take up the entire question as it is now before us on the record, and decide it without necessitating further litigation or delay.

We consider the Officiating Judge's order on the issue of limitation to be wrong. Granting that, by Clause 16, Section 1, Act XIV. of 1859, no more than six years' wassilat can, under ordinary circumstances, be recovered, this Section refers to suitors who are under no legal disability, and for whom the law makes no special provision. In the present case, the party seeking redress is a minor, and it would be manifestly absurd to deny him the enlargement of time granted to persons in his situation merely on the techinal plea that his mother and guardian was the person actually suing; and that, as she personally was under no legal disability, limitation might be applied to a suit as brought by her, which could afterwards, on the minor's attaining majority, be revived, and be, as in the present case, carried to a successful issue.

There is nothing in the law which limits the power to recover wassilat, considered as wassilat, to the collections of six years; and if, therefore, it can be shown that a plaintiff has been legally disabled from bringing a suit within six years of his right accruing, there seems to be no reason why he should not get back all that is justly due to him.

Now, the minor's right to the wassilat accrued in 1260 B. S, the year of his adoption, and every year since then he would have had a fresh cause of action for the mesne-profits of the year that had expired, for the cause of action in suits for mesne-profits arises from the date when they be-

came annually due (3 Weekly Reporter 38, Maharaj Koer Ramput Singh *versus* J. Furlong). Before the year 1259, the father was alive and in possession, and so far the claim is undoubtedly barred, the person to whom wassilat was due being under no legal disability, and having allowed the 6 years to lapse; but from that date we agree with the Judge, and for the reasons given by him, that the minor, or, in other words, the plaintiff who appears in his behalf, can recover.

With regard to the amount of wassilat due, upon the Court's suggestion, the appellant's vakeel, in order to avoid the expense and delay of a second local enquiry (should such be considered necessary), professed himself willing to accept the Judge's finding on the evidence, if the respondent consented to a diminution of 30 per cent. on the Ameen's calculation for the first five years; and, in respect of the last five, to an allowance for collection-charges at 5 per cent.

The respondent's vakeel, on behalf of his client, agrees to these terms, and the Judge's decree will be modified accordingly, in the terms of the arrangement now assented to by both parties before this Court.

The practical result will be, therefore, that the appeal is dismissed with costs in proportion to the amount now decreed.

The 16th February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Ejectment.

Case No. 2295 of 1866.

Special Appeal from a decision passed by the Judge of Dacca, dated the 12th June 1866, reversing a decision passed by the Principal Sudder Ameen of Fureedpore, dated the 18th December 1865.

Gobind Chunder Lahory and others (Plaintiffs), *Appellants,*

versus

Messrs. Jardine, Skinner, and Co., and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Greeja Sunkur Mojoomdar* for Appellants.

Mr. R. T. Allan for Respondents.

Plaintiff sued upon a kubooleut, and filed a pottah in support of it. The pottah having been rejected, and the kubooleut not proved, he was held not entitled to fall back on a general statement that he has a jote pottah, that the lands in dispute are part of the same, and that he can oust the defendant who was duly in possession.

Seton-Karr, J.—THE point at first pressed on us is that the Judge should have pronounced on the kubooleut, which is stated to have been executed by Mr. A. Battersby, a former manager of the concern, for the lands which are now the subject of dispute, and which were said to be let to the factory for the cultivation of indigo.

But we cannot find that there is any evidence as to the kubooleut in question, or any thing material on which the Judge has omitted to pronounce. The plaintiff came into Court on that kubooleut as his main deed, and might have cited the 4 witnesses named in the margin thereof to prove its execution and the signature of Mr. Battersby. He failed to adduce any such evidence, and then subsequently filed a pottah which the Lower Appellate Court, apparently for very good reasons, has declared to be not proved. After his pottah has been rejected, and after he has failed to prove his kubooleut, he has no right to fall back on a general statement that he has a jote pottah, and that these lands are part of the same, and that he can oust the defendant who is duly in possession.

In a case of ejectment, it has been held in England that a person who obtained leave from a servant of the plaintiff to enter the premises, and who then set up a title, could not defend an action of ejectment, but was bound to deliver up possession before he disputed the title (Roscoe's Digest, page 638).

Without actually applying this doctrine to the case before us, we may say that, had the plaintiff really kept to his kubooleut and had proved it, and had shown that the lands in dispute were covered by it, he might possibly have succeeded in his case.

As he has not thought fit to adopt this course, he cannot ask us to remand the case for any further enquiry, or on any other ground.

The appeal is dismissed with costs.

The 16th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Limitation—Cause of action—Suit for monies advanced in payment of goods to be subsequently supplied.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Court of Small Causes of Pubna.

Boiddonath Shah and another, *Plaintiffs*,

versus

Lalunnissa Bibee and another, *Defendants*.

Suit to recover Rupees 703 *as.* 3 *gds.* 3 *cowrees*, being balance of account.

A suit for balance of account consisting of moneys advanced in payment for goods to be subsequently supplied is governed by the limitation prescribed by Clause 9, Section 1, Act XIV. of 1859. The cause of action accrued at the time when the goods ought to have been delivered.

Case.—THE plaintiffs allege that defendants, selling to plaintiffs ——— and kullye, took from plaintiffs advances of certain sums of money since 13th of Bysack to 27th Kartick 1269 mohajunee; that Rupees 70-3-3-3 are now justly due by them to plaintiffs after giving credit for the value of articles supplied by them against the money so advanced, and that, this transaction being a mutual dealing between two traders, six years' limitation is applicable to this case.

The defendants, in answer to plaintiffs' claim, urged that they did not take any money from the plaintiffs, nor are they liable to plaintiffs for their claim; that plaintiffs first received delivery of goods, and then paid for them; that they did not give any advance; that a balance of Rupees 32-13-9 is still due to defendants by the plaintiffs for value of goods supplied to them; and that, the suit not having been brought within 3 years' time, plaintiff's claim is barred by limitation.

Issue.

What Section of the Statute of Limitation governs this suit?

1st.—The pleader for the plaintiffs verbally contends that defendants used to take advances of money from the plaintiffs for supplying them with different kinds of goods, and repaid the money by value of goods supplied; but as, at the time when money was advanced, there was no stipulation made as to the time when goods would be supplied to the plaintiffs, the accounts between plaintiffs and defendants could not be adjusted until the close of the mercantile year; that, under these circumstances, the cause of action in respect of the balance having arisen at the beginning of the year 1270 mohajunee, or 28th Aghran, the date of opening a fresh account, this suit is not barred by limitation; that, though the transaction between the parties closed on the 27th Kartick 1269 mohajunee, yet, as under Section 8, Act XIV. of 1859, the period of limitation is to be counted from the close of the mohajunee year, three years have not elapsed since the close of that year to the date of institution of the suit, namely, 4th December 1866, corresponding with 20th Aghran 1273 B. S.; and that, inasmuch as no other limitation is expressly provided by the law for actions of this kind, the period of limitation by which the suit is to be governed may also be taken to be that provided in Clause 16, Section 1, Act XIV. of 1859, *viz.*, six years.

The Counsel for the defendants argues that in this suit the cause of action cannot be deemed to have accrued since the close of the mercantile year in the accounts, as there was no mutual dealing in goods between the parties, but only goods were supplied to the plaintiffs for money received from them, and, therefore, the provisions of Section 8, Act XIV. of 1859, cannot apply to the suit; that this suit cannot be deemed to have arisen out of mutual dealings between merchants and traders, but from a breach of contract, and therefore the limitation of three years found in Clause 9, Section 1, Act XIV. of 1859, rules the suit; and that, a period of more than three years having elapsed since 27th Kartick 1269, the date when the transaction was closed, to the date of institution of this suit, *viz.*, 20th Aghran 1273 B. S., plaintiff's claim is barred by limitation.

In my opinion, the facts of the case do not admit that the cause of the present action is the same as that alleged by the plaintiffs, because there is nothing to show that defendants sold any goods by retail; but rather from the entries in the khattahs of 1269 filed by plaintiffs at page 4, it appears that plaintiffs paid to defendants the value of goods supplied to them, on dates subsequent to those on which the articles were delivered to them, and that, even by

instalments. This being the case, the defendants cannot be deemed to be traders or retail-sellers. If the fact that plaintiffs advanced to defendants certain sums of money for goods, and that they did not receive sufficient quantity of goods for the money advanced be admitted as true, plaintiff's claim can be based upon no other grounds than on a breach of contract. Under these circumstances I am of opinion that Section 8 and Clause 16, Section 1, Act XIV. of 1859, which plaintiffs urge are applicable to their suit, cannot apply to it, but that 3 years' limitation as prescribed in Clause 9, Section 1, Act XIV. of 1859, will be applicable to the suit; and that, therefore, a period of more than 3 years having elapsed since 27th Kartick 1269, the date on which payment of money was closed, to 4th December 1866, corresponding with 20th Aghran 1273 B. S., the date of institution of the suit, plaintiff's claim is barred by limitation.

The judgment of the High Court was delivered as follows by—

Peacock, C.J.—In this case, according to the finding of the Judge of the Small Cause Court, the balance due to the plaintiffs consists of moneys advanced by them in payment for goods to be subsequently supplied.

Upon the facts found by the Judge of the Small Cause Court, we are of opinion that he is right in holding that Section 8, Act XIV. of 1859, was not applicable to the case, and also that Clause 16, Section 1 of that Act, was not applicable. We think that he is also right in holding that Clause 9, Section 1 of the Act, is the Clause which governs this case.

The Judge of the Small Cause Court has held that the cause of action accrued when the advance of the money took place; and that, as that was more than 3 years before the commencement of the suit, the suit was barred. But, upon the finding that the money was advanced in payment of goods which were to be subsequently supplied, we are of opinion that the cause of action accrued at the time when the goods ought to have been supplied.

It appears that no time was expressly fixed for the delivery of the goods. But the Judge will have to find whether there was any usage or dealing either in the particular trade in which the defendants were concerned, or any previous usage between the plaintiffs and the defendants on their previous dealings from which the time at which the defendants ought to have delivered the goods to cover the advances can be ascertained. If there was no usage, and no time fixed, then we think that the time for the delivery of the goods would be a reasonable time after the advance of the money, having reference to all the circumstances. It appears from the statement that part of the goods to be delivered consisted of kullye. If the kullye to be delivered was to be the produce of crops which had not then been gathered, probably the time for the delivery of the goods would be at the expiration of the harvest.

The Judge will have to find as a matter of fact what was the time at which the goods ought to have been delivered. If that was more than 3 years before the commencement of the suit, the suit is barred. If it was within the period of three years next before the commencement of the suit, then the suit is not barred, although 3 years might then have expired from the time when the advances were made.

The 16th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Small Cause Courts—References to High Court.

Reference to the High Court by Major E. H. C. Wintle, Judge of the Court of Small Causes of Dum-Dum Cantonment.

Dinonath Addy, *Plaintiff*,

versus

Pay-Sergeant W. Weller, *Defendant*.

According to Section 22, Act XI. of 1865, a Small Cause Court is required, in referring a case for the decision of the High Court, to draw up a statement of the case, and to refer it with the Court's own opinion.

Case.—In accordance with Section 22 of Act XI. of 1865, I have the honor to submit, for the opinion of the High Court, the following question of law which has arisen in this case: Whether under Section 40 of the Mutiny Act, European non-commissioned officers or soldiers are amenable to this Cantonment Small Cause Court?

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—Major Wintle, the Judge of the Court of Small Causes of the Dum-Dum Cantonment, should follow the provisions of the Section of the Act under which he has referred the case for the opinion of the Court. That Section (22

of Act XI. of 1865) directs that he shall draw up a statement of the case, and refer it, with the Court's own opinion, for the decision of the High Court. In the present instance, there is no statement of the case, no statement that the question arose on the trial of a suit, and no statement of the Court's own opinion. It is impossible for this Court to answer the abstract question propounded. The Court should be informed in the statement for what amount and on what date the suit was commenced. The case must be sent back for amendment.

The 16th February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Review of Judgment—Appeal.

Case No. 1011 of 1866.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 29th July 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 8th March 1865.

Bunkoo Lal Singh (one of the Defendants), *Appellant,*

versus

Basoomunissa Bibee and another (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Greeja Sunker Mojoomdar* for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

A decree for wassilat was passed against "*the defendant*" in a case where there were several defendants; and, as soon as one of them, who was not the person against whom the plaintiff sought for wassilat in the original plaint, found that the decree was to be executed against him, he applied to the Court for a review, though after the time prescribed by Section 377, Act VIII. of 1859. HELD that the Court was quite right in holding that there was reasonable cause, within the meaning of that Section, for the application for review not being preferred within the limited time.

The preferring of an appeal against a decision by one defendant does not deprive another defendant of his right to apply for a review of the same decision, with reference to Section 376.

Norman, J.—THE facts of this case are as follows:—

The plaintiffs sued, for possession of an 8-annas share of certain talooks, two defendants, Syud Hossein and Khojesta Bibee, who had ousted him. Twenty-five other persons were made co-defendants. The plaint prayed for wassilat and costs against the defendants who had dispossessed him. A decree passed *against the defendant* for wassilat and costs on the 21st of March 1859. Syud Hossein and Khojesta appealed to the Judge, and afterwards presented a special appeal to the Sudder Court. These appeals were rejected.

The plaintiffs proceeded to execute the decree against Odoito Churn Sein, one of the defendants called *pro formâ* defendants, a purchaser from the principal defendants. He objected, but the Principal Sudder Ameen disallowed his objections. Within three months after this allowance, *viz.*, on the 2nd August 1864, Odoito Churn presented a petition for a review of the original decree, which was admitted by the Principal Sudder Ameen, Baboo Sreenath Bidyabagish, and the case restored to the file.

Mr. Reilly, the succeeding Principal Sudder Ameen, on hearing the parties, amended the decree by making Odoito Churn liable for a moiety of the wassilat from the date of his purchase.

On appeal the Judge set aside this decision, holding that the Principal Sudder Ameen had no power, after the interval of five years from the date of the original decree, to admit a review.

On special appeal two cases were referred to before us, both reported in the 6th Weekly Reporter, pp. 100 and 167.

We do not mean to say that a Judge has an entirely arbitrary power to admit reviews at any time. But it appears to us that the Principal Sudder Ameen was quite right in holding that there was reasonable cause for not preferring the application for review within the limited time so as to bring the case within the 377th Section of Act VIII. of 1859. The decree being wholly ambiguous, it is difficult to see why the Principal Sudder Ameen allowed it to be executed at all.

It appears to us that the defendant, who is the appellant before us, had no reason to suppose that a decree for wassilat against "*the defendant,*" when there were 27 defendants in the cause, would have been executed against *him*, when he was not the person against whom the plaintiff sought for wassilat in the original plaint. As soon as he found that the decree was to be executed against him, he came into Court by petition of review to get the decree corrected, and we think that he had excellent reasons for not coming into Court till then.

Under these circumstances the decision of the Principal Sudder Ameen admitting the review was final under Section 378, and the Judge should not have interfered with it.

We do not think that the fact that another defendant had preferred an appeal against the decision deprived the defendant now before the Court of his right to apply for a review.

The words of the 376th Section of Act VIII. of 1859, "any person considering "himself aggrieved by a decree of a Court "of original jurisdiction, from which no ap- "peal shall have been preferred to a supe- "rior Court," must be construed as meaning a decree from which no appeal shall have been preferred by the applicant himself.

The judgment of the Court below must, therefore, be reversed, the decision of the first Court restored, and this appeal decreed with costs and interest.

The 16th February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale by Hindoo widow—Suit by Reversioner.

Case No. 2326 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 21st June 1866, affirming a decision passed by the Moonsiff of Begumgunge, dated the 8th September 1865.

Ram Gutty Kurmokar (one of the Defendants), *Appellant,*

versus

Boishtub Churn Mojoomdar (Plaintiff), *Respondent.*

Baboos Sreenauth Doss and *Nuleet Chunder Sein* for Appellant.

Baboos Nil Monee Sein, Kalee Mohun Doss, and *Shushee Bhoosun Bose* for Respondent.

A sale by a Hindoo widow is not invalid if made without collusion. But the sale is limited to the widow's life-interest, and the reversioner is only entitled to a declaration that the sale will not affect or prejudice his interests beyond the widow's life.

Seton-Karr, J.—THIS was one of those suits which are not unfrequent in our Courts, *viz.*, for the reversal of a sale of property by a Hindoo widow. Both the Courts decided that the claim advanced by the reversioner was good. They annulled the sale, and ordered the reversioner, plaintiff, to be put in possession as a surburakar. In appeal by the purchaser, defendant, we have heard both parties fully, and reference has been made to the cases on the subject of sales by Hindoo widows as follows: Special Number of the Weekly Reporter, page 165, Full Bench Decision; 1 Hay's Reports, page 110, August 2nd, 1862; Sudder Dewanny Adawlut, page 210, for 1859, Weekly Reporter, Volume II., page 245.

In only one of these cases, *viz.*, that reported in the decisions of the late Sudder Dewanny Adawlut, was the reversioner ever put in possession; and in that instance the circumstances were very peculiar. No case has been quoted to us in which, since the establishment of the High Court, an award of possession has been made in favor of the reversioner. The general rule appears to be that the sale shall be limited to the life-interest of the widow, and that a declaration shall be made in favor of the reversioner that the sale shall not affect or prejudice his interests beyond the widow's life. There is no proof of collusion between the widow and the purchaser, special appellant, who is one of a different caste, and it cannot be said, in this instance, that a complete transfer of her interests by the widow to a third party is an act of waste such as would warrant an order for possession in the plaintiff's favor.

Acting, therefore, on this view, we modify the order of the Lower Courts so as to erase that portion which would give possession as a surburakar, and we declare that the right of the purchaser, defendant, be limited to the life-interest of his vendor, the widow. The appeal, therefore, is partly decreed, and partly dismissed. Both parties may, however, pay their own costs in this special appeal.

Norman, J.—I agree that the decree must be modified. The appellant, Ram Gutty Kurmokar, appears to be a *bonâ fide* purchaser from the widow, and, as such, acquires a title limited to the interest which, under the circumstances, the widow had the power to dispose of (*a*). There is no ground for interfering with his possession during the time his title is good.

But if he had colluded with the widow, and his purchase had been fraudulent or wholly fictitious, for myself I should have had no hesitation in acting on the precedent in the Sudder Reports of 1859, page 213, and

(*a*) As to the effect of a purchase of this sort in English Law, those who are curious on the subject may refer to Comyn's Digest, title "Forfeiture."

the suggestion of Mr. Justice L. S. Jackson, 1 Hay's Reports for 1862, page 110, and giving possession to the heir or a receiver as manager for the party entitled during the life of the widow, and to protect the estate for the benefit of the reversioner.

The 16th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Section 4, Act VIII. of 1862—Suits against the ex-King of Oude.

Petition of Begum Bibee, Bismullah Khanum, and Zainub Khanum, praying for an order directing the Principal Sudder Ameen of the 24-Pergunnahs to take cognizance of a suit instituted by them against the ex-King of Oude, which the Principal Sudder Ameen refused to entertain without the consent of the Government.

Baboo Dwarkanath Mitter for Petitioners.

Section 4, Act VIII. of 1862, does not prevent the Civil Courts from entertaining a suit against the ex-King of Oude without the consent of the Government.

Chief Justice.—SECTION 4, Act VIII. of 1862, provides that "no writ or process "shall at any time be sued forth or prose- "cuted out of any Civil, Revenue, or Cri- "minal Court against the person, goods, or "property of His said Majesty, unless such "writ or process shall be so sued forth or "prosecuted with the consent of the Govern- "or-General in Council first had and ob- "tained, such consent to be testified by the "signature of a Secretary to the Govern- "ment of India; and any writ or process "which shall at any time be sued forth or "p rosecuted against the person or goods or "property of His said Majesty, without "such consent as aforesaid, shall be utterly "null and void."

This Section does not prevent the Courts of Civil Judicature from entertaining a suit against His Majesty the King of Oude without the consent of the Government. It only prohibits the Courts from issuing any writ or process against the person, goods, or property of His Majesty, by which is meant a writ or process for the capture or seizure of his person or property. The Courts are competent to receive a plaint against His Majesty if properly prepared, and to issue a summons upon it.

Under these circumstances we think that an order ought to be issued to the Principal Sudder Ameen, directing him to take cognizance of the suit, and to receive and admit the plaint, unless it be open to any of the objections which would justify the rejection of it under the Code of Civil Procedure, without reference to Act VIII. of 1862.

The 18th February 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Plaint (Verification of).

Petition complaining of an order passed by Mr. H. R. Madocks, Judge of Bhaugulpore, dated the 5th December 1866.

Rajah Leelanund Singh, *Petitioner.*

Mr. R. E. Twidale and *Moonshee Ameer Ali* for Petitioner.

A plaintiff may be excused from verifying his plaint, not only by reason of his absence, but also for any *other good cause* to the satisfaction of the Court.

THIS order of the Judge of Bhaugulpore has been called for upon the application of Rajah Leelanund Singh. When the motion was originally made before me, it was represented that the Judge had made an order, which undoubtedly appeared to be an objectionable one, referring exclusively or at least specially to Rajah Leelanund Singh, the petitioner. Now that order has come up; it does not appear to be an order precisely of that description. It is, no doubt, the fact that the Judge was induced to make the order which he did by reason of a practice which he found prevailing in the subordinate Courts in his district, namely, that all plaints filed on behalf of Rajah Leelanund should be verified by the agents of the Rajah. But, acting upon that information, the Judge made an order, which did not refer exclusively or specially to the Rajah, but was meant to apply to all plaints, and all plaintiffs within his district.

It is quite clear that there was nothing objectionable, but the contrary, in the Judge calling the attention of the subordinate Courts to the provisions of Section 28 of the Code of Civil Procedure. It could not be right, either in the case of Rajah Leelanund Singh, or in the case of any other person whatever, that he should have or exercise the privilege of having plaints filed on his account, verified invariably by other persons. It is undoubtedly for the Court, in each case where a verification is not made

by the plaintiff, to consider whether, by reason of absence or for other good cause, the plaintiff is unable to subscribe and verify, and whether, if so, the person who has verified it is a person competent to make the verification. The Judge has probably taken too narrow a view of the excepting Clause, when he says that it is only absence from the district which should be looked upon as a sufficient cause. The Section expressly says: "By reason of absence *or for other good cause.*" It is impossible to set down categorically, by way of general directions, what shall be or shall not be considered good cause. That is for the consideration of the Court in each case, and it is only necessary to see that in no case is the plaintiff excused from verifying his plaint, except where, by reason of absence or other good cause, it is made out to the satisfaction of the Court that he is unable to do it.

I think that the Judge should send to all the Courts to which a copy of his original order was directed a copy of the present order of this Court.

The 18th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Attachment—Stipends of members of Mysore Family.

Case No. 520 of 1866.

Application for review of judgment passed by the Hon'ble Justices Loch and Macpherson, on the 8th December 1866, in Miscellaneous Appeal No. 520 of 1866.

Hazee Mohamed Kuzulbash (Decree-holder), *Petitioner,*

versus

Shazada Mohamed Buseerooddeen (Judgment-debtor), *Opposite Party.*

Mr. G. C. Paul, Moonshee Ameer Ali, and *Baboo Romanauth Bose* for Petitioner.

Messrs. R. V. Doyne and *R. E. Twidale* for Opposite Party.

The stipends allowed by Government to the members of the Mysore family cannot be attached.

Macpherson, J.—HAVING re-heard this case, we remain of the same opinion as that which we expressed when the matter came first before us.* There is nothing whatever upon the record to show that there is any capitalized stock belonging to the appellant, or that there is any particular fund from which (if at all) he can enforce payment of the allowance which the Government usually makes him.

The Lower Court says that the interest may be attached, because "it is a sum cer-"tain due to the debtor as interest due "on a fund belonging to him." No doubt, a sum certain, due to the debtor as interest on a fund belonging to him, might be attached. But the materials on which we have to act wholly fail to establish that the money which it is now sought to attach is such a sum. It has been repeatedly held that the original stipends allowed by Government to the members of the Mysore family cannot be attached. It may be that the Government has made certain propositions, the effect of which, if carried out, might be to alter the nature of those stipends. But there is nothing before us to show that the propositions which were made have been acted upon so as in any way to alter the appellant's position, nor is there anything to show us that that which it is now sought to attach is other than a mere gratuity. The case is in principle much the same as Innes *versus* The East India Company, 25 Law Journal, C. P., 154.

We affirm our former order with costs.

The 18th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Lakheraj—Kubooleut—Resumption.

Case No. 2861 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 10th August 1866, reversing a decision passed by the Deputy Collector of that District, dated the 31st May 1866.

* *Original judgment.*—We reverse the order of the Lower Court with costs. It has, on various occasions, been decided that the pensions or allowances of the Mysore family, of whom the petitioner is one, cannot be attached (*see* case No. 516 of 1862 decided on 13th June 1863).* These allowances are not the absolute property of the recipients, nor are they in the nature of debts due to them from the Government; and therefore they cannot be seized in the hands of Government.

Mussamut Bibee Fuzlun and others (Plaintiffs), *Appellants*,

versus

Shaikh Abdoollah and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Kissen Succa Mookerjee for Respondents.

A landlord is not bound to sue for resumption before bringing a suit for a kubooleut, in respect of lands which the defendant claims to hold as lakheraj.

Loch, J.—We think the Judge is wrong in considering that this case cannot be tried in its present form. Plaintiff sues for a kubooleut, and he is, of course, bound to show that he has a right to it. He has a right to it only if he proves that the land is part of his mâl land, which may be done by showing that he has received rent or by other evidence. The defendant has, of course, a right to plead his rent-free title and limitation, and it is for the Lower Court to consider whether these pleas are good against the plaintiff's claim. We think that this case is not on all fours with the case quoted by the Judge of 13th April 1866, Volume I., Weekly Reporter, page 62, Act X. Rulings, nor of the case referred to in that decision, for in this case the lands held by the defendant had been declared in another suit between him and the plaintiff's co-sharers to be mâl. It is somewhat similar in character to the case reported in 3 Weekly Reporter, page 192, Civil Rulings; and, though it is possible that the ruling in that precedent may not be sufficient to support the plaintiff's case, yet we think it must be tried, and that there is no sufficient ground for referring him to a suit for resumption before bringing her action for a kubooleut. The case is remanded to be disposed of with reference to these remarks.

The 18th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Court where Suit to be instituted.

Cases Nos. 2662 and 2663 of 1866 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Rajshahye, dated the 24th August 1866, affirming a decision passed by the Collector of that District, dated the 1st May 1866.

Mr. C. G. Phillip (Defendant), *Appellant*,

versus

Bundhoo Sircar (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Issur Chunder Chuckerbutty* for Appellant.

Mr. J. S. Rochfort and *Baboo Greeja Sunker Mojoomdar* for Respondent.

A Collector has no jurisdiction to allow a suit to be instituted in the Sudder Station instead of in the Sub-division Court.

Where the Collector wrongly exercised such jurisdiction in a case below 100 rupees—Held that the Judge could be moved to set aside the Collector's order on the ground that the Deputy Collector, and not the Collector, had the proper jurisdiction to try the case; and that, even if the Judge had not such power, the power was vested in the High Court, under its Charter, to order the proper legal proceedings.

Bayley, J.—No. 2662.—The plea in special appeal, that there was no jurisdiction in the Collector to allow the suit to be instituted in the Sudder Station, and not in the Sub-division Court, is a valid one. The Collector states: "It is quite clear that, as "a Collector, I can withdraw any case from "a Deputy Collector in charge of a sub-divi-"sion; and, if so, it seems to me hardly "necessary to force a man to institute his "suit at the Sub-divisional Court, in order "that I might withdraw it, and by doing "so simply complicate matters."

Now, the question is not one as to the Collector's view of the expediency or the practical result of his assuming a jurisdiction, but whether the law does or does not give it him.

The Law, Section 20, Act VI. of 1862, was thus:—

"Suits under this Act, or under Act X. of "1859, shall be *preferred in the Revenue "office of the district, or, when a sub-divi-"sion of a district has been placed under "the jurisdiction of a Deputy Collector, in "the Revenue office of the sub-division* in "which the cause of action shall have "arisen, or when the cause of action shall "have arisen within the limits of the local "jurisdiction of any Deputy Collector not "in charge of a sub-division, but who has "been specially authorized by Government "to receive such suits, then in the office of "such last mentioned Deputy Collector. "provided always that the Collector may "withdraw any suit from any Deputy "Collector, and try it himself, or refer it to "another Deputy Collector."

Now, as the law enacts that this suit shall be instituted in the Sub-division Court, it is clearly opposed to the Collector's view of expediency. It is necessary then that the

Collector should follow the law. The Collector will, therefore, return the plaint to be filed in the Sub-division Court, and the orders of the Judge and Collector are hereby reversed. The costs of the special appellant to be given to him by the plaintiff, special respondents.

No. 2663.—This is a case similar to the above case (No. 2662) just decided by us, excepting so far that in *this* case the subject-matter of dispute was *below one hundred rupees*, and the Lower Appellate Court has accordingly stated that it has no right to try the appeal.

We hold that, notwithstanding the case being of a value within 100 rupees, the Lower Appellate Court, as the first Appellate Court, could be moved to set aside the order of the Collector who decided the case, on the ground that the Deputy Collector had the proper jurisdiction to try the case, and not the Collector; and even if, on account of the value of the suit being under 100 rupees, the illegal order of the Collector, who had no jurisdiction to try it at all, could not be *reversed* by the Judge below, still it is not denied that, under the Charter of this Court, power to order the proper legal proceedings is vested in us.

This case is, accordingly, also remanded to the Collector, to carry out the order as passed by this Court in 2662.

The 19th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Section 230, Act VIII. of 1859—Dispossession—Possessory actions.

Case No. 2573 of 1866.

Special Appeal from a decision passed by Baboo Punchanun Banerjee, Principal Sudder Ameen of Hooghly, dated the 22nd August 1866, affirming a decision passed by Baboo Mothooranath Gooptoo, Moonsiff of that District, dated the 31st October 1865.

Gobind Chunder Bagdee (Defendant), *Appellant,*

versus

Gobind Ghose Mundul (Plaintiff), *Respondent.*

Baboo Woopendur Chunder Bose for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Section 230 Act VIII. of 1859 does not refer to decrees obtained in possessory actions, but to executions in regular suits where judgments have been pronounced on the merits, and cannot be introduced into a case determined under Section 15, Act XIV. of 1859.

Glover, J.—THE special appellant in this case, calling himself a jotedar under one Tara Chand, the sole proprietor of 19 beegahs 15 cottahs of land, sued Roop Chand Bagdee, a trespasser, under Section 15, Act XIV. of 1859, to recover possession of a 2-annas share thereof, and got a decree by confession of judgment.

On his taking out execution, however, the plaintiff in his suit intervened on the ground that she was in possession of the land by purchase from one of her co-proprietors Hara Chand, and that the possessory action had been collusively brought by Tara Chand in the name of his ryot, against a nominal trespasser, in order to defraud his brother, Hara Chand, of his rights in the property.

The objection was heard by the Moonsiff under Section 230 of Act VIII. of 1859, and given in the intervenor's favor, a decision afterwards confirmed on appeal by the Principal Sudder Ameen.

The defendant now appeals specially, urging that the Civil Court had no power to entertain the intervenor's objection under Section 230 of Act VIII. of 1859. It should, under the provisions of Section 15, Act XIV. of 1859, have referred him to a regular suit.

We think that this contention is sound. It appears from the record of the other cases which have been heard in special appeal with this, that there are several co-sharers in the estate; and that, as between them and Tara Chand, there is a dispute as to the amount of the latter's interest. To allow, therefore, an enquiry under Section 230 of the Procedure Code, would be to graft upon a mere possessory action between two parties questions of title between Tara Chand and third parties in no way connected with the original suit.

It may be, as argued by the special respondent's pleader, that, as the Civil Court has gone into the plaintiff's claim, the result of a regular suit would be the same as that already arrived at; but when the law lays down in express words a mode of relief, this Court would not be justified in permitting other and irregular methods of coming to the same end.

Section 230 does not refer to decrees obtained in possessory actions, but to execu-

tions in regular suits where judgments have been pronounced on the merits, and cannot be introduced into a case which has been determined under Section 15, Act XIV. of 1859.

The special respondent's remedy is a regular suit.

Special appeals 2575 and 2576 are admittedly governed by the order in case No. 2573.

And we, therefore, decree all three appeals, reversing the Principal Sudder Ameen's decision with costs.

The 19th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Notice of Enhancement—Section 17, Act X. of 1859.

Case No. 2438 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 25th June 1866, affirming a decision passed by the Assistant Collector of that District, dated the 25th February 1865.

Ram Kant Chuckerbutty (Defendant), *Appellant,*

versus

Rajah Mohesh Chunder Singh and others (Plaintiffs), *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

There is nothing in Section 17, Act X. of 1859, which provides that, if one of the grounds specified in the notice of enhancement be not proved, there shall be no decree for enhancement on account of any other ground which is proved.

Bayley, J.—This case was remanded by this Court (Bayley and E. Jackson, JJ.) on the 22nd December 1865.

The points now taken up in special appeal are—

1. That the Lower Appellate Court has decided without evidence and on conjecture that the value of the produce has increased.

2. That, even if the value of the produce be increased, the decrease of the productiveness of the soil counter-balances it; and that, therefore, there should be no enhancement.

We do not think that either of these pleas are tenable.

As to the *first*, there was evidence of witnesses on the record to the effect that the value of produce had increased. It is not a legal presumption that this evidence was not considered by the Lower Appellate Court. The substance of the Judge's decision is in our view that the evidence on the record proved the increase of the value of the produce, and that certain patent physical facts showed that the just conclusion was that their evidence as to such increase of the value of the produce was correct.

The *first* plea, therefore, is overruled.

On the *second* plea, we think that the judgment is in accordance with law. Excess of area, increase of value of produce, and of productiveness of the lands, are *each* and *all* grounds of enhancement under Section 17, Act X. of 1859, and were all taken in the notice. Of these grounds, the *first* and *second* are held by the Lower Appellate Court to have been proved, and the *third* not to be so. This finding is not incompatible with enhancement, as long as any one ground is proved; nor is there anything in the law to the effect that, one ground not being proved, there shall be no decree for enhancement on account of any other ground which is proved.

In this view we dismiss this special appeal with costs.

The 19th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Interest—Regulation XV., 1793.

Case No. 2737 of 1866.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 17th August 1866, modifying a decision passed by the Deputy Commissioner of Hazareebagh, dated the 14th March 1865.

Thakoor Jeebnath Singh (Plaintiff), *Appellant,*

versus

Kureemun Bibee, mother and guardian of Kureem Khan minor, and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboos Nilmonee Sein and *Poorno Chunder Shome* for Respondents.

Where, under Section 6, Regulation XV., 1793, interest upon the principal prior to the institution of the suit was adjudged to the plaintiff, limited to a sum equal to the principal, although that Regulation was repealed when the suit was brought, yet, looking to the time when his contract was made, the plaintiff was held not entitled to any further interest before suit, but interest upon the principal was allowed to him from the date of suit to the date of decree.

Pundit, J.—THE special appellant is entitled to interest upon the principal sum due to him, from the day of suit to the date of decree, in addition to a sum equal to the principal adjudged to him under Section 6 of Regulation XV. of 1793 as interest upon his principal for the period preceding the date of suit. Upon the aggregate of the principal and interest decreed, interest has properly been allowed from date of decree.

Special appellant, however, pleads that, Regulation XV. of 1793 having been repealed when the present suit was brought, the claim of the plaintiff for interest upon the principal should not be limited to a sum *equal* to the principal.

Looking, however, to the time at which the plaintiff's contract was made, plaintiff is not, in our view, entitled to any further interest preceding suit.

We accordingly decree that, to the sum decreed below, be added the interest upon the principal from the date of suit up to the date of decree, and that, upon the whole sum decreed, interest should be charged up to realization from the date of decree.

So far the special appeal of the special appellant is decreed with proportionate costs against the special appellant's vendor, the principal defendant.

Plaintiff, however, will have to pay full costs to the other respondents who have appeared, and who have no interest in any question regarding principal or interest, which special appellant has to obtain from his vendor only.

The 20th February 1867.

Present :

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Mesne-profits—Interest.

Case No. 2741 of 1866.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Chittagong, dated the 23rd August 1866, modifying a decision passed by the Sudder Ameen of that District, dated the 15th December 1866.

Muneeram Acharjee and others (some of the Defendants), *Appellants,*

versus

Sreemutty Turungo and others (Plaintiffs), *Respondents.*

Baboo Bama Churn Banerjee for Appellants

Mr. R. E. Twidale for Respondents.

Mesne-profits can be decreed only for 6 years before the institution of suit.

Interest on the mesne-profits may be allowed year by year during the period of dispossession.

Glover, J.—THE points taken in this special appeal are (1) that the Principal Sudder Ameen has given the plaintiff mesne-profits, counting from 7 years from the date of suit, whereas by law the recovery of wassilat is limited to six years from that date; and (2) that interest ought only to have been allowed from the date of ascertainment of the mesne-profits.

The first objection must be allowed, it having been frequently ruled by this Court that there can be a decree only for mesne-profits that have accrued for six years before the institution of suit (Koer Ramput Sing *versus* J. Furlong, 3 Weekly Reporter 38); and, as the Principal Sudder Ameen has given wassilat from 1216 M. S. to 1220 M. S., the suit not being instituted till 1223 M. S., he has decreed one year in excess of the quantity allowed by law, and so far his decision must be amended. The special respondent will recover mesne-profits from the year 1217 M. S up to 1220 M. S., the year in which possession passed from her by process of law, and so far the appeal is decreed with costs.

But, with regard to the interest, we do not see why a wrong-doer like the special appellant, who succeeded in keeping a rightful owner out of possession of her land for several years, and during that time consumed the produce of it, should escape making good the full value of what he illegally took, and there can be no reason why he should not be saddled with interest year by year from the date on which he has been ordered to disgorge the mesne-profits. A decision of this Court, Joy Kurun, appellant, *versus* Ranee Asmed Koer, V. Weekly Reporter 125, has laid down the same rule.

And we, therefore, dismiss this portion of the special appeal with costs.

The 20th February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Recovery of possession—Onus probandi.

Case No. 2555 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 31st August 1866, reversing a decision passed by the Moonsiff of Russoolgunge, dated the 14th December 1865.

Jadubnath and another (two of the Defendants), *Appellants,*

versus

Ram Soondur Surmah and another (Plaintiffs), *Respondents.*

Baboo Nursing Chunder Mitter for Appellants.

Baboo Greesh Chunder Ghose for Respondents.

Where *A* was illegally dispossessed by *B* of land for which *A* obtained a decree in a suit with *C*, and *A* brought a suit to recover possession—HELD that, the dispossession being proved, the *onus* of proving title was in the first instance on *B*, and that the mere fact of the land being identical with that decreed to *A* in his suit with *C* could not entitle him to a decree in his suit with *B*.

Trevor, J.—THE plaintiff in this case alleges that, in a previous suit with a stranger, certain lands were determined to belong to his talook No. 10; that he acquired possession under that decree, and was subsequently dispossessed by the defendant in this suit. He, therefore, brings his present action to recover possession of the land of which he has been dispossessed by defendant.

Defendant alleges that he has never dispossessed plaintiff of any of the lands of his talook No. 10, and that he has always been in possession of the land sued for as a portion of his talook No. 36.

The first Court was of opinion that plaintiffs had failed to prove that they were ever in possession of this land as a portion of their estate No. 10, and had been dispossessed therefrom by defendant. It, therefore, both on limitation and title, dismissed plaintiff's claim.

The Lower Appellate Court considered it proved that plaintiff, in a suit with a third party, obtained possession of the land in dispute, and that he had been ousted by defendant. He, therefore, on that ground, and also on the ground that defendant was out of Court by efflux of time, he not having brought his suit to reverse the summary order in execution within the time specified in Clause 5, Section 1 of Act XIV. of 1859, decreed plaintiff's suit.

Defendant now appeals specially, urging that the proper issue in this case has not been tried, *viz.*, are the lands in dispute part of plaintiff's talook No. 10, or defendant's talook No. 36; that the identity of the land in suit with those decreed to plaintiff in another case with a stranger, in execution of which decree possession was given to plaintiff, may have the effect of throwing the *onus* of proving title first upon him, defendant, but it cannot have the effect of entitling plaintiff to a decree in the present suit; that again enquiry was refused in execution; that consequently defendant had twelve years within which to bring his suit for possession; and that period had not elapsed when the present suit was filed.

We think it quite clear that defendant has not, by efflux of time, lost his title to the land in suit, but that the title of the parties to the land in dispute must be enquired into. The illegal dispossession by defendant of plaintiff of lands for which he obtained a decree in a suit with a third party has, when proved, as contended by special appellant, the effect of throwing the burden of proof of title first upon him, defendant, and in case he gives proof of this, the title of the plaintiff must then be enquired into. The mere fact that the land is identical with that decreed to plaintiff in a suit with a stranger cannot, in the present suit with defendant, entitle him to a decree. To that plaintiff will only be entitled, after a full and searching enquiry into the title of both parties. The case is remitted to the Principal Sudder Ameen, with directions to him to re-investigate the case in the mode suggested in the foregoing remarks.

The 21st February 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Joinder of causes of action—Land and Mesne-profits.

Case No. 2832 of 1864.

Special Appeal from a decision passed by Mr. E. F. Lautour, Judge of Bhaugul-

* Judgment orally delivered on 14th June 1865.

pore, dated the 10th August 1864, affirming a decision passed by Mr. William Wright, Principal Sudder Ameen of that District, dated the 19th January 1861.

Luchmeepurshad Doobey and others (Defendants), *Appellants*,

versus

Mussamut Koylassoo (Plaintiff), *Respondent*.

Baboo Luckhy Churn Bose for Appellants.

Baboos Kali Mohun Doss and *Romesh Chunder Mitter* for Respondent.

Causes of action joined in one suit may be tried by a Court which has jurisdiction as to the entire value, although the value of one of the causes of action is below the value cognizable by him. Thus, a Principal Sudder Ameen has jurisdiction to try a suit for land with mesne-profits, notwithstanding that the value of the land standing by itself was under the value cognizable by him.

This case was referred to a Full Bench by Trevor and Campbell, JJ., with the following order:—

Referring Order.—A QUESTION regarding jurisdiction arises in this case. Plaintiff claimed land of a value cognizable in a Moonsiff's Court, and wassilat in excess of Rupees 1,000; and the whole claim being thus valued above Rupees 1,000 he went to the Court of the Principal Sudder Ameen, by whom the case was tried and decided. Special appellant urges that, by Section 10 of the Civil Procedure Code, a claim for the recovery of land, and a claim for the mesne-profits of such land, shall be deemed separate causes of action within the meaning of Sections 8 and 9; and that, by Section 8, separate causes of action can be joined in one suit only, when the different causes are cognizable in the same Court, and the combined value does not exceed the jurisdiction of that Court. He says that in this case the causes of actions were, in respect of value, not cognizable in the same Court, and could not be conjoined; that the suit for land should have been brought in the Moonsiff's Court, and the suit for wassilat in the Principal Sudder Ameen's Court.

This seems to be a very unnatural and improbable construction of the law, and we must see whether we are compelled to put such a construction on it. We are inclined to think that we are not; that the words "cognizable by the same Court" refer to the subject and nature of the suit, and not to value; that an action on combined causes, each of which is, on a ground of action cognizable by the Court, in respect of the subject thereof, may be brought in that Court which has jurisdiction in regard to suits of the value of the causes combined. But we find that another Bench (Levinge and Roberts, JJ., Special Appeal No. 2186 of 1862, dated 15th May 1863) has ruled this point otherwise. We refer the case for the decision of a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—This case was referred to a Full Bench in consequence of a decision passed by Mr. Justice Levinge and Mr. Justice Roberts on the 15th of May 1863, 2nd Volume of Reports published by Hay & Co., p. 585, in which they said:—

"We were of opinion that the objection "taken in special appeal to the jurisdiction "of the Sudder Ameen was frivolous. But, "on reconsideration, we are of opinion that the "Sudder Ameen had no jurisdiction to "entertain this suit, inasmuch as the causes "of action on the two bonds were cognizable "in the Moonsiff's Court, and therefore could "not be joined in the same suit, and tried in "the Sudder Ameen's Court. We must "therefore reverse the decree."

It appears to us that that decision is not correct. Act VIII. of 1859, Section 5, says:—

"Subject to such pecuniary or other limita- "tions as are or shall be prescribed by any law "for the time being in force, the Civil Courts "of each grade shall receive, try, and deter- "mine all suits hereby declared to be cog- "nizable by those Courts," &c.

Now, what are the suits which are declared to be cognizable by the Civil Courts? They are the suits mentioned in Section 1, *viz.*:—

"All suits of a civil nature, with the "exception of suits of which their cognizance "is barred by any Act of Parliament, or by "any Regulation of the Codes of Bengal, "Madras, and Bombay respectively, or by "any Act of the Governor-General of India "in Council."

As an instance of suits of which the cognizance is barred, we may refer to Section 23 of Act X. of 1859, which provides that suits for arrears of rent, &c., shall be brought before the Collectors, and, except in the way of appeal, shall not be cognizable by any other Court. Now, the pecuniary limitation as regards a Moonsiff's jurisdiction is 300 rupees. If a suit is for a sum exceeding 300 rupees, it is beyond the jurisdiction of the Moonsiff.

Section 8 provides that "causes of action "by and against the same parties, and "cognizable by the same Court, may be joined "in the same suit, provided the entire claim "in respect of the amount or value of the

"property in suit do not exceed the jurisdic-"tion of such Courts."

Causes of action on two bonds may therefore be joined. The suit may be brought in the Moonsiff's Court, provided the whole amount claimed does not exceed the pecuniary limit of the jurisdiction of that Court. But, if the amount claimed in respect of the two bonds exceeds 300 rupees, the suit would be cognizable in the Principal Sudder Ameen's Court.

Section 6 enacts that "every suit shall be "instituted in the Court of the lowest grade "competent to try it." That amounts to no more than this that, if the aggregate amount of the causes of action joined in one suit is less, or, in other words, if the suit is for less than 300 rupees, the suit could not be brought in the Principal Sudder Ameen's Court, because by Section 6 "every suit is to "be instituted in the Court of the lowest "grade competent to try it."

Section 9 has also been referred to. Its object is to enable the Court, when different causes of different natures are joined, and the Court shall be of opinion that they cannot conveniently be tried together (with reference to the evidence, for instance), to order each separate cause of action to be tried separately.

Take the case of a suit for an account and partition between two brothers who were also partners, and including a dispute as to the possession of land. The Judge might say: "I will try the title to the land first, and afterwards go into the partnership-account;" and after trying both questions, whether together or separately, he would give one decree in the suit. It would still be one suit, and cognizable as such.

In the present case we think that the Principal Sudder Ameen had jurisdiction to try this suit for land with mesne-profits, notwithstanding that the value of the land standing by itself was under the value cognizable by him.

The case will be sent back to the Court which referred this question for our decision, with an expression of our opinion on the subject.

The 21st February 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges.*

Enhancement—Ryots holding at fixed rents from Permanent Settlement—Auction-purchasers under Act I. of 1845.

Case No. 146 of 1865 under Act X. of 1865.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 28th November 1864, reversing a decision of Baboo Rakhal Doss Mookerjee, Deputy Collector of Hooghly, dated the 28th June 1864.

Hurryhur Mookerjee (Plaintiff), *Appellant,*

versus

Puddo Lochun Dey and others (Defendants), *Respondents.*

Baboos Kissen Succa Mookerjee and *Gopal Lall Mitter* for Appellant.

Baboo Dwarkanath Mitter for Respondents.

Ryots holding land at fixed rates of rent, which have not been changed from the time of the Permanent Settlement, are not liable to have their rents enhanced, even at the suit of a purchaser at a sale for arrears of revenue under Act I. of 1845.

This case was referred to a Full Bench by E. Jackson and Glover, JJ., with the following order:—

Referring Order.—THIS was a suit for arrears of rent at enhanced rates after notice.

The defendant pleaded payment of an uniform rate of rent from the Permanent Settlement, and claimed the presumption under Section 4, Act X. of 1859.

The Court of first instance held that, as the plaintiff bought the rights and interests of an auction-purchaser under Act I. of 1845, he was entitled to enhance, and that the presumption claimed by the defendant could not bar his right.

The Judge on appeal considered that the plaintiff's *status* as purchaser from an auction-purchaser did not give him the privileges of his vendor, and accorded to the ryot the benefit of Act X. of 1859. Under this law he held, on the evidence, that the ryot had proved uniform payment of rent for upwards of 20 years, and that his holding was not therefore liable to enhancement.

* Judgment orally delivered on 15th June 1865.

It is urged in special appeal—

(1.) That no difference ought to be made between an auction-purchaser under Act I. of 1845, and a purchaser from that auction-purchaser; that both are equally entitled to the same privileges, and able, under Section 26 of the Act, to enhance the rents of all tenures not held at a fixed rate from 12 years anterior to the Decennial Settlement.

(2.) That an auction-purchaser under Act I. of 1845 is not affected by Act X. of 1859; and

(3.) That in any case the Judge was wrong in giving the defendant (special respondent) the benefit of the presumption, he not having proved uniform payment of rent for 20 years preceding the suit.

The last objection may, we think, be disposed of at once. The Judge has decided in favor of the ryot on evidence. He has not proceeded solely on the dakhilas themselves, which, as they do not extend further down than 1256 B. S., fifteen years previous to the date of suit, would not have afforded the requisite proof; but on the direct evidence of the special appellant's own gomasta, the person who conducted the suit. His testimony, we observe, is not so direct or strong as described by the Judge, but he deposes, at all events, to one thing and; that is, that he has never known the defendant to pay a varying rate of rent, and that in 1257 B. S., when the rents of all the other ryots on the estate were raised, defendants were exempted, and held on at their former payments.

With the decision on this point, therefore, we cannot interfere in special appeal, the Judge's finding being on evidence which is legally good, and with the sufficiency or otherwise of which we have no concern.

On the first objection taken, we think that the Judge was wrong in making any difference between an auction-purchaser and a purchaser from him. The privileges bought by the former under Act I. of 1845 were heritable; and, had he in his turn fallen into arrears, Government would have again sold the estate, and have vested the new purchaser with the same rights as the old one. We do not see, therefore, why a private purchaser of an auction-purchaser's right should not have precisely the same privileges as his vendor, and we think that, under the law as it stood, the special appellant would have been fully entitled to enhance the rent on the special respondent's holding, inasmuch as it had not been held at a fixed rent from 12 years before the Permanent Settlement.

But we think also that the provisions of that Section were altogether modified by Act X. of 1859.

A decision of this Court (No. 425 of 1860, Luteefoonnissa Bibee, defendant, appellant, decided on the 22nd August 1862) has been brought to our notice, in which it is held that a mokurruree tenant is not exempt from enhancement as against an auction-purchaser, before Act XI. of 1859 was passed, unless his mokurruree was created 12 years before the Permanent Settlement. But, on reading that decision, it appears to us that the Court overlooked the preamble of Act X. of 1859, in which it is distinctly stated "that such parts of Section 26, Act I. of 1845 as relate to the enhancement of rents, and the ejectment of tenants by the purchaser of an estate sold for arrears of revenue, are declared subject to the following modifications," to the modifications, that is, prescribed by Act X., and which include that pleaded by the ryot in the case now before us.

With this clear statement of the law before us, we are unable to follow the precedent quoted above; and, as it does not appear from that judgment that the objection now noticed by us was taken into consideration, we think that this appeal should be referred to a Full Bench of the Court for an authoritative ruling as to whether, before the passing of Act XI. of 1859, Act I. of 1845 was modified by Act X. of 1859; in other words, whether an auction-purchaser under Act I. of 1845 was entitled to enhance a ryot's rent, irrespective of the presumption raised in the latter's favor by Section 4 of Act X. of 1859.

The judgment of the Full Bench was delivered as follows by—

Peacock, C.J.—It appears to us that ryots, who hold land at fixed rates of rent, which have not been changed from the time of the Permanent Settlement, are not liable to have their rents enhanced, even at the suit of a purchaser at a sale for arrears of revenue under Act I. of 1845. In the case cited, Poolin Behary Sein *vs.* Luteefoonnissa Bibee (Marshall's Report, page 107), the attention of the Court was not drawn to that part of Section 1, Act X. of 1859, which says that such parts of Section 26 of Act I. of 1845 as relate to the enhancement of rents, "and "the ejectment of tenants by the purchaser "of an estate sold for arrears of Govern- "ment revenue, are declared subject to the "following modifications."

One of those modifications is that contained in Section 3, *viz.*, that a ryot who has held at a fixed rate of rent, which has not been changed from the time of the Permanent Settlement, is entitled to receive a pottah at that rate. If he is entitled to receive a pottah at that rate, he is not liable to have his rent enhanced.

The appeal will be dismissed without costs.

The 21st February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Ghatwalee Tenures (not liable for debts of former deceased holder).

Case No. 520 of 1866.

*Application for review of judgment passed by the Hon'ble Sir Barnes Peacock, Kt., Chief Justice, and the Hon'ble L. S. Jackson, Judge, on the 1st August 1866, in Regular Appeal No. 115 of 1866.**

Binode Ram Sein (Defendant), *Petitioner*,

versus

The Deputy Commissioner of the Sonthal Pergunnahs, on behalf of the Court of Wards (Plaintiff), *Opposite Party.*

Messrs. R. V. Doyne and *W. E. Peacock* for Petitioner.

Baboo Kishen Kishore Ghose for Opposite Party.

The rents of a ghatwalee tenure are not liable for the debts of the former deceased holder of the tenure.

Peacock, C.J.—We think that this application for review must be rejected. The opposite party was summoned upon the ground of the decision of Mr. Hawkins, reported at page 423, II. Sevestre's Reports. But, at the time when we granted the application, we expressly guarded ourselves against saying that we either agreed with that decision, or disapproved of it. But, with that decision before us, we thought it right to have the question fully discussed. It has now been discussed, and we are called upon to decide, with reference to the decisions of the late Sudder Court and the Regulation XXIX. of 1814, whether the surplus proceeds of a ghatwalee tenure, which has passed by descent from ancestor to heir, are liable to pay the debts of the ancestor. It appears to me that a ghatwalee estate which passes from father to son is not what is called assets by descent. The Regulation above cited says that the ghatwals and their descendants in perpetuity shall be maintained in possession of the lands. Therefore, the lands themselves cannot be seized as assets in the hands of the heir. If the heir is to be maintained in possession of the estate, is he to be maintained in possession, and to enjoy the whole profits, or to enjoy such portion of the income as it may be necessary for him to expend in the ghatwalee services?

I think it is evidently contemplated by the Regulation that the holder of the tenure should enjoy the whole income of the estate. It is clear that he must be entitled to something beyond the mere expenditure for the purpose of remunerating himself for his service. It could not, therefore, have been intended that, after payment of the wages of the chowkeydars, or other persons employed by the incumbent, the balance should go to the payment of a previous ghatwal's debts.

The Regulation contained the following recital: "Whereas every ground exists to "believe that, according to the former usages "and constitution of the country, this class "of persons are entitled to hold their lands "generation after generation in perpetuity, "subject to the payment of a fixed and "established rent to the zemindar of "Beerbhoom, and to the performance of "certain duties for the maintenance of the "public peace and support of the police; and "whereas the rents payable by those tenants "have been recently adjusted, after a full "and minute enquiry made by the proper "officers in the Revenue Department; and "whereas it is essential to give stability to "the arrangements now established among "the ghatwals."

But the estate had been settled with the zemindar, and it would have been unjust on the part of Government to adjust the rents with the ghatwals without giving the full benefit to the zemindar of the terms made with him at the time of the Permanent Settlement; and therefore it was enacted that the rent assessed upon the ghatwals should be paid direct to the Government officers, and by Section 4 the Government bound itself to pay to the zemindar the difference between the amount of the revenue assessed on the ghatwals, and the fixed assessment of revenue payable by the zemindar to Government.

It appears, therefore, that the rents of the ghatwalee tenures were originally fixed at

* *See* 6 Weekly Reporter, Civil Rulings, p. 129.

such a rate as to leave a sufficient income to the ghatwals for the performance of the services, and it was laid down by Section 2 that the ghatwals and their descendants in perpetuity should be maintained in possession of the lands so long as they should respectively pay the revenue then assessed upon them. The rent being assessed at such a rate as to leave the holders of the tenures what was then considered only sufficient upon an average to enable them to perform the services, and to provide for their own remuneration and support, it must have been intended that each ghatwal should be entitled to the whole income of the estate, and that such income should not be charged or encumbered by a previous ghatwal, or be made liable to the payment of his debts.

In course of time, no doubt, these ghatwalee tenures have brought a larger profit than has been necessary to provide for the performance of the services. But the lands having been originally vested in the ghatwals at such a rent as to leave a sufficient remuneration for the performance of the services as already explained, each ghatwal for the time being must be entitled to the full benefit to be derived from the estate, after paying the reserved rent, on condition of his performing the services attached to the estate. Therefore, it appears to me that the son, taking these lands after the death of the father, does not take them as assets by descent, subject to the payment of the father's debts, but he takes the lands by descent under the specific rules laid down in the Regulation by which the lands were vested in the ghatwals and their descendants in perpetuity. The law enacting that he is to be kept in possession of the estate, he is entitled to the rents and the profits to be derived from it.

I think, therefore, that the Judge was right in holding that the profits derived from this estate during the life of the son are not liable in his hands to pay the father's debts.

Jackson, J.—I quite agree. It is only necessary to notice that the decision of Mr. Hawkins, which has been referred to, was overruled by a decision of the Full Bench of the Sudder Court in 1853.

Peacock, C.J.—I intended to have referred to that decision, and I may add that it was held by the Sudder Court that the lands were not alienable; and, if so, they cannot be subject to encumbrances created, or debts contracted by any of the previous holders.

The application for review is refused with costs.

The 21st February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Hoondees (Bills of Exchange).

Case No. 2289 of 1866.

Special Appeal from a decision passed by the Judge of Purneah, dated the 11th June 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 11th November 1865.

Shib Ram Mundul (Plaintiff), *Appellant,*

versus

Makhun Lal Biswas and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Taruck-nath Sein* for Appellant.

Baboo Romanath Bose for Respondents.

The drawing of a hoondee on one's own factory and the delivery of it to another may be evidence of indebtedness to the amount of the hoondee, but it is not an item for which the drawer of the hoondee is entitled to credit.

Norman, J.—THE plaintiff in this suit seeks to have credit for a hoondee which he gave to the defendant for 1,507 rupees, payable 3 days after date. The hoondee was drawn on plaintiff's own factory of Peergunge. Now, the drawing of a hoondee on his own factory, and the delivery of it to the defendant, may be evidence of indebtedness to the amount of the hoondee; but it is not an item for which the plaintiff is entitled to credit. It may be proof of a debt due from plaintiff to defendant, but not of any right of action accrued to the plaintiff against the defendant; as an item on the credit side of the plaintiff's account, it must be disallowed. If it appears from the accounts of the Peergunge factory that the amount of the hoondee has been paid, in taking the accounts of Peergunge, the plaintiff may be entitled to credit for that sum. But it appears to us that no such question is at all likely to arise. We dismiss the appeal with costs and interest.

The 21st February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Sale in Execution—Co-purchasers.

Case No. 2840 of 1866.

Special Appeal from a decision passed by Moulvie Syud Saadut Hossein, Officiating Principal Sudder Ameen of Shahabad, dated the 30th August 1866, modifying a decision passed by Baboo Joy Gopal Bose, Moonsiff of Buxar, dated the 25th April 1866.

Brijoo Ram Misser and others (Defendants), *Appellants,*

versus

Bhugwan Doss and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Kishen Succa Mookerjee* for Appellants.

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Respondents.

Plaintiff purchased two-thirds and defendant one-third of the rights and interests of certain judgment-debtors sold in execution of a decree. Plaintiff paid his own and defendant's quota of the purchase-money, and, on defendant's failure to reimburse him, sued for possession of the whole property on the ground that he should be considered the sole purchaser. The Lower Court directed defendant to pay his share of the purchase-money to plaintiff with interest, which was accordingly done. Though the relief granted by the Lower Court was different from that prayed for in the plaint, the order was not disturbed in appeal, as it did substantial justice.

Loch, J.—THE plaintiff and the defendants, appellants, in this case joined together in purchasing the rights and interests of certain judgment-debtors sold in execution of a decree. It was agreed that plaintiff should be entitled to two-thirds, and defendants to one-third of the property so purchased. Plaintiff paid his share of the earnest, and the whole of the balance of the purchase-money; and, as the defendants failed to reimburse him, he brought the present action to get possession of the whole property, and to set aside a deed of conditional sale which the defendants alleged that they held from the judgment-debtors. The defendants urged that they had paid their quota of the purchase-money, and that the property was purchased by the plaintiff and them, with its previous lien upon it; and that, if plaintiff wished to get possession, he must pay off the mortgage in proportion to his interest in the property.

The Lower Appellate Court finds that the defendants have not paid their quota of the purchase-money, and that the deed of conditional sale set up by the defendants is spurious, and the Principal Sudder Ameen directed the plaintiff to be put in possession of his two-thirds of the property, and that defendants should deposit in Court their share of the purchase-money in four days, and so become the owners of the one-third share, and that they pay interest on the money paid in by the plaintiff from the date of such payment.

In special appeal it is urged that the relief given by the Lower Appellate Court is different from that prayed for in the plaint. Plaintiff asked to be put in possession of the third share to which, under their joint purchase, defendants would have been entitled, had they paid their quota of the purchase-money. As they had failed to reimburse the plaintiff, he asked the Court to consider him as the sole purchaser, and to put him in possession of the whole property, but the Principal Sudder Ameen has directed the defendants, appellants, to pay their share of the purchase, which plaintiff did not ask for, and therefore his order must be set aside.

Further, it is urged that plaintiff cannot sue for possession on the ground that the defendants have failed to fulfil their part of the agreement to pay a third of the price. Their failure to do so gives plaintiff no title to the land, though it may give him a right to sue for the money, but that cannot be given him in this suit. The parties entered into no arrangement that, on the failure of any one of them to contribute, his right to the land should go to the party who had paid.

A further objection is taken to the finding of the Lower Court in regard to the deed of conditional sale propounded by the defendants. The Principal Sudder Ameen has, however, considered the evidence adduced in support of it, and has given sufficient reasons for rejecting it; and, with his finding on the evidence, we cannot interfere in special appeal.

Mr. Allan for the respondent takes an objection under Section 348 to the decision below, asking this Court to give him possession as prayed for in his plaint. He states that he is not dissatisfied with the order passed by the Court below; but, if the appellants object to it, he presses this Court to give him the relief he asked for.

We find that the Principal Sudder Ameen has directed the defendants, appellants, to deposit their quota of the purchase-money in 4 days, but he has omitted to pass any

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alternative order, in case they should refuse to comply. As, however, the money has, so we are given to understand, been paid into Court, this omission is not of much consequence. The order passed by the Principal Sudder Ameen is not, strictly speaking, the proper one which should have been made in the case, for plaintiff asked for possession, and the Principal Sudder Ameen has directed the defendants to pay the share of the purchase-money due by them to the plaintiff. We will not, however, disturb this order as it does substantial justice.

This appeal is dismissed with costs.

The 21st February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Majority—Proprietors of Revenue-paying estates—Section 3, Regulation XXVI., 1793—Res Judicata.

Case No. 2246 of 1866.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 9th June 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 30th January 1866.

Huro Monee Debia (Defendant), *Appellant,*

versus

Tumeezoodeen Chowdhry and others (Plaintiffs), and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellant.

Baboos Dwarkanath Mitter and *Kalee Mohun Doss* for Respondents.

The holder of an estate paying revenue direct to Government, whether the settlement of that estate be temporary or permanent, is a *proprietor* within the meaning of Section 3, Regulation XXVI., 1793; and the minority of such a proprietor extends to the end of the 18th year.

A suit which was brought by *A* against *B* and *C*, and dismissed, cannot be pleaded as *res judicata* in a subsequent suit brought by *B* against *C*.

Bayley, J.—THE special appellant urges that plaintiffs are not *proprietors* under Section 3, Regulation XXVI. of 1793, because they do not hold any *estate permanently settled* paying revenue to Government, and that therefore 18 years are not required to complete their majority.

We think the Judge below is right in holding that Section 3, Regulation XXVI. of 1793, does not contemplate anything more than payment of revenue direct to Government without reference to whether the settlement of that estate is temporary or permanent.

It is admitted that the land referred to is land in the Soonderbuns, paying revenue directly to Government.

The view of the Lower Appellate Court is, we think, also in accordance with Section 13, Regulation VIII. of 1800, which enacts as follows:—

"In Section 2, Regulation XLVIII., 1793, "and Regulation XIX., 1795, prescribing a "quinquennial register of estates paying "revenue to Government, it is explained "that 'by the term *estate* is to be under-"stood any land being malgoozaree, or "subject to the payment of public revenue, "for the discharge of which a separate en-"gagement has been or may be entered into "with Government.' But as this definition, "strictly construed, would exclude estates "held khas, in consequence of the proprie-"tors having declined to engage for the "public assessment thereupon under the "option given by the rules for the Perma-"nent Settlement, as well as the estates of "disqualified proprietors which, by those "rules and by Regulation X., 1793, were "placed under the superintendence of the "Court of Wards, as well as estates belong-"ing to Government, for *the revenue of* "*which no engagement* may have been "taken; and it being intended that all lands "paying revenue to *Government should be* "*included in the registers of estates* "prescribed by Regulations XLVIII., 1793, "and XIX., 1795, it is hereby further ex-"plained that by the term estate therein used "is to be understood *any land subject to the* "*payment of revenue, for which a separate* "*engagement may have been executed* to "Government, as in cases where the estate "may be held khas by a sezawal or other "officer on the part of Government, or be "managed by a surburakar for the benefit "of a disqualified proprietor."

Further, under the Sale Law, I. of 1845, Sections 26 and 27, and Act XI. of 1859, Section 52, it is clear that an estate is sold as "*an estate,*" whether it be settled temporarily or permanently.

Lastly, by the 4th Section of the deed of grant, the holder of this Soonderbun grant is not a farmer, but a proprietor holding direct under Government, and paying his rents as revenue direct to the Government, with an acknowledgment in terms of *proprietary* right.

Another plea raised in special appeal is that this case is governed by Section 2, Act VIII. of 1859, *i. e.*, that it has been already decided, and is thus "*res adjudicata.*"

The Section relied upon is as follows:—

"The Civil Courts shall not take cog-"nizance of any suit brought on a *cause* "*of action* which shall have been heard and "determined by a Court of competent juris-"diction in a former suit between the *same* "*parties* or those under whom they claim."

The facts shown to us as to that other suit are that a certain ousut talookdar, who held an ousut talookdaree under special respondent, sued the special appellant for certain land, alleging *that* land to belong to the ousut talook, and not to the special appellant. The ousut talookdar made the special respondent a defendant in that suit, together with the special appellant. That suit was dismissed.

But we do not think that the *subject-matter*, or *the cause of action*, or *the parties* actually contested anything in that case which can be legally said to be *the same* as here. There the ousut talook was the subject-matter, the appropriation of the ousut talookdar's land by the special appellant the *cause of action*, the ousut talookdar and the special appellant the *real* parties suing and sued, and *not* the special respondent. The latter as a co-defendant cannot be properly said to be a party suing or sued by the other defendant.

In this view we think both the pleas are untenable, and dismiss this special appeal with costs.

The 21st February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Ejectment (of dependant Talookdar).

Case No. 2129 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 29th May 1866, affirming a decision passed by the Deputy Collector of that District, dated the 31st January 1866.

Moulvie Myenooddeen (Defendant), *Appellant,*

versus

Ram Monee Chowdhrain (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboos Hem Chunder Banerjee and *Sreenath Doss* for Respondent.

When a dependant talookdar, holding under a temporary settlement, has that settlement placed in abeyance by the Collector taking the collections into his own hands khas, the Collector's act is not one of dispossession from which limitation can count; but limitation will reckon from the date when the purchaser at a sale, after the Collector had ceased to hold khas, had himself made collections, and so created a cause of action by dispossession of the former talookdar.

Bayley, J.—It is admitted by both parties that the question, and the only question, to be decided in this special appeal is, whether, when a dependant talookdar, holding under a temporary settlement, has that settlement placed in abeyance by the fact of the Collector taking the collections into his own hands khas, the Collector's act is one of dispossession from which the period of limitation shall be calculated; or whether it should be such date from which the purchaser at a sale, after the Collector had ceased to hold khas, had himself made collections, and so created a cause of action by dispossession of the former talookdar.

It is contended on the one hand that, when the Government took the estate khas, no further right remained to the talookdar previously holding under a temporary settlement, and that these rights all ceased and determined thereby, and passed absolutely to Government, and that thus the Government's act of collection was the cause of action.

On the other hand, it is pleaded that the Collector, holding khas, only managed the property, not however as absolutely that of Government, but merely in supersession of all talookdaree rights, merely for such intermediate time as might elapse before a new settlement; that the first dispossession, then, of the talookdar was when the new purchaser made collections, and not before.

It is admitted that, in the latter case, the suit would be in time, but not in the former.

The first Court held that there was no distinct order by Government for any dispossession of the talookdar, and that it really by its inaction in that respect waived all rights of dispossession, and that thus there was no cause of action until the purchaser began to collect.

We think that there was no ejectment by Government. The collections of a mehal khas, and the issue of the necessary orders to that effect pending orders as to future settlement, which was the case here, do not necessarily involve ejectment or repudiation

of former talookdaree right or tenure, nor in fact is such ejectment shown. On the contrary, the instruction of the superior revenue office is that talookdaree rights are to be respected. In this view dispossession by the new purchaser only can be taken to have given a cause of action.

In this view no limitation, it is admitted, bars the suit.

We would, therefore, dismiss this special appeal with costs.

The 21st February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Appeal—Jurisdiction—Dismissal of under-valued suit.

Case No. 2425 of 1866.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 2nd July 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 10th February 1866.

Mussamut Bibee Jahan Buksh and others (some of the Defendants), *Appellants,*

versus

Mussamut Meher Bibee *alias* Bibee Mohur and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

Baboo Tarucknath Sein for Respondents.

An appeal will lie from the order of a Moonsiff dismissing a suit as beyond his jurisdiction, because it was under-valued.

Loch, J.—THE appellant in this case urges that no appeal could lie from the order of the Moonsiff who "non-suited" the case, because the property was under-valued. We do not see under what Section of the Law an appeal is barred. When the case came up for trial, the Moonsiff, considering that the suit had been under-valued, dismissed it as being beyond his jurisdiction. He has in his judgment used the word "non-suit." This word is unknown in the Procedure Code, and should not have been used. The effect, however, of the order was to dismiss the suit, with reservation to the plaintiff to bring a fresh suit in the proper Court. There being no ground for interfering with the judgment of the Lower Appellate Court, we dismiss this appeal with costs.

The 22nd February 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Fraudulent sale in execution by Collector.

Case No. 315 of 1865.

Special Appeal from a decision passed by Mr. H. S. Thompson, Principal Sudder Ameen of Backergunge, dated the 17th November 1864, affirming a decision of Moonshee Fumeerooddeen, Sudder Ameen of that District, dated the 10th March 1863.

Gunga Doss Dutt (Plaintiff), *Appellant,*

versus

Ramnarain Ghose and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Khetter Mohun Bose* for Appellant.

Baboos Grija Sunker Mojoomdar and *Omesh Chunder Banerjee* for Respondents.

When the tenure of a tenant admittedly in possession is sold under Section 105, Act X. of 1859, he has no right to sue for the reversal of the sale; but, when a party alleges that *he* is the tenant, and that the person against whom the Act X. suit was brought was not the tenant in possession, he has a right to bring his action in the Civil Court to set aside the sale alleged to have been procured by fraud, or to restrain the defendants from availing themselves of rights acquired by such sale.

This case was referred to a Full Bench by Bayley and E. Jackson, JJ., with the following minutes:—

E. Jackson, J.—I DIFFER from Mr. Justice Bayley in the view which he takes of the law applicable to this case, and am of opinion that the Civil Courts have jurisdiction to try the suit. It has been ruled in the case of Rutton Monee Dossee, appellant, Special Number, Weekly Reporter, page 147, that Civil Courts have no jurisdiction as respects orders passed by Collectors under Act X. of 1859 in execution of decree; that the terms of Section 151 of that Act declare that such orders are not open to revision or appeal, except as provided in the Act. In this case the allegation is that the plaintiff's tenure has been sold by the Collector in his absence, in execution of decree obtained against another person, and the plaintiff sues to set aside that sale and recover his tenure. Clauses 106 and 107 lay

* Judgment orally delivered on 20th June 1865.

down the procedure which is to be followed when a third party lays claim to the tenure which is about to be sold, and prefers such claim to the Collector before the day fixed for the sale. But the Act contains no procedure for such a case as the present, where the claimant is prevented from objecting to the sale before the day of sale, and comes in to make his objections after the sale. The Collector could not therefore give the plaintiff redress; and, as he alleges that he has suffered injury, and is entitled to a trial of that question, his only remedy appears to me to be in the Civil Courts, who have jurisdiction in all cases of a civil nature, except when their jurisdiction is expressly barred. The case referred to above ruled that the Civil Courts have no jurisdiction to interfere in orders passed in execution of decree by a Collector under Act X. of 1859, as between the parties to the suit of which execution was being taken out. But I would not extend this view of the law to cases in which the interests of third parties are affected, between whom and the parties to the suit, in fact, no order has been passed either in the original suit, or in the execution-proceedings. I observe that, under the 106th Section, the Collector is not obliged to take up the case of the third party and to try his objections. He may refuse to enter into them, and in such a case I apprehend the third party would be left to his remedy in the Civil Courts, the more so as, even if the Collector does take up the case and decide against the third party, he still has a right to sue in the Civil Courts under Section 107. It is not therefore a case in which the Civil Courts are expressly debarred from all jurisdiction.

Bayley, J.—Plaintiff, as purchaser of a 7-anna share of a certain howala, sued in *one* suit to set aside *two* sales in execution of decrees effected by two defendants, decree-holders, against the defaulter, plaintiff's vendor.

The first Court held that, "as the decree-"holders were *not* the *same* parties, the "institution of one and the same suit for "the reversal of the sale of the property, "which was separately sold in execution of "the decrees obtained by them, is not "valid," and that thus Section 8, Act VIII. of 1859, would not warrant plaintiff bringing *one* suit against *two* decree-holders to reverse two separate sales. The first Court accordingly dismissed plaintiff's suit.

The Lower Appellate Court (the Principal Sudder Ameen, Mr. Thompson) has held that, as the decree-holders held *separate* and distinct interests, and did not sue together for the rents, the decrees for which led to the *two* separate sales in execution, and, (further) as the Government lost the value of a stamp of 32 rupees by there being *one* instead of *two* suits, the plaintiff's suit was properly dismissed.

The plaintiff appeals specially, and urges that Section 8 does apply; that the loss of the stamp should not be the test of the admissibility of the suit; and that, at any rate, instead of the suit being dismissed, plaintiff should have had permission to bring *two* suits on the deposit of a second stamp.

The respondent, under Section 348, urges that no suit to set aside a sale in execution for arrears of rents will lie. He pleads that "the Courts must be guided by the decision of the 16th March 1864, p. 148, Special Number, Weekly Reporter, and referred to and decided by a Full Bench."

I think this objection valid. This suit is by a party who is purchaser from a defaulter, judgment-debtor, to reverse sales by the Collector of the defaulter's tenures in executions of decree for rent against that defaulter. The purchaser can have no higher right than that of his vendor. He has therefore only the right of the judgment-debtor. The Full Bench ruling cited shows clearly that the judgment-debtor, here represented by his vendee, could not sue. Therefore the party whose rights are only the rights of, and who represents, the judgment-debtor, cannot sue.

I stated in my separate judgment on the 16th March 1864, on the Full Bench, that I thought the Legislature had omitted to provide a remedy for these cases of judgment-debtors. It is not for us to do more than execute what the law is and is ruled to be by the Full Bench precedent of the Court.

I therefore think that the appeal must be dismissed with costs; but, as Mr. Justice Jackson differs, let the matter be referred to a Third Judge, or Full Bench, as the Chief Justice thinks fit.

The case then came under consideration before a Full Bench, when judgment was delivered as follows by—

Peacock, C.J.—The plaintiff sued to set aside a sale of an under-tenure sold in execution of two decrees under Act X. of 1859. He alleged that he had purchased the tenure from the former holder of it in 1265 B. S.; that he was in possession, and had paid the rents to the defendants as landlords, who had recognized him as tenant; and that the

defendants afterwards fraudulently brought suits for the rents of 1266 against the former owners, and, in execution of an *ex-parte* decree obtained in that suit themselves, purchased the under-tenure.

The landlords denied the fact of the receipt of the rent from the plaintiff as alleged by him.

The case is referred to us by the Divisional Bench, before whom the special appeal was heard, because one of the learned Judges, referring to a decision of the High Court, dated the 16th March 1864 (Special Number, Weekly Reporter, p. 147), thinks that the plaintiff cannot sue to set aside the sale.

We think that the rule laid down in the case cited does not apply to the present case. When the tenure of a tenant admittedly in possession is sold under Act X. of 1859 in execution of a decree for rent, he has no right to sue for the reversal of the sale. The plaintiff did not, before the sale, appear under Section 106 to urge his claim before the Collector. If he had, on his objections being overruled, he would have been allowed to sue within a year from the date of the adjudication by the Collector upon the claim. But, as he did not so appear, his present suit is not affected by the provisions of Section 107. The plaintiff has a right to bring his action in the Civil Court, to set aside the sale alleged to have been procured by fraud, or to restrain the defendants from availing themselves of rights acquired by such sale.

The case must, therefore, be sent back to the Division Bench for orders.

The 22nd February 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Summary suit for rent—Regular suit.

Case No. 893 of 1864.

Special Appeal from a decision of Baboo Tarrakani Biddyasagur Bhuttacharjee, Principal Sudder Ameen of Jessore, dated the 26th January 1864, reversing a decision of the Moonsiff of Chowkey Tremobani, dated the 30th March 1861.

Gobind Chunder Mookerjee (one of the Plaintiffs), *Appellant*,

versus

Kola Gazi and others (Defendants), *Respondents*.

Baboo Banee Madhub Banerjee for Appellant.

Baboo Kadernath Mozoomdar for Respondents.

Where a summary suit for rent under Regulation VII., 1799, was commenced before the passing of Act X. of 1859, it was held that the unsuccessful party was not, by reason of the decision in that suit having been given after that Act came into operation, deprived of his right, under Section 4, Regulation VIII., 1831, to contest the justice of the summary decision by a regular suit.

This case was referred to a Full Bench by Justices Morgan and Shumbhoonath Pundit, with the following order:—

Referring Order.—THE judgment of the Lower Appellate Court upon the question of jurisdiction, which is the ground of this special appeal, appears to us to be wrong. When Act X. of 1859 came into operation, the summary suit for rent under Regulation VII. of 1799 was pending. The Act repeals this and many other Regulations, but with the following qualification, "except as to *proceedings* commenced before the date of this Act coming into force" (Section 1). The pending suit was therefore clearly not affected by the new law, and the words we have quoted have the effect of keeping the old law in force, not merely until the summary judgment in the pending suit was pronounced, but until the proceedings in Court between the litigants concerning the arrears of rent shall be concluded.

The "summary judgment" of Regulation VII. is expressly declared (Section 18) to be not subject to appeal; but it is clear that the summary remedy was not intended to exclude "a regular judicial investigation and decision." Any person considering himself aggrieved by a summary judgment had his remedy by a regular suit in the Civil Court. We think that the saving words in the repealing Section of Act X. of 1859 have preserved to the plaintiff in the present suit (who was the unsuccessful party to the summary suit pending when that Act passed) the right of proceeding by regular suit, and that the Court below has erroneously decided that the plaintiff is deprived by the Act of his remedy by regular suit. The Sections of Act X. of

* Judgment orally delivered on 14th June 1865.

1859, to which we are referred (Sections 151-160), seem to us to be confined to decisions under the new law, and not to entitle the plaintiff to resort to them for the purpose of obtaining a revision of the summary judgment passed under the Regulation; but, as this construction is doubtful and is opposed to a previous* decision of a Division Court, we shall not dispose of the appeal without a reference to a Full Bench.

* 2 Sutherland, page 27 of Act X. cases.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—We quite agree with the two learned Judges, who have referred this case to us. The summary suit is found by them to have been commenced before the passing of Act X. of 1859, although the decision in the summary suit was given after the Act came into operation.

The two learned Judges refer to a case reported at page 27 of the Act X. Rulings in the 2nd Weekly Reporter, as in conflict with the view they took.

By Section 1 of Act X. of 1859 certain Regulations were repealed, except as to *proceedings* commenced before the date when that Act came into force. As the summary suit was pending when that Act was passed, it was governed by Regulation VIII. of 1831, and it had all the incidents of such a suit before Act X., including the right of the unsuccessful party to contest its justice by a regular suit.

Section 4 of Regulation VIII. of 1831 is as follows:—

"Summary claims connected with arrears "or exactions of rent shall be preferred in "the first instance to the several Collectors "of land-revenue, whose decisions in such "cases shall be final subject to a regular "suit, unless the ground of appeal be the "irrelevancy of the Regulation to the case "appealed, on which ground only the Com-"missioner of Revenue for the Division is "authorized to receive an appeal, if preferred "to him within one month of the date of the "summary decision."

That suit must, under Section 6, be brought within one year from the date of the delivery, or of the tender to the party against whom the award is made, of the Collector's decision.

The case will be sent back to the Court, which referred it to us, with that expression of our opinion.

The 22nd February 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Clause 6, Section 23, Act X. of 1859—Jurisdiction—Ejectment—Possessory actions—Title—Mesne Profits.

Case No. 137 of 1864.

Regular Appeal from a decision of Baboo Tarrakant Biddyasagur, Principal Sudder Ameen of Jessore, dated the 30th January 1864.

Gooroo Doss Roy (one of the Defendants). *Appellant,*

versus

Ramnarain Mitter (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Juggodanund Mookerjee* for Appellant.

Baboos Banee Madhub Banerjee and *Sreenath Doss* for Respondent.

Case No. 3130 of 1864.

Special Appeal from a decision of Baboo Tarrakant Biddyasagur, Principal Sudder Ameen of Jessore, dated the 1st August 1864, affirming a decision of Baboo Modoo Soodun Ghose, Sudder Ameen of that District, dated the 3rd March 1863.

Gooroo Doss Roy (Defendant), *Appellant,*

versus

Bishtoo Churn Bhuttacharjee and others (Plaintiffs), *Respondents.*

Baboos Mohendro Loll Shome and *Hem Chunder Banerjee* for Appellant.

Baboo Bungsee Dhur Sein for Respondents.

Clause 6, Section 23, Act X. of 1859, refers only to possessory actions on the ground of illegal ejectment. It does not apply to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given him in pursuance of that title; and does not bar the jurisdiction of the Civil Courts in such suits, whether the plaintiff sues for wasilat or not.

These cases were referred to a Full Bench by Trevor and Campbell, JJ., with the following order:—

Referring Order.—In these cases the question is whether an under-tenant, alleging a permanent right in the land, can bring a suit in the Civil Court for the recovery of the same, on the allega-

* Judgment orally delivered on 20th June 1865.

tion that he has been dispossessed by the zemindar and others, or whether he can only sue in the Collector's Court under Section 23, Act X. of 1859. In the latter case the period or limitation is one year, and a person who, after dispossession for any cause, omits or is unable to sue for one year, would be wholly barred.

In the present cases the plaintiffs go to *the Civil Court* after having been 10 or 11 *years out* of possession. The question seems to be—

First.—Whether a suit on account of illegal ejectment under Clause 6, Section 23, Act X. of 1859, is a mere possessory action, giving a remedy for ejection otherwise than in due course of law, and in which the only question to be considered is possession, and the legality of the ejectment *without reference to title*, and *whether consequently an action on title may* be brought against the zemindar in the Civil Court, or whether the Collector is bound to dispose of the whole case, and the jurisdiction of the Civil Court is barred.

Second.—In the latter case whether, when other persons are included by the plaintiff as wrong-doers in common with the zemindar, or the plaintiff sues for wasilat in addition to possession, or otherwise touches on matters beyond the jurisdiction of the Collector, the Civil Court then has jurisdiction in the whole case.

It appears that there have been conflicting decisions on this latter point, and we have great doubts on the whole matter. We, therefore, refer these cases to a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—We think that the words "suits to recover the occupancy or possession of any land," &c., in Clause 6, Section 23 of Act X. of 1859, refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title. Full meaning may, and we think must, be given to the words "illegally ejected," without treating them as giving a wider sense to the words above mentioned.

In many instances which may be suggested under this Act, a zemindar, having a right to get possession, would be guilty of an illegal act, if he ejected his ryot otherwise than by means of a decree of a Court. For instance, Section 22 says that—"When "an arrear of rent shall be adjudged to be "due from any farmer or other leaseholder "not having a permanent or transferable "interest in the land, the lease of such "leaseholder shall be liable to be cancelled, "and the leaseholder to be ejected." Now, if the lease is liable to be cancelled, and the leaseholder to be ejected, the leaseholder would have no title as against the zemindar seeking to cancel the lease. But it is declared "that no such lease shall be can-"celled, nor the leaseholder ejected otherwise "than in execution of a decree or order "under the provisions of this Act."

A zemindar, therefore, could not of his own authority cancel the lease, and eject the ryot forcibly, but must get the lease cancelled by a decree of Court. If, regardless of the law, he. by force or otherwise, turned the ryot out of his field, the ryot might say: "You have ejected me out of my lands with-"out a decree of Court. I have therefore been "*illegally ejected* by you, and, notwithstand-"ing that you may have the title to eject "according to law, I have a right to be re-"stored to possession during the pendency "of your action." That suit which would be under Clause 6, Section 23 of Act X., must be brought within one year. But suppose the ryot sues alleging that he has committed no breach of the condition of his lease, and that, apart from the question of mere possession, the zemindar had no title whatever to eject him, and prays for possession with damages and mesne-profits, no such suit is provided for by Section 23, and it is clear, therefore, that the ryot is left to his remedy in the Civil Court in such a case. We think he has that right equally whether he claims wasilat or not.

Looking to the whole Act, it appears to us that Clause 6, Section 23, does not take from the Civil Court the power to try the question of title as between a ryot, farmer, or tenant, and the person to whom he pays rent. It follows, therefore, that in this action which is brought, setting out a title by plaintiff, and asking "under the above facts" to be declared "entitled on the strength of "his documents to recover possession of the "lands," he will be entitled, if he makes out his case, to a decree that he be put into possession of the land with mesne-profits, and have compensation in damages to cover the expense of demolishing the houses and garden, and filling up the tanks which are said to have been excavated.

The case will be returned to Mr. Justice Trevor's Bench.

The 22nd February 1867.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Measurement—Intervenor.

Case No. 476 of 1866.

*Application for review of judgment passed by the Hon'ble Justices Loch and Jackson, on the 28th June 1866, in Miscellaneous Appeal No. 13 of 1866.**

Baboo Nundun Lal, *Petitioner,*

versus

Mr. J. S. Smith, *Opposite Party.*

Mr. G. C. Paul and *Baboo Anund Gopal Paleet* for Petitioner.

Mr. J. S. Rochfort for Opposite Party.

On application to the Collector for an order for the measurement of certain lands under Section 10, Act VI. of 1862 B. C., a third party intervened, but the Collector passed an order in favor of the applicant, which the Judge reversed in appeal, on the ground that the law gave the Collector no jurisdiction to determine the right to make a measurement where the proprietary right to the land was contested. In special appeal the High Court simply reversed the Judge's order without any direction for the trial of the appeal by him *de novo*. On review of judgment, the order of the High Court was amended, and the case remanded to the Judge to determine, according to Sections 9 and 10 of the above Act, which party was in receipt of the rents and under which of these Sections the application for measurement had been made, and to decide accordingly.

Loch, J.—I THINK that our order has not gone far enough. Besides reversing the order of the Judge, we ought to have remanded the case to him for trial on the point of possession, *i. e.*, the Judge should determine, as is necessary by the terms of Sections 9 and 10, Act VI. of 1862 B. C., which party is in receipt of the rents. At the same time he should ascertain under which of these Sections the application has been made. The order of the 28th June 1866 should be amended accordingly.

Jackson, J.—I quite agree that the order of this Court stopped short of the direction which it ought to have made. We reversed the decision of the Judge passed on appeal, upon the ground that the Judge had decided the appeal upon a wrong principle; but, when the Judge's judgment turned on an erroneous view of his jurisdiction in the matter, and we reversed his decision on that point, we ought to have directed him to take up the appeal and try it *de novo*, and to ascertain whether the order of the Collector was right; and then he ought, in the first instance, to have determined whether this was really an application to the Collector under the powers conferred by Section 9 or by Section 10, Act VI. of 1862 B. C., and to have applied the provisions of those Sections accordingly.

Section 21, Act VI. of 1860, expressly declares that this Act shall be read with, and taken as part of, Act X. of 1859. If that be so, Section 77, Act X of 1859, may be read in this way: "When, in any suit be-"tween a landholder and a ryot or "under-tenant under *this Act or under Act "VI. of 1862*, the right to receive the rent "of the land or tenure, cultivated or held by "the ryot or under-tenant, is disputed, and "such right is claimed by, or on behalf of, "a third person, on the ground that such "third person, or a person through whom "he claims, has actually and in good faith "received and enjoyed such rent before and "up to the time of the commencement of "the suit," then that shall be enquired into. That apparently gives the intervenor the right to be heard both in cases under Section 9 and under Section 10, Act VI. of 1862, and thus we now find it necessary to express an opinion on this point on which we had formerly expressed none.

The intervenor will, I think, be entitled to be heard before the Judge, and the Judge will have to determine whether the plaintiff or the intervenor was actually in receipt of the rents of this land, and decide accordingly on the application to measure; that is, if the original applicant be found not to have been in receipt of them, the application should be refused.

The 22nd February 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Res Judicata.

Case No. 2601 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 11th August 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 24th July 1865.

Khettronath Dey (Plaintiff), *Appellant,*

versus

Gossain Doss Dey and others (Defendants), *Respondents.*

* *See* 6 Weekly Reporter, Act X. Rulings, p. 13.

Baboos Romesh Chunder Mitter and *Nil Madhub Sein* for Appellant.

Baboos Chunder Madhub Ghose and *Bama Churn Banerjee* for Respondents.

Five brothers, *A*, *B*, *C*, *D*, and *E*, executed an ikrar, by which talook *N* and others were to remain in the possession and under the management of *A*. On *A's* refusal to give his brothers their shares of the profits, they sued separately, and obtained decrees against him for the amount due to them. *A's* son now sues *B* for the sums which his father was compelled under the ikrar to pay his other brothers, on the allegation that *B* alone was in possession of talook *N*, and appropriated the rents wrongfully. HELD that the present suit was not barred by the former suits under the ikrar, except so far as *B's* share in talook *N* was concerned.

Trevor, *J.*—IT appears that there were five brothers, Juggunnath Doss, Gossain Doss, Puddo Lochun Doss, Nil Kant Doss, and Sreedhur Doss; that on the 10th Magh 1251 they executed an ikrar amongst them, according to which talook Neamutpore and others were to remain in the possession and under the management of Juggunnath; that subsequently, Juggunnath refusing to give them their shares of the profits of Neamutpore, they sued separately, and obtained decrees against him for the amount due to them. Khetturnath, the son of Juggunnath Doss, now sues Gossain Doss for the sums which his father has been compelled by virtue of the ikrar to pay his other brothers, on the allegation that Gossain Doss alone was in possession of the property of Neamutpore, and appropriated the rents wrongfully. He made the other brothers of his father defendants *pro formâ*.

The Lower Courts both found in defendant's favor, the Principal Sudder Ameen holding that the suit was barred under Section 2 of Act VIII. of 1859.

Plaintiff now appeals specially, urging that the suit is not barred; that the previous suits were decided against his father under the ikrar, whereas the present suit is against Gossain Doss for having appropriated the rents wrongfully, which, in the first instance, plaintiff's father was compelled to pay to each of the brothers severally under the ikrar; that consequently Section 2 of Act VIII. cannot apply, and the suit should be enquired into on its merits.

It appears that four of the brothers brought separate suits against the plaintiff's father for the rents of Neamutpore during 1251 and 1252, and obtained decrees for the same under the ikrar by which Juggunnath was appointed manager. Juggunnath's son now sues on the allegation that, though his father has been made liable under the ikrar, still, as his father was not in possession of the property during those years, and as that possession was wrongfully held by Gossain Doss, who appropriated the rents and profits, he is entitled to bring an action against this person for illegally detaining that for which he has been made liable to others.

We are clearly of opinion that, as regards the share of Gossain Doss in Neamutpore, this action will not lie. In the suit which he brought against Juggunnath Doss, the present plaintiff's father, the plea raised was non-liability in consequence of Gossain Doss's possession. That possession was considered not to be proved, and on the ikrar, which was admitted, the decree was given in Gossain Doss's favor. No contention as to Gossain Doss's possession of his share during those years can again be raised between the parties to that suit or their privies. It follows that the present action, so far as regards Gossain Doss's share based on his possession of it, cannot be entertained; but, as regards the shares of the other brothers, it may be entertained, though with what success it is not for this Court to say. The action brought by the other three brothers against Juggunnath Doss turned mainly on the ikrar, and Gossain Doss was not a party to the suit. It follows that his possession of his brother's shares during the years 1251 and 1252 was not in issue, neither were the parties now before the Court then before it. The case must, therefore, be remitted for enquiry whether Gossain Doss was in possession of and appropriated the profits of the shares of his brothers, Puddo Lochun, Nil Kant, and Sreedhur; if he was not, the suit must be dismissed; if he were, plaintiff will be entitled as against Gossain Doss for the amount which, in the former cases, his father was compelled to pay on their behalf under the ikrar. The case is remitted accordingly.

The 23rd February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Evidence—Statement of fact by Judge.

Case No. 849 of 1866.

Miscellaneous Appeal from an order passed by Mr. H. S. Bivar, Officiating Judicial Commissioner of Assam, dated the 17th September 1866, affirming an order

passed by Captain J. F. Sherer, Deputy Commissioner of Kamroop, dated the 6th September 1866.

Mrs. Rousseau and another (Decree-holders), *Appellants,*

versus

Mrs. Pinto (Judgment-debtor), *Respondent.*

Messrs. R. V. Doyne and *W. E. Peacock* and *Baboo Juggodanund Mookerjee* for Appellants.

Mr. G. C. Paul for Respondent.

A Judge cannot give evidence in a case merely by making a statement of fact in his judgment. If he intends the Courts to act upon his statement, he is bound to make that statement in the same manner as any other witness.

Peacock, C.J.—THE statement of the Deputy Commissioner is rather in the form of a certificate than in the form of a judgment. But we apprehend it is a judgment.

A regular appeal was preferred from that judgment to the Judicial Commissioner, and the question was whether the Deputy Commissioner had or had not carried out the decree of the High Court, by delivering possession up to the Choonsalee Jan to the east of the Choonsalee Hills, as described in Juggooram Ameen's map. That was what, according to the decision of this Court and the subsequent order of the 11th day of July 1866, the Deputy Commissioner was bound to do. The question was whether he had done it or not, and the Judicial Commissioner had to decide that question. We apprehend that the Judicial Commissioner was bound to decide that question of fact in the same way as he would any other question of fact arising on regular appeal, *viz.*, by evidence. There was no evidence in this case. There was merely a statement of the Deputy Commissioner himself that he had put the decree-holders into possession of all the land up to the Choonsalee Jan as described in Juggooram Ameen's map as the eastern boundary. Now, a Judge cannot give evidence in a case merely by making a statement of fact in his judgment. If the Deputy Commissioner intended that the Courts were to act upon his statement he was bound to make that statement in the same manner as any other witness; and then, having given his evidence, he might have decided upon that evidence, and the Judicial Commissioner would have had to act upon that evidence, and satisfy his own mind that that evidence was sufficient to prove the fact found by the Lower Court. But there was no evidence, except the simple statement of the Deputy Commissioner's, to show up to what point as the eastern boundary possession had been given.

It appears to us, therefore, that the decision of the Judicial Commissioner must be reversed upon the ground of an error in procedure which may have caused injury to the parties, and that the case must be remanded to the Judicial Commissioner, with a direction to take evidence as to what is the eastern boundary of the lands of which the Deputy Commissioner, in executing the decree of the High Court, has put the decree-holders into possession. He may examine the Deputy Commissioner as a witness if he think fit. But the case must go down in order that that point may be determined by the Judicial Commissioner upon evidence to be legally taken.

The 23rd February 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Enhancement—Notice.

Case No. 2072 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. R. Maddocks, Judge of Bhaugulpore, dated the 18th May 1866, reversing a decision passed by Mr. W. H. Grimly, Assistant Collector of that District, dated the 15th January 1866.

Bodhnarain Singh (Plaintiff), *Appellant,*

versus

Rungolall Mundur (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory and *Baboo Anund Gopal Paulit* for Respondent.

In a former suit brought by a ryot against the holder under a temporary ijara extending down to 1271, a decree was passed maintaining the ijaradar's right to enhance. But, notwithstanding this decree, the ryot was by express agreement allowed, and in fact continued, to hold at the old rates. On the expiration of the ijara, the zemindar entered upon the lands, and, after collecting a part of the rents for 1272, gave the plaintiff a putnee of the estate from 1273 and an assignment of the right to collect the uncollected portion of the rents of 1272. The putneedar now sues to recover from the defendant the rent for the remainder of 1272 and for 1273 at the enhanced rates decreed to the ijaradar. HELD that neither the zemindar nor the putneedar could recover enhanced rents from the ryot without some notice.

Jackson, J.—THE plaintiff in this case was a putneedar. He sued defendant for

rent at an enhanced rate confirmed by a decree of the Judge passed in 1862. This decree had been obtained by the ryot in a suit to contest the right to enhance against Mr. Mellis, who held this estate under a temporary ijara extending down to 1271. After this decision had been come to in his favor, Mr. Mellis entered into an arrangement with the ryot, and agreed to forego the benefit of the decree, and to allow the ryot to continue in occupation of the lands at the old rates. On the expiration of Mellis's ijara at the end of 1271, the zemindar entered upon the lands, and collected the rents for 1272. The whole rents, however, were not collected, and the plaintiff, taking a putnee from the year 1273 Fuslee, took also by assignment from the zemindar the right to collect the uncollected portion of the rents of 1272. He now seeks to recover from the ryot defendant rents for part of 1272. as well as for 1273 at the rates decreed in Mellis's suit.

The Deputy Collector, it seems, gave him a decree, which was reversed by the Judge, upon the ground that Mellis, who obtained the decree, had waived his rights under it; that consequently the decree was now dead in effect, and the plaintiff could not claim enhanced rent under it. Against this decision of the Judge, the plaintiff has appealed specially to this Court, and he contends that, as the decree was obtained in a suit by the ryot to contest the ijaradar's right to enhance his rent, that decree is permanently binding as between the ryot and any one who represents the zemindar, and that the agreement subsequently made by Mellis to forego the benefit of the decree was only binding for the period of Mellis's ijara, and does not bind either the zemindar or the plaintiff who now holds as putneedar.

It appears to me that the sole question before the Judge in this case was whether the plaintiff could recover the particular sums of rent for which he sued, namely, rent for the year 1273, and a portion of 1272, at the enhanced rate; and that, in answer to this suit, it was quite sufficient for the defendant to say that, notwithstanding the decree obtained by Mellis in 1862, he had been allowed to hold, and had, in fact, continued to hold the lands since then under express agreement that he was to hold at the old rates, and that the plaintiff had not given the defendant any notice, either under Section 13, Act X. of 1859, or otherwise, that he would be called upon to pay at any enhanced rate. It appears to me that this suit ought to have been decided upon this ground alone; that it was premature and unnecessary for the Judge to raise the general question, whether the decree obtained by Mellis had become of no effect in consequence of the agreement afterwards made between Mellis and the ryot; and that, consequently, the decision of the Judge upon this point ought not to stand, but that the question should be left open for future decision in any suit which the plaintiff may bring against the defendant after notice for rent at an enhanced rate. I should expressly wish to reserve my opinion upon that question if it should come to be decided hereafter.

I would therefore affirm the decree of the Court below with costs, but upon the ground which I have above stated, and not upon the ground on which the Judge has decided it.

Markby, J.—I am of the same opinion. To what extent (if any) the zemindar could take advantage of the decree obtained by Mellis in 1862, it is not necessary to determine. It is quite clear that, after what had taken place, neither he nor his assignee could do so without some notice to the ryot that he would be called upon for the higher rent, so as to enable him to exercise his option, whether he would remain in occupation or not.

The 25th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges.*

Ferries (Resumption of private—by Government)—Suit for compensation—Jurisdiction of Civil Courts.

Case No. 3354 of 1864.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 26th August 1864, modifying a decision of Mr. W. Wright, Principal Sudder Ameen of that District, dated the 31st December 1863.

The Collector of Pubna (Defendant), *Appellant,*

versus

Romanath Tagore and others (Plaintiffs), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Mr. R. T. Allan and *Baboos Mohendro Lall Shome, Ashootosh Dhur,* and *Baney Madhub Banerjee* for Respondents.

When a ferry previously held under private management has been declared to be a public ferry by the Government under Section 3, Regulation VI., 1819, an individual claiming compensation for the loss alleged to have been sustained by him in consequence of the extension of the authority of the Government cannot maintain an action in the Civil Courts to enforce his claim.

This case was referred to a Full Bench by Morgan and Shumbhoonath Pundit, JJ., with the following order :—

Referring Order.—THIS is a suit for compensation for the loss sustained by the plaintiff in consequence of the Government having "resumed" a ferry which has hitherto belonged to or been under the private management of the plaintiff. It is brought against the "Collector of Pubna on behalf of Government."

An objection was taken before us at the hearing of the appeal, which had before been urged in the Lower Courts, that the jurisdiction of the Civil Courts was barred by Regulation VI., 1819; and a decision (The Government *versus* Brijo Soonder Dossee and others, 1848, S. D. A. Rep., p. 456) was cited in support of the objection.

That was a suit, according to the report, against the Joint Magistrate of Pubna and another for *possession* of a ferry. The Court held that it had no jurisdiction: (1) because the Magistrate's official acts "were exempt from the jurisdiction of the Courts;" (2) because the Legislature had provided by the Regulation (Section 6) the machinery for settling the amount of compensation in such cases; and, although the Regulation did not *expressly* (like the former Regulation XIX., 1816) exclude the ordinary Courts of jurisdiction from taking cognizance of such cases, yet the proper construction of the later Regulation was, like the first, to exclude the Court's jurisdiction.

The Regulation provides a mode for the investigation of claims to compensation, and for a report on the merits of any such claim to the Government; but the law does not appear to us to exclude the jurisdiction of the Civil Courts in the manner stated in the decision. The question is one which may perhaps be properly brought under the consideration of a Full Bench, and we, accordingly, desire that the necessary steps may be taken for submitting the matter of law for their opinion.

The judgment of the Full Bench was delivered as follows by—

Peacock, C.J.—The question in this case is whether, when a ferry previously held under private management has been declared to be a public ferry by the Government under the provisions of Regulation VI. of 1819, Section 3, an individual claiming compensation for the loss alleged to have been sustained by him in consequence of the extension of the authority of the Government can maintain any action in the Civil Courts to enforce his claim.

In considering this question, it is necessary to remember that the Government of this country has, in various Regulations, and otherwise, always asserted its paramount right to deal with ferries and claims to take tolls at ferries for the providing passage over rivers, &c., at its pleasure. *See* Regulation XVIII. of 1806, Section 2, Clauses 4, 5, 6; Regulation XIX. of 1816; and Circular Order, Sudder and Nizamut Adawlut, 25th July 1845, No. 208.

By Regulation XIX. of 1816, Section 9, it was expressly provided that the Courts of Judicature should not take cognizance of any claims to deduction or compensation on account of the tolls levied at any ferry, &c.

These words are not found in Regulation VI. of 1819. It is argued that the Civil Courts must therefore have jurisdiction.

Section 1 of Act VIII. of 1859 has been referred to in argument as giving such right. It says that "the Civil Courts shall take cognizance of all suits of a civil nature." That is, the Civil Court is competent to investigate the complaint of the suitor, and determine whether he has a legal right or not. Although the Court has cognizance of the suit, it cannot decree for the plaintiff, unless he has a cause of action. The question then arises whether there is a cause of action vested in the claimant.

Regulation VI. of 1819, Section 3, describes what ferries are to be considered public ferries. Clause 2 of that Section reserves to the Government the power of determining what ferries shall be deemed public ferries, subject to the immediate control of the Magistrates. It prohibits Magistrates from assuming the management of ferries which have not been let in farm, or held khas, or otherwise subjected to assessment by the Collector, &c., without the previous authority of Government.

Section 5 requires lists of all public ferries to be stuck up in the cutcherries and

thannahs. Section 6 enacts that "such "ferries shall exclusively belong to Govern- "ment, and no person shall be allowed "to employ a ferry-boat plying for hire "at or in their immediate vicinity without "the previous sanction of the Magistrate or "Joint Magistrate."

If the Regulation stopped there, it is clear that the plaintiff would have no legal claim under this Regulation for compensation. But it was considered not right to deprive the party altogether of compensation for the loss of privileges which had been *de facto* enjoyed, and the Section then goes on to provide "that due attention shall "be paid to all claims for compensation which "may be preferred by individuals for any loss "which may be sustained by them in conse- "quence of the extension of the authority "of Government to ferries hitherto under "their private management, and which "may not have been heretofore let in farm, "or held khas, or otherwise deemed subject "to assessment on account of Government."

An Act or Regulation does not usually give a right to claim compensation by saying that due attention shall be paid to a claim. But the Regulation goes further, and shows how such claims are to be enquired into. Clause 2 says: "Claims of that nature "shall be enquired into by the Magistrates "and Joint Magistrates, and their opinion on "the merits of each case shall be reported "through the channel of the Superintendent "of Police for the consideration and orders "of Government."

It appears to us, therefore, that, when the Legislature said that these claims should receive due attention, it meant no more than that they should be enquired into in the manner provided by the Regulation, and that it did not intend to give any right enforceable by suit in Court.

The case is analogous to that of Stevens *versus* Peacocke, 11 Queen's Bench Reports, p. 731, and Doe *dem* the Bishop of Rochester *versus* Bridges, 1 Barnwall and Adolphus, p. 847, where the Court of Queen's Bench in England laid it down that, if the Legislature creates an obligation to be enforced in a specific manner, as a general rule, performance cannot be enforced in any other way.

We think that the rule laid down in the decision of the Sudder Court on the 18th of May 1848, S. D. A. Rep., p. 457, was right, though we do not adopt the reasons there assigned for the rule.

The decision of the Lower Court will be reversed, and a decree given for the defendants with costs.

The 25th February 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Orders to "file with the record."

Case No. 2879 of 1866.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 20th August 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 16th June 1863.

Nil Monee Banerjee (Plaintiff), *Appellant,*

versus

Saurbo Mungula Debee (Defendant), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

The order *to file with the record* again condemned as meaningless and as really amounting to no order at all.

Seton-Karr, J.—We regret very much that we must again remand this case owing to the Judge's own fault. On the 13th of August, one witness having appeared, the other witness Koilash Chunder Banerjee put in a medical certificate from an European practitioner, stating that he was suffering from diarrhœa, and requesting a few days' rest. On this the Judge recorded the order, which this Court has repeatedly condemned, that the "request should be filed with the record"—an order meaningless, and really amounting to no order at all.

There was no reason whatever why the Judge should not have given the witness 10 or 15 days' time to appear in Court.

We remand the case, in order that the Judge may take the evidence of this witness, and decide the case afresh.

The 25th February 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree for Contribution.

Case No. 2640 of 1866.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 1st August 1866, modifying a decision passed by the Sudder Ameen of that District, dated the 9th February 1866.

Shaikh Otioollah (one of the Defendants), *Appellant,*

versus

Mussamut Aseerun (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Romanath Bose for Respondents.

In a suit for contribution, a decree cannot, and ought not, to pass jointly against all the defaulters. The decree should specify the particular sums to be paid by each person.

Seton-Karr, J.—THE appeal before us is limited to one point, and that is that the Principal Sudder Ameen was wrong in reversing the Sudder Ameen's decision as to the apportionment of the shares, and in giving a joint decree against all the parties.

We have heard both parties, and are quite clear that the ruling of the Principal Sudder Ameen is wrong in law. It has already been ruled (Weekly Reporter, Volume III., page 170, Civil Rulings) that, in a suit for contribution, a decree cannot and ought not to pass jointly against all the defaulters. The decree should specify the particular sums to be paid by each person.

The case quoted is on all fours with the case before us. The Sudder Ameen found, with advertence to the shares of each defaulter, that the amount for which they were liable was so much respectively. The Principal Sudder Ameen should not have reversed this finding on the ground recorded by him, *viz.*, that it was not clear for what amount each individual defaulter was responsible.

The decision of the Principal Sudder Ameen is set aside, and the case is remanded to him that he may apportion the share of each defaulter's liability, as the Sudder Ameen has done. If the decision of the first Court is founded on good and reliable evidence on this one point, the Principal Sudder Ameen should follow the same. But he may consider any evidence tending to show that Otioollah, the special appellant before us, had retained possession of more shares than his own, and was therefore liable for a larger amount than the first Court had decreed against him. But, in any case, the Principal Sudder Ameen must not lose sight of the correct principle of apportionment of the liability against each defendant according to his share. Case remanded with reference to the above remarks.

The 25th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Enhancement—Evidence—Ex-parte decision.

Case No. 2566 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 17th July 1866, affirming a decision passed by the Deputy Collector of that District, dated the 30th April 1866.

Mufeezooddeen *alias* Bhaloo Mean (Defendant), *Appellant,*

versus

Woolfutoonissa Bibee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Kalee Mohun Doss for Respondent.

An *ex-parte* decision is not sufficient evidence as to the rates of similar lands in the neighbourhood on which to base an enhancement of rent from 17 to 50 rupees.

Bayley, J.—IN this case we see no reason to interfere in regard to so much of the decision as finds, as a fact on the evidence, that the *pottah* put forward by special appellant as showing him to hold at a fixed rent, was untrustworthy.

As to the *rates*, however, we must remand the case. The Lower Appellate Court, looking to the appellant's pleaded rates, and the rates taken by the Ameen, thinks neither of them reliable.

The Lower Appellate Court, then, decides the case on an *ex-parte* decision as to lands in the *neighbourhood*, which raises the rent from 17 to 50 rupees.

We do not think an *ex-parte* decision sufficient evidence for such an increase.

The Court should get proper evidence of the rates paid for similar lands in the neighbourhood, as the land is admittedly near a bazar, and then re-decide the case accordingly.

Remand accordingly.

We have to notice that, as, contrary to the standing rules of the High Court, only one pleader has been appointed, and he is absent in another Court, the case has been heard *ex parte*.

The 25th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation — Pre-emption — Possession under Section 264, Act VIII. of 1859.

Case No. 2287 of 1866.

Special Appeal from a decision passed by Mr. H. R. Maddocks, Judge of Bhaugulpore, dated the 31st July 1866, affirming a decision passed by Baboo Gobind Chunder Sandyal, Officiating Sudder Ameen of that District, dated the 29th January 1866.

Mahomed Hossein (Plaintiff), *Appellant;*

versus

Mohsun Ali and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Moonshee Ameer Ali and *Baboo Dwarkanath Mitter* for Respondents.

Possession under Section 264, Act VIII. of 1859, being merely symbolical, was held to have no legal effect as regards limitation, under Clause 1, Section 1, Act XIV. of 1859, in a case of pre-emption.

Loch, J.—THE plaintiff claimed a right of pre emption to certain property which one of the defendants had sold to the other. It appears that, in June 1849, the one defendant had sold to the other, under two deeds of sale, an 8-anna and a 5-anna share of the property in dispute. The plaintiff then claimed a right of pre-emption, and performed the preliminary observances necessary for the preservation of his right. In 1850, the vendee defendant brought a suit to obtain the remaining 3 annas of this property under a right of pre-emption, but this suit was finally dismissed on 31st March 1857 by the late Sudder Court, on the ground that he was not in possession of the 13 annas which he alleged that he had purchased. In 1857, the vendee defendant brought two suits against the vendors for the possession of the 5 and 8-anna shares sold to him, and on 14th July 1859 got a decree for 8 annas, his other suit for 5 annas being dismissed. Appeals were preferred to the Judge in both cases, by whom the orders of the first Court were confirmed on 30th December 1861, and from this order special appeals were filed. In the meanwhile, the vendee defendant executed his decree, and was put in possession of the 8 annas on 6th August 1860, under the provisions of Section 264, Act VIII. of 1859. In 1862, the High Court reversed the decisions of the Lower Courts, and remanded both cases for further enquiry; and on 30th December 1863 the Principal Sudder Ameen gave the vendee defendant a decree for both 8 annas and 5 annas, and this order was confirmed by the High Court on 21st September 1864.

Plaintiffs in this case sue on the ground of right of pre-emption, and instituted their suit on 5th December 1864, alleging that the vendee defendant had obtained actual possession only since the judgment of the High Court of 21st September 1864 was passed. The present suit is for the 8-anna share, and the Lower Courts have held that the suit is barred by limitation, not having been brought within one year from the date on which defendants got possession under Section 264.

The plaintiffs in special appeal assert that the possession referred to in Clause 1, Section 1, Act XIV. of 1859, must be an actual and not a symbolical possession; that the possession under Section 264 is merely symbolical, and can have no legal effect as regards limitation, and, in support of their argument, they quote a judgment of a Division Bench reported in 2 Weekly Reporter, page 5, Civil Rulings, in which the Court held that the words "taken possession" in Clause 1, Section 1, Act XIV. of 1859, meant an actual, and not a mere constructive, possession, so that a right of pre-emption may be enforced within a year from the purchaser taking manual possession of the property in dispute. Though the rule laid down by the learned Judges in that case is very general, yet the facts in that case were very different from the facts in the case before us; nor do the Judges appear to have taken into consideration, or to have had before them, the question as to the effect of possession given under Section 264, Act VIII. of 1859. Whatever may be the effect

The 25th February 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree for Contribution.

Case No. 2640 of 1866.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 1st August 1866, modifying a decision passed by the Sudder Ameen of that District, dated the 9th February 1866.

Shaikh Otioollah (one of the Defendants), *Appellant,*

versus

Mussamut Aseerun (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Romanath Bose for Respondents.

In a suit for contribution, a decree cannot, and ought not, to pass jointly against all the defaulters. The decree should specify the particular sums to be paid by each person.

Seton-Karr, J.—THE appeal before us is limited to one point, and that is that the Principal Sudder Ameen was wrong in reversing the Sudder Ameen's decision as to the apportionment of the shares, and in giving a joint decree against all the parties.

We have heard both parties, and are quite clear that the ruling of the Principal Sudder Ameen is wrong in law. It has already been ruled (Weekly Reporter, Volume III., page 170, Civil Rulings) that, in a suit for contribution, a decree cannot and ought not to pass jointly against all the defaulters. The decree should specify the particular sums to be paid by each person.

The case quoted is on all fours with the case before us. The Sudder Ameen found, with advertence to the shares of each defaulter, that the amount for which they were liable was so much respectively. The Principal Sudder Ameen should not have reversed this finding on the ground recorded by him, *viz.*, that it was not clear for what amount each individual defaulter was responsible.

The decision of the Principal Sudder Ameen is set aside, and the case is remanded to him that he may apportion the share of each defaulter's liability, as the Sudder Ameen has done. If the decision of the first Court is founded on good and reliable evidence on this one point, the Principal Sudder Ameen should follow the same. But he may consider any evidence tending to show that Otioollah, the special appellant before us, had retained possession of more shares than his own, and was therefore liable for a larger amount than the first Court had decreed against him. But, in any case, the Principal Sudder Ameen must not lose sight of the correct principle of apportionment of the liability against each defendant according to his share. Case remanded with reference to the above remarks.

The 25th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Enhancement—Evidence—Ex-parte decision.

Case No. 2566 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 17th July 1866, affirming a decision passed by the Deputy Collector of that District, dated the 30th April 1866.

Mufeezooddeen *alias* Bhaloo Mean (Defendant), *Appellant,*

versus

Woolfutoonissa Bibee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Kalee Mohun Doss for Respondent.

An *ex-parte* decision is not sufficient evidence as to the rates of similar lands in the neighbourhood on which to base an enhancement of rent from 17 to 50 rupees.

Bayley, J.—IN this case we see no reason to interfere in regard to so much of the decision as finds, as a fact on the evidence, that the *pottah* put forward by special appellant as showing him to hold at a fixed rent, was untrustworthy.

As to the *rates*, however, we must remand the case. The Lower Appellate Court, looking to the appellant's pleaded rates, and the rates taken by the Ameen, thinks neither of them reliable.

The Lower Appellate Court, then, decides the case on an *ex-parte* decision as to lands in the *neighbourhood*, which raises the rent from 17 to 50 rupees.

We do not think an *ex-parte* decision sufficient evidence for such an increase.

The Court should get proper evidence of the rates paid for similar lands in the neighbourhood, as the land is admittedly near a bazar, and then re-decide the case accordingly.

Remand accordingly.

We have to notice that, as, contrary to the standing rules of the High Court, only one pleader has been appointed, and he is absent in another Court, the case has been heard *ex parte*.

The 25th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation — Pre-emption — Possession under Section 264, Act VIII. of 1859.

Case No. 2287 of 1866.

Special Appeal from a decision passed by Mr. H. R. Maddocks, Judge of Bhaugulpore, dated the 31st July 1866, affirming a decision passed by Baboo Gobind Chunder Sandyal, Officiating Sudder Ameen of that District, dated the 29th January 1866.

Mahomed Hossein (Plaintiff), *Appellant,*

versus

Mohsun Ali and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Moonshee Ameer Ali and *Baboo Dwarkanath Mitter* for Respondents.

Possession under Section 264, Act VIII. of 1859, being merely symbolical, was held to have no legal effect as regards limitation, under Clause 1, Section 1, Act XIV. of 1859, in a case of pre-emption.

Loch, J.—THE plaintiff claimed a right of pre emption to certain property which one of the defendants had sold to the other. It appears that, in June 1849, the one defendant had sold to the other, under two deeds of sale, an 8-anna and a 5-anna share of the property in dispute. The plaintiff then claimed a right of pre-emption, and performed the preliminary observances necessary for the preservation of his right. In 1850, the vendee defendant brought a suit to obtain the remaining 3 annas of this property under a right of pre-emption, but this suit was finally dismissed on 31st March 1857 by the late Sudder Court, on the ground that he was not in possession of the 13 annas which he alleged that he had purchased. In 1857, the vendee defendant brought two suits against the vendors for the possession of the 5 and 8-anna shares sold to him, and on 14th July 1859 got a decree for 8 annas, his other suit for 5 annas being dismissed. Appeals were preferred to the Judge in both cases, by whom the orders of the first Court were confirmed on 30th December 1861, and from this order special appeals were filed. In the meanwhile, the vendee defendant executed his decree, and was put in possession of the 8 annas on 6th August 1860, under the provisions of Section 264, Act VIII. of 1859. In 1862, the High Court reversed the decisions of the Lower Courts, and remanded both cases for further enquiry; and on 30th December 1863 the Principal Sudder Ameen gave the vendee defendant a decree for both 8 annas and 5 annas, and this order was confirmed by the High Court on 21st September 1864.

Plaintiffs in this case sue on the ground of right of pre-emption, and instituted their suit on 5th December 1864, alleging that the vendee defendant had obtained actual possession only since the judgment of the High Court of 21st September 1864 was passed. The present suit is for the 8-anna share, and the Lower Courts have held that the suit is barred by limitation, not having been brought within one year from the date on which defendants got possession under Section 264.

The plaintiffs in special appeal assert that the possession referred to in Clause 1, Section 1, Act XIV. of 1859, must be an actual and not a symbolical possession; that the possession under Section 264 is merely symbolical, and can have no legal effect as regards limitation, and, in support of their argument, they quote a judgment of a Division Bench reported in 2 Weekly Reporter, page 5, Civil Rulings, in which the Court held that the words "taken possession" in Clause 1, Section 1, Act XIV. of 1859, meant an actual, and not a mere constructive, possession, so that a right of pre-emption may be enforced within a year from the purchaser taking manual possession of the property in dispute. Though the rule laid down by the learned Judges in that case is very general, yet the facts in that case were very different from the facts in the case before us; nor do the Judges appear to have taken into consideration, or to have had before them, the question as to the effect of possession given under Section 264, Act VIII. of 1859. Whatever may be the effect

of possession so given, the possession taken in 1860 was set aside in 1862, when the High Court reversed the decisions of the Lower Courts, and remanded the cases for further trial. We think, therefore, that the Lower Courts are wrong in considering the plaintiff's case barred by limitation, and we reverse the judgments given by them, and remand the case for trial on the merits.

The 25th February 1867.

Present :

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Sale for arrears of revenue (under Regulation XI., 1822)—Effect of.

Case No. 2577 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 9th July 1866, affirming a decision passed by the Deputy Collector of that District, dated the 29th December 1865.

Gunga Monee (Defendant), *Appellant,*

versus

Mussamut Luteefoonnissa Chowdhrain and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

An estate having been sold for arrears of revenue under Regulation XI., 1822, it was purchased by Government, and the Government, as landlord, raised the rents throughout the property. HELD that the revenue-sale cancelled all former arrangements entered into intermediately by the former proprietors; and that the fresh settlement made by Government with the present proprietors will not restore former arrangements and rates, because they happen to be the heirs of the former proprietors.

Loch, J.—WE think that this appeal must be dismissed with costs. The appellant's tenure is not one that was in existence at the time of the Decennial Settlement, and consequently it does not come within the meaning of the dependant talooks specified in Section 6 of Regulation VIII., 1793. When the estate was sold for arrears of Government revenue under Regulation XI., 1822, it was purchased by Government, and the Government, as landlord, raised the rents throughout the property, and those of this talook among the rest. Some years after, the Government made over the estate to the heirs of the former proprietors, but on an entirely *new* footing. It was on an entirely new arrangement, and, therefore, the plaintiffs are not in any way bound by the acts of their predecessors done before the revenue sale. The revenue-sale cancelled all former arrangements entered into intermediately by the former proprietors; and the fresh settlement made by Government with the *present* proprietors will not restore former arrangements and rates, because they *happen* to be the heirs of the former proprietors.

The 25th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Sale—Breach of warranty.

Case No. 247 of 1866.

Regular Appeal from a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of Gya, dated the 11th April 1866.

Syud Sayef Ali (Defendant), *Appellant,*

versus

Syud Mahomed Jowad Ali (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Appellant.

Mr. R. E. Twidale for Respondent.

Suit laid at Rupees 500.

A buyer may at once sue on a warranty of title if he can show that the seller has not a good title in accordance with his undertaking, and that he has sustained loss in consequence.

Semble.—It does not follow as a matter of course that, on proof of breach of warranty, the buyer is entitled to receive back the whole of the consideration-money; or that, on its being ascertained that the seller had no title, the conditional sale is nullified.

Markby, J.—THE 4 annas and 7 dams share of the property dealt with by the *above* conditional sale had already been the subject of litigation between the defendant and a third party when the deed was executed, and at that time the defendant held a decree in his favor of the Principal Sudder Ameen; but, on the 26th of November 1863, after the deed of conditional sale was executed, this decree was reversed by the High [illegible] the defendant's title declared to be [illegible] and the right of possession declared to [illegible] another person.

Upon this the present plaintiff brou[illegible] this suit, the plaint in which states sho[illegible] the above circumstances and proceeds th[illegible] "Hence the right of Sayef Ali (defen[illegible] ceased to exist, and he held no long[illegible]

h

lien on the property sold. That, for this reason, your petitioner has become entitled to recover the consideration-money with interest accrued thereon." This we consider to be substantially a claim for damages for breach of warranty of title, the damages being laid at the full amount of the consideration-money or loan.

The plaint was filed on the 2nd of February 1864; the time fixed for repayment of the money, so as to prevent the sale becoming absolute, was the month of Sawun 1271 F. S, corresponding with the month of August 1864 A. D.

The answer of the defendant (arranging the allegations in a somewhat different order to what may appear in the written statement) amounts to this: That there was no warranty of title; but that, if there was, still the plaintiff cannot bring any action for two reasons, *first*, because the time for repayment of the consideration-money (by which we suppose the defendant means the loan) has not elapsed; and, *secondly*, because, at the time of this suit being brought, the decision on the appeal to the High Court above referred to was under review, so that the defendant's title had not been finally ascertained to be bad, and, therefore, that there had been no breach of warranty.

With regard to the *first* issue, we are of opinion that, looking to the deed, as we are bound to do, as a whole, there was a warranty of title, in other words, a contract or covenant by the vendor with the vendee that, at the time of the sale, he had a good title to the property sold.

With regard to the defence that the action is premature, because the time for repayment of the loan has not elapsed, we think that it is not well-founded. The defendant has misunderstood the cause of action; it is not brought to enforce repayment of the loan, but it is an action for damages for breach of contract. A warranty of title amounts to a contract by the seller that, in consideration the buyer purchasing the property and the consideration-money, he (the will make good to the buyer any loss the buyer may incur by reason of the not having a good title to the property. is an absolute contract from the moment been entered into, and the buyer can on it at once, if he can show that the has not a good title in accordance his undertaking, and that he has sus- loss in consequence.

The other allegation of the defendant—that, at the time this action was brought, the title of the defendant had not been finally declared to be bad—is also disposed of by considering the true nature of the defendant's cause of action. In this action the plaintiff is bound to show that there has been a breach of his undertaking by the defendant, that is, that the defendant has not a good title; the proceedings referred to of a third party against the defendant, in respect of this property, would not be in any way conclusive between the present parties as to the goodness or badness of the defendant's title, even if those proceedings had finally terminated in the Highest Court of appeal. The defendant, notwithstanding those proceedings, was at perfect liberty to show in this action that he had a good title to the property sold. But this he has not attempted to do; and, not having done so, it must be taken that his title is bad.

None of the grounds, therefore, put forward by the defendant in answer to this suit can be supported.

It is perhaps desirable to point out that, though, as above stated, the buyer may at once bring an action on a warranty of title, if he can show a breach of that warranty, it does not follow, as a matter of course, that he is entitled to recover back, as damages, the whole of the consideration-money. Nor do we assent to an argument which has been put forward on the part of the plaintiff, and has received some countenance from the Principal Sudder Ameen that, on its being ascertained that the seller had no title, the conditional sale was (to use the expression of the judgment below) *nullified*. But no question arises on either of these points. We are not asked to set aside the deed, nor is any complaint made that the damages are excessive.

The decree of the Lower Court is, therefore, affirmed, and the appeal dismissed with costs.

It is admitted that this decision governs appeal No. 246, which is also, therefore, dismissed with costs.

The 25th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Ex-parte decree—Section 119, Act VIII. of 1859.

Case No. 2005 of 1866.

Special Appeal from a decision passed by Baboo Kadarnath Banerjee, Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 21st April 1866, affirming a decision passed by Baboo Bhooputly Roy, Officiating Sudder Ameen of that District, dated the 21st August 1865.

Radha Binode Chowdhry (Plaintiff), *Appellant,*

versus

Modhoo Soodun Sircar and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Mohesh Chunder Chowdhry* for Appellant.

No one for Respondents.

Process for enforcing a judgment (within 30 days from which a defendant may apply to set aside an *ex-parte* decree) has not been executed within the meaning of Section 119, Act VIII. of 1859, until the proceedings in execution have been brought to a termination by a sale of the property attached.

Markby, J.—In this suit, which was brought before the Sudder Ameen for the resumption of certain lands held by the defendant under an alleged invalid lakheraj tenure, the plaintiff obtained a decree *ex parte* on the 2nd of March 1863. The decree, besides being a declaratory one of the plaintiff's title, contained an order for the payment by the defendant to the plaintiff of a certain sum for costs.

The plaintiff, in order to obtain payment of this sum, proceeded to attach certain lands of the defendant, and, on the 28th June 1865, proclamation of sale was made for the 8th August 1865.

On the 8th July 1865, the defendant put in a petition to stop the sale, and also to set aside the judgment, and to appoint a day for proceeding with the suit, under Section 119 of the Code of Civil Procedure.

The prayer of this petition was granted, and the suit was proceeded with in the usual way. Ultimately a decision was given in favor of the defendant.

The plaintiff appealed to the Principal Sudder Ameen, and urged that the *ex-parte* decree was final; that the Sudder Ameen had no power under Section 119 to set it aside, because more than 30 days, after process for enforcing the judgment had been executed, had elapsed; and that all the proceedings subsequent to the 18th of July were without jurisdiction.

The Principal Sudder Ameen seems to have been under the impression that the order made on the application of the 18th of July 1865 was for the admission of a review, and disposed of this objection on the ground that "no appeal lies against the order of the Lower Court admitting an application for a review," and accordingly he proceeded to hear the appeal on the merits which he dismissed.

The plaintiff now appeals, and raises the same point as to the jurisdiction of the Court of first instance.

We have examined the record, and find that the plaintiff is right in saying that the order made on the petition of the 18th July is not for the admission of a review, but to set aside the *ex-parte* decree under the powers conferred by Section 119. The Principal Sudder Ameen was, therefore, mistaken in the grounds on which he decided this case in favor of the defendant. But, by the plaintiff's own showing, his objection is invalid on another ground; for, as appears by the above statement of facts, the application to set aside the *ex-parte* decree was made, after proclamation of sale, but before the sale took place. The provision of Section 119, however, is that the defendant may apply to set aside an *ex-parte* decree "within a reasonable time not "exceeding thirty days after any process "for enforcing the judgment has been "executed to the Court by which judgment "was passed for an order to set it aside." We are of opinion that process for enforcing a judgment has not been executed within the meaning of this Section, until the proceedings in execution have been brought to a termination by a sale of the property attached. The application under Section 119 was, therefore, made within time, and the point as to whether the objection to the jurisdiction can be taken by way of appeal does not arise.

The appeal is dismissed, but without costs, the respondent not having appeared.

The 26th February 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Limitation—Summary suit under Act XIX. of 1841—Possession—Regular suit to try title.

Case No. 856 of 1864.

Application for review of judgment passed by Justices Bayley and E. Jackson in Regular Appeal No. 198 of 1864.

Loknarain Sing, *Petitioner*,

versus

Ranee Myna Kooer, *Opposite Party*.

Mr. R. E. Twidale for Petitioner.

Mr. R. T. Allan for Opposite Party.

A summary order made under Act XIX. of 1841, and intended only to affect the question of possession, does not operate as a bar to a regular suit to try the title. Such suit may be brought within 12 years according to Clause 12, Section 1, Act XIV. of 1859.

This case was referred to a Full Bench by Bayley and E. Jackson, JJ., with the following order:—

Referring Order.—After hearing the objections of the opposite party, we consider that this application for review ought to be admitted.

Mr. Twidale for the applicant has shown to us that our decision, as regards the application of Clause 5, Section 1, Act XIV of 1859, to awards under Regulation XIX. of 1841, conflicts with the opinion of Justices Steer and Glover as recorded at page 40 of Sutherland's Weekly Reporter, Volume 1, and again with the opinion expressed by Justices Morgan and Shumbhoonath Pundit, as recorded at page 342 of the same publication.

Under these circumstances the point in question must be referred to a Full Bench for final determination.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—If this were a suit merely to set aside a summary decision as to the right of possession under Act XIX. of 1841, we are of opinion that, if any such suit is maintainable, it should, under Clause 5, Section 1, Act XIV. of 1859, be brought within one year.

Here the plaintiffs do not simply raise the question whether the Judge's order under that Act was rightly made; but seek to establish their own title and to be put into possession as the heirs of Chaen Sing and Nepal Sing.

Two cases have been referred to, Gredharee Doss *versus* Nundkishore Dutt Mohunt, 24th June 1863, II. Reports published by Hay, page 633, and Mussamut Momeedoonissa *versus* Mahomed Ali, 1 Weekly Reporter, page 40.

The question is, does the summary order made under Act XIX. of 1841, and intended only to affect the question of possession, operate as a bar to a regular suit to try the title?

The recital of that Act is as follows:—

"Whereas much inconvenience has been "experienced where persons have died pos- "sessed of moveable and immoveable pro- "perty, and the same has been taken under "pretended claims of right by gift or succes- "sion; the difficulty of ascertaining the "precise nature of the moveable property "in such cases, the opportunities for mis- "appropriating such property, and also the "profits of real property, the delays of a "regular suit when vexatiously protracted, "and the inability of heirs when out of "possession to prosecute their rights, afford- "ing strong temptations for the employment "of force or fraud in order to obtain pos- "session. And whereas, from the above "causes, the circumstance of actual posses- "sion, when taken upon a succession, does "not afford an indication of rightful title "equal to that of a decision by a Judge, "after hearing all parties, in a summary "suit, though such summary suit may not "be sufficient to prevent a party removed

* Judgment orally delivered on 14th June 1865.

"from possession thereby from instituting "a regular suit," &c. "And whereas it will "be very inconvenient to interfere with "successions to estates by summary suits, "unless satisfactory grounds for such pro- "ceedings shall appear, and unless such pro- "ceedings shall be required by, or on the be- "half of, parties giving satisfactory proof "that they are likely to be materially pre- "judiced if left to the ordinary remedy of a "regular suit:—

"It is hereby enacted that, whenever a per- "son dies leaving property, moveable or im- "moveable, it shall be lawful for any person "claiming a right by succession thereto, or "to any portion thereof, to make application "to the Judge of the Court of the District "where any part of the property is found or "situate for relief, either after actual "possession has been taken by another per- "son, or when forcible means of seizing "possession are apprehended."

Section 3 says:—

"And it is hereby enacted that the Judge "to whom such application shall be made "shall, in the first place, enquire by the "solemn declaration of the complainant, and "by witnesses and documents at his dis- "cretion, whether there be strong reasons "for believing that the party in possession, "or taking forcible means for seizing pos- "session, has no lawful title, and that the "applicant or the person on whose behalf "he applies is really entitled, and is likely "to be materially prejudiced, if left to the "ordinary remedy of a regular suit, and "that the application is made *bond fide*."

Then Section 4 enacts:—

"And it is hereby enacted that, in case "the Judge shall be satisfied of the exist- "ence of such strong ground of belief, but "not otherwise, he shall cite the party com- "plained of, and give notice of vacant or "disturbed possession by publication, and "after the expiration of a reasonable time "shall determine summarily the right to "possession, subject to regular suit as "hereinafter mentioned, and shall deliver "possession accordingly."

Section 18 says:—

"And it is hereby enacted that the deci- "sion of the Judge, upon the summary suit "under this Act, shall have no other effect "than that of settling the actual possession; "but that, for this purpose, it shall be final, "not subject to any appeal or order for "review."

Section 17 says:—

"And it is hereby provided that nothing "in this Act contained shall be any impe- "diment to the bringing of a regular suit, "either by the party whose application "may have been rejected, before or after "citing the party in possession, or by the "party who may have been evicted from the "possession under this Act."

If the summary order made under this Act is to be no impediment to bringing a regular suit, there is no necessity for setting aside that order.

Then the question is, within what time is the regular suit to be brought to try the title to land and to be put into possession of it? That summary order cannot be pleaded or set up as a bar to the maintenance of the suit to try the title, and to be put into possession under that title.

Clause 12, Section 1, Act XIV. of 1859, fixes the period of limitation in suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of that Act applies at the period of 12 years from the time when the cause of action arose.

We think, then, that the period of limitation in such a suit as this is 12 years, and not one year.

The case will be sent back to the Division Court which referred it to us, with this expression of our opinion.

We may add that we express no opinion as to the effect of summary orders other than those under Act XIX. of 1841.

The 26th February 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and Shumbhoonath Pundit, *Judges*.

Section 14, Act VIII. of 1859—Disputed local jurisdiction—Rejection of Plaint.

Cases Nos. 2100 to 2104 of 1864.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Officiating Additional Judge of Backergunge, dated the 4th

* Judgment orally delivered on 20th June 1865.

May 1864, affirming a decision of the Principal Sudder Ameen of that District, dated the 2nd May 1863.

Hurronath Roy and others (Defendants), *Appellants,*

versus

Mr. W. Scott and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss and *Bungsee Dhur Sein* for Appellants.

Mr. A. F. Lingham and *Baboo Onookool Chunder Mookerjee* for Respondents.

Where a plaintiff sued in the Court of *B* for the recovery of certain lands, and the defendant objected that the lands in question were not in the district of *B*—HELD that the Court had power, under Section 14, Act VIII. of 1859, before it proceeded to try the suit, to enquire and determine whether the lands were in *B* or not.

The rejection of a plaint under the same Section cannot give jurisdiction to a Court which does not otherwise possess it.

This case was referred to a Full Bench by Morgan and Shumbhoonath Pundit, JJ., with the following order:—

Referring Order.—As our decision on these five cases is in conflict with the decision of another Divisional Court passed in the case of special appeal No. 2099 reported in pages 329 and 330 of the Weekly Reporter, Vol. I., we admit the review, and wish the point to be authoritatively decided by a Full Bench.

The judgment of the Full Bench in No. 2100 was given as follows by—

Peacock, C. J.—The plaintiff in this case sued in the Backergunge Court for the recovery of certain lands, and the defendant objected that the lands in question were not in the district of Backergunge.

By Section 5 of Act VIII. of 1859, the Court has jurisdiction if the land is situate within the limits to which the jurisdiction of the Court extends. Under Section 14 the Court had power, before it proceeded to try the suit, to enquire and determine whether the lands were in Backergunge or not. The proviso to that Section is as follows:—

"Provided that, if it is shown that the "land in dispute has been adjudged by "competent authority to belong to an "estate, village, or other known division of "land situate within the local jurisdiction of "another Court, the Court in which the suit "is brought shall reject the plaint, or return "it to the plaintiff in order to its being "presented in the proper Court."

This seems to amount to no more than that if, on the presentation of the plaint, the Court should find that the question has been already determined by any authority competent to try and decide it, the Court should reject the plaint, or return it for the purpose of being presented in the proper Court.

It cannot be said that either the decision of the Magistrate under Act IV. of 1840, which found that the defendant was in possession of these lands, or the award of the surveyor, was a decision by a competent authority. Neither the Magistrate nor the Superintendent of Survey had power to determine the question conclusively. In order rightly to apprehend the meaning and object of the proviso, it should be compared with Section 2.

Two cases were cited—Shamkanto Lahoree *vs.* Hurish Chunder Chowdhry, Reports published by Hay and Co., Vol. 2, p. 485, as to which we need only observe that the rejection of a plaint under Section 14 cannot give jurisdiction to a Court which does not otherwise possess it; and Huronath Roy *vs.* Anundo Chunder Roy, 1 Weekly Reporter, p. 329, which is similar to the present case.

The point is a very clear one, and the papers must be sent back to the Divisional Court, with an expression of our opinion that the Lower Court had the power to try whether the lands were in Backergunge or not.

The above order applies to special appeals Nos. 2101, 2102, 2103, and 2104 of 1864.

The 6th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Section 73, Act VIII. of 1859—Intervenors being made parties to a suit.

Case No. 1980 of 1865.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 21st

April 1865, affirming a decision of the Principal Sudder Ameen of that District, dated 23rd December 1864.

Joy Gobind Doss (Intervenor), *Appellant,*

versus

Goureeproshad Shaha and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *W. E. Peacock* and *Baboo Rajendurnath Bose* for Appellant.

Baboo Anundgopal Paulit for Respondents.

A person cannot be made a party to a suit under Section 73, Act VIII. of 1859, unless he is likely to be affected by the result of the suit. The title of the plaintiff only will form the subject of the decree.

Where an intervenor claimed a portion of the subject-matter of the suit, it was held that it would be most inconvenient and contrary to all principle if every person, claiming a title adverse to those set up by the plaintiff and the defendant in the suit, should intervene and be introduced into the suit, so that, as soon as the plaintiff's title is determined against him, the intervenor might take up the case as a fresh claimant.

Peacock, C. J.—In this case the plaintiff sued to have a declaration of right to certain lands, and to recover possession of parts of those lands. Joy Gobind Doss intervened, alleging that a portion of the lands which were the subject of the suit between the plaintiff and the defendant belonged to him, and it was ordered that he should be made a party to the suit.

It appears to me that it was wrong to order that he should be made a party to the suit, because, according to Section 73 of the Code of Civil Procedure, it is only when it appears to the Court that persons who may be entitled to, or who claim some share or interest in the subject-matter of the suit, *and who may be likely to be affected by the result*, have not been made parties to the suit, that the Court may direct such persons to be made either plaintiffs or defendants, as the case may be.

Now here, although the intervenor claimed a portion of the subject-matter of the suit, he was not likely to be affected by the result of the suit, because claiming adversely to the title both of the plaintiff and of the defendant, and not being a party to the suit, he would not have been bound by the decision. The title which he claimed was not admitted either by the plaintiff or by the defendant. He claimed no community of interest with either of them. The title set up by him was inconsistent with the title set up by the plaintiff, as well as with that set up by the defendant. The plaintiff claimed the lands as pertainifig to talook No. 2; defendant claimed them as pertaining to talook No. 12; and the intervenor claimed them as pertaining to talook No. 104.

In a decision which is referred to in Baboo Ramapersad's Edition of the Code of Civil Procedure under Section 73, in the second note to that Section, the Madras Sudder Court held on the 15th December 1860 that "the Section required no more "than that those persons should be joined "as defendants whose claims were necessary "to be taken into consideration before "deciding on the plaintiff's title, and that "it was the latter only which would form "the subject of the decree."

It appears to me that that decision was correct, and it is in accordance with the principles accepted in English Courts of Equity. Story (in his Work on Equity Jurisprudence, Section 1526, Vol. II., p. 993) says: "The general rule in Equity is, "that all persons are to be made parties "who are either legally or equitably *inter-*"*ested in the subject-matter and result* "*of the suit.*"

Here, as I have observed, the intervenor claimed to be interested in the subject-matter of the suit; but he was not interested in the result or object of the suit. But, correctly or incorrectly, he was, in fact, made a party. He was not made a plaintiff but a defendant; and an issue was raised, whether that portion of the land which was claimed by the intervenor belonged to the plaintiff's talook, or to the defendant's talook, or to the intervenor's talook. That, however, was not really an issue between the intervenor and the defendant, but was one between him and the plaintiff. The strict issue to be laid down between the plaintiff and the intervenor, who was made a party to the suit as a defendant, and also between the plaintiff and the original defendant, would have been whether the lands belonged to the plaintiff's talook or not. If that had been the sole issue tried between the plaintiff on one side, and the intervenor and the defendant on the other, the result would have been that, if the lands were found not

o belong to the plaintiff's talook, his suit would have been dismissed as against both he defendant and the intervenor.

The Court did substantially so find; but it lso found, unnecessarily, that the lands belonged to the defendant's talook. That, owever, as it appears to me, was the finding pon an issue not raised as between the riginal defendant and the intervenor as plaintiff, but simply as between the laintiff and the two defendants, *viz.*, the riginal defendant and the intervenor defendant. Consequently, the decision upon hat issue ought not to be binding in any other case as between the intervenor and the defendant, any more than if the simple issue had been tried whether the lands appertained o the plaintiff's talook or not. We express no opinion as to the merits of the case between the intervenor and the defendant. All that we determine is, that the decision in this case that the lands belonged to the defendant's talook will not be binding upon the intervenor in any other suit.

The plaintiff's suit having been dismissed, here is no necessity now to send the case back for a trial between the intervenor defendant and the original defendant; for, even if it should be found on the new trial hat the lands belonged to the intervenor's talook, the Court could not give him a decree to recover the land as against the defendant.

Story, I may observe, in his Equity Jurisprudence, lays it down as a general rule hat no person but a plaintiff can entitle himself to a decree (*see* Section 522, Vol. , p. 585). The decision of the Madras Court ited above adopts the same principle. hey say: "It is the plaintiff's title only hich will form the subject of the decree." would be most inconvenient and contrary all principle, if every person claiming a le adverse to those set up by the plaintiff nd the defendant in a suit should intervene nd be introduced into the suit, so that, as soon s the plaintiff's title is determined against im, the intervenor might take up the case s a fresh claimant.

For the reasons stated, it is unnecessary o send the case back for a new trial to determine as between the intervenor and the defendant whether the lands appertain to the intervenor's talook or to the defendant's talook.

I may add that, when the review was moved for, I was under the impression that the intervenor was one of the plaintiffs, and that the appeal was between the defendant and a plaintiff. The endorsement on the paper book was to the effect that the defendant was appellant against the plaintiff as respondent; whereas, I now find that the intervenor was appellant against the defendant as respondent.

This application for review is allowed, the order remanding the case for a re-trial is rescinded, the appeal of the intervenor is re-heard upon review, and, upon that rehearing, we affirm the decision of the Lower Appellate Court, and dismiss the appeal of the intervenor with costs.

Jackson, J.—I am of the same opinion for the same reasons.

The 26th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Alluvial Land—Survey Award—Suit for rent.

Cases Nos. 2575 to 2593 of 1866 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Mymensingh, dated the 31st August 1866, reversing a decision passed by the Assistant Collector of Jumalpore, dated the 14th June 1866.

Tarinee Kant Lahoory (Plaintiff), *Appellant,*

versus

Hanee Mundul and others (Defendants), *Respondents.*

Mr. J. S. Rochfort and *Baboo Chunder Madhub Ghose* for Appellant.

Baboos Romesh Chunder Milter and *Kalee Kishen Sein* for Respondents.

In a case for setting aside a survey-award which declared the plaintiff and the opposite party entitled to certain *chur* lands to the extent they had respectively lost by diluvion, and the residue to be held jointly according to their shares—HELD that the opposite party had no right to sue for rents on the plea of joint

possession, for he must first have fixed what lands are to be appropriated by him, and what by the intervenor separately for the loss suffered by each party by diluvion, and, after that, how much and what of the remainder is entitled to be held jointly.

Bayley, J.—It is admitted that these fifteen cases are to be governed by one and the same decision before us in special appeal.

Plaintiff is special appellant, and claimed rents to the extent of a seven-annas share from certain ryots of chur lands.

One Shama Kant (special respondent) intervened.

It appears that the Survey Authorities had recorded these chur lands as jointly belonging to the plaintiff and Shama Kant, the intervenor, in proportion to these shares in the original *aslee* mehal.

Shama Kant sued to set aside this demarcation, stating that he was in possession of the whole, and it was decided by Mr. Justice Glover (then Judge of the District) that each party should first receive an equivalent from the chur to the extent which each had lost by diluvion (that amount being recorded in the order) and divide the remainder in proportion to the share of each in the original *aslee* lands. The quantity of the chur lands was also set forth in that decision.

Plaintiff brought a suit for measurement of *all* the lands on his alleged right of joint possession under the survey, and was considered by the High Court entitled to do so. The point, however, then more directly determined was that withholding of rents by ryots did not destroy plaintiff's possession, and that the civil decree in his favor passed in a case in which the plaintiff was a defendant, and in which intervenor's suit was dismissed, need not be executed by the plaintiff.

It was not noticed, however, on that occasion, that the decree passed in the suit of Shama Kant awarded a separate distribution of large parcels of lands to either party, and which will leave a small fraction alone of the *chur* lands to be held jointly as required by the decree. It does not distinctly appear that in the Civil Court it was found that that intervenor was not in possession. The Survey Authorities are not shown to have actually given possession to the plaintiff, and the decision in the measurement case went only to decide that the fact of ryots withholding rents from plaintiff was not a legal dispossession. In the measurement case, the first Court decided that plaintiff had some possession as a joint sharer, and the Lower Appellate Court did not decide anything, but that since 1266 plaintiff had not received rents. This may be equivalent to saying that plaintiff had obtained rents before that year, and this must refer to his doing so under a joint right.

Now, the first Court holds that the decree in the measurement case left the question of possession no longer open, and that it had found possession with the plaintiff.

The Lower Appellate Court decides that the evidence shows plaintiff to have been in possession *before* the decision of the Civil Court, and also *after* the decision of the measurement case.

Now, as the Civil Court decree has fixed and determined *rights*, any possession of the parties in opposition to this decree cannot be legal and real. There may be room to doubt if the High Court correctly said that the decree in the Civil Court could not be executed by the plaintiff.

We think that, under the peculiar circumstances of these cases, plaintiff should not be allowed to sue for rents on the ground of the decree in the measurement case. Plaintiff must first have fixed what lands are to be appropriated by him, and what by the intervenor separately for the loss suffered by each party by diluvion, and, after that, how much and what of the remainder is entitled to be held jointly.

Plaintiff, moreover, has not given below proof of his having collected before from the ryots whom he is now suing, either for the period preceding the present suit, or preceding 1266, since which time it was found in the measurement case that the ryots had ceased to pay rents to the plaintiff.

We do not then think that plaintiff can urge successfully that the intervenor has no authority to plead possession in opposition to the decree of the Civil Court, as plaintiff himself is urging a right to collect rents for lands, possession of which was neither found with him, nor was awarded to him by that decree. Thus, plaintiff cannot be allowed to sue for rents against that decision, and, when he cites that decision against the intervenor, it is also to be equally cited against him.

We think on the whole that the order of the Lower Appellate Court is right. It is for plaintiff to adopt some other course to obtain and hold possession of that which may be found to belong to him out of the *chur* lands both separately and jointly, and to collect the rents.

The special appeals in all these fifteen cases are, therefore, dismissed with costs.

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The 26th February 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Section 208, Act VIII. of 1859—Assignee of decree.

Case No. 898 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 29th September 1866, reversing an order passed by the Sudder Moonsiff of that District, dated the 19th April 1866.

Shamanund Surmah (Decree-holder), *Appellant,*

versus

Shumboo Chunder Doss and others (Judgment-debtors), *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

No one for Respondents.

Section 208, Act VIII. of 1859, puts a party to whom a decree is transferred into the position of the original decree-holder, and entitles him to have the decree executed as if application were made by the original decree-holder.

Loch, J.—We think that the Judge has overlooked the effect of Section 208, Act VIII. of 1859, the concluding words of which clearly put a party to whom a decree is transferred into the position of the original decree-holder, and entitle him to have the decree executed as if application were made by the original decree-holder. We reverse the order of the Judge with costs, and we remand this case to him to dispose of the objection raised before him in appeal by the judgment-debtors.

The 27th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Appeal—Arbitration.

Case No. 2843 of 1866.

Special Appeal from the decision of the Additional Judge of Tirhoot, dated the 23rd July 1866, affirming a decision of the Sudder Ameen of that District, dated the 29th December 1864.

Ramonoogra Chobey (Defendant), *Appellant,*

versus

Mussamut Putmoorta Chobayan (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Debendronarain Bose for Respondent.

A judgment of a Court given in accordance with an award of arbitration is final, even if there has been corruption and misconduct on the part of the arbitrators.

Peacock, C.J.—Section 324, Act VIII. of 1859, says: "No award shall be liable to be "set aside, except on the ground of corruption or misconduct of the arbitrators or "umpire. Any application to set aside an "award shall be made within ten days after "the same has been submitted to the Court."

Section 325 enacts as follows:—

"If the Court shall not see cause to remit "the award or any of the matters referred to "arbitration for re-consideration in manner "aforesaid, and if no application shall have "been made to set aside the award, or if the "Court shall have refused such application, "the Court shall proceed to pass judgment "according to the award," * * * * "and, "upon the judgment which shall be so given, "decree shall follow, and shall be carried "into execution in the same manner as other "decrees of the Court. In every case in "which judgment shall be given according to "the award, the judgment shall be final."

The Judge on appeal says that he cannot set aside the award except for corruption and misconduct. The Moonsiff, by whom the case was referred to arbitration, having given judgment according to the award, that judgment was final. It appears to me that the Judge on appeal could not have set aside the award, even if there had been corruption and misconduct, for, according to Section 325, the decision of the first Court was declared to be final.

The decision of the Lower Court is affirmed with costs.

Jackson, J.—The application to set aside an award must be made to the Courts which directed the reference to arbitration, and within ten days after the award has been submitted to the Court. But, if the Judge refuses to comply with the application, and gives judgment in accordance with the award, then the judgment is final.

The 27th February 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Money-decree (Rights of judgment-creditor under).

Case No. 2170 of 1866.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 24th April 1866, affirming a decision passed by Mr. W. Dacosta, Officiating Principal Sudder Ameen of that District, dated the 26th July 1865.

Mussamut Moona (Plaintiff), *Appellant,*

versus

Chand Monee Gossain (Defendant), *Respondent.*

Baboos Sreenath Doss, Mohesh Chunder Chowdhry, and *Kalee Kishen Sein* for Appellant.

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Respondent.

A judgment-creditor, under a simple money-decree, has no lien whatever upon any portion of the property of a judgment-debtor, and therefore any alienation or incumbrance created by the judgment-debtor, prior to attachment in execution, must be held to be valid.

Markby, J. (Jackson, J., concurring). —In this case the plaintiff, special appellant, sues to recover possession of a village granted to her under a putnee pottah by two persons, who are respectively the son and widow of Furzund Ali. The defendant, who is the respondent, had purchased a decree which one Faiz Buksh obtained against the son and widow in respect of a debt of Furzund Ali. That decree was against them in their representative capacity, and it is simply a money-decree. Subsequently, the defendant purchased from the son Dowd Ali (who seems, on this matter, to have represented the widow also) a 14-annas share of the same village, and the question in this case is whether the defendant can maintain possession of the village to the exclusion of the putneedar. Now, it is quite clear that, under the purchase from Dowd Ali, she can claim no rights as against a prior purchaser; and the only question, therefore, arises as to her position as representative of the rights of Faiz Buksh, the judgment-creditor. Now, if she, as representing Faiz Buksh, had chosen to attach this property in execution of the decree, there is no doubt she could have done so; but, according to the law of this country, as I understand it, a judgment-creditor, under a simple money-decree, has no lien whatever upon any portion of the property of a judgment-debtor, and therefore any alienation or incumbrance created by the judgment-debtor, prior to attachment in execution, must be held to be valid. It is admitted in this case that no attempt has yet been made by Radha Bibee in any way to execute the decree, and therefore the putnee, which was created long prior to her purchase, must be held to be valid as against her.

The decision of the Lower Appellate Court, therefore, must be reversed, and the appeal decreed with costs.

The 27th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Pre-emption—Re-sale.

Case No. 2211 of 1866.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 5th June 1866, reversing a decision passed by the Deputy Collector, exercising the powers of a Sudder Ameen of that District, dated the 31st August 1865.

Putooaram (Plaintiff), *Appellant,*

versus

Sham Lal Sahoo and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Romanath Bose for Respondents.

A re-sale cannot destroy the right of pre-emption in a property, the sale of which is admitted by the vendor.

Kemp, J.—This was a suit by one co-sharer against another in right of pre-emption. Both the parties are Hindoos.

The defendant and his vendee put in an appearance. The vendor admitted the sale, but urged that it had been cancelled within a few days after its completion, and that, therefore, the right of pre-emption did not attach.

The Court of first instance found that the alleged re-transfer of the property by the vendee to the vendor was fraudulent, and set up to deprive the plaintiff of his right of pre-emption.

The Lower Appellate Court, without giving any reasons whatever, simply

erved that he could not see anything raudulent in the defendant's conduct. The ecision of the first Court was reversed.

It has been contended before us,—

1st.—That the right of pre-emption is one eculiar to the Mahomedan Law, and can- ot be claimed by the parties to this suit ho are Hindoos.

2nd.—That the preliminaries required y the Mahomedan Law were not complied ith by the plaintiff.

3rd.—That the re-sale was *bonâ fide* and tinguished the right of pre-emption, if y, possessed by the plaintiff.

The first point was not raised below. n the contrary, it was contended that the laintiff had not complied with the re- irements of the Mahomedan Law. In some stricts, the custom of pre-emption obtains ongst Hindoos, and has been recognized decisions of the late Sudder. If the efendant wished to rely upon any custom the Zillah of Dinagepore to the contrary, should have raised the plea.

The question as to the compliance by the laintiff with the requirements of the lahomedan Law was not seriously con- nded below, and was not put in issue.

Whether, admitting that the re-sale was *nâ fide*, it would destroy the right of re-emption, a sale having taken place, is a w point which we are not called upon to cide; for, on referring to the evidence of e vendor, defendant, we find that he ad- its that the re-sale by him to the co-defend- t, Sham Lal, was made a few days fore he was examined in Court, and, nsequently, subsequent to the suit brought the plaintiff to enforce his right of e-emption; such re-sale cannot destroy right of pre-emption of the plaintiff the property, the sale of which is ad- ed by the vendor defendant.

The decision of the Judge is, therefore, med, and that of the Court of first in- stance restored with costs and interest, and this appeal decreed with costs and interest.

The 27th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Evidence—Pre-emption—Sale for arrears of revenue.

Regular Appeals from a decision passed by Mr. Abercrombie, Judge of Dacca, dated the 16th July 1866.

Case No. 299 of 1866.

Juggobundhoo Dutt and others (Defendants), *Appellants*,

versus

Pran Kishen Banerjee and another (Plaintiffs), *Respondents*.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellants.

Baboo Sreenath Doss and *Dwarkanath Mitter* for Respondents.

Suit laid at Rupees 4,927-4.

Case No. 386 of 1866.

Pran Kishen Banerjee and another (Plaintiffs), *Appellants*,

versus

Juggobundhoo Dutt and others (Defendants), *Respondents*.

Baboos Sreenath Doss and *Dwarkanath Mitter* for Appellants.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Respondents.

Suit laid at Rupees 2,072-10-6.

If a particular mouzah had been held for many years as part of a particular mehal or zemindaree, the fact of such holding affords a strong presumption that it is part of that mehal, even as against a purchaser at a sale for arrears of revenue of another mehal who claims that part of the mehal purchased by him. It

is not conclusive evidence against such auction-purchaser, nor could any length of adverse holding prior to his purchase preclude the auction-purchaser from recovering it, if he could show clearly that it belonged to the mehal which he had purchased.

Peacock, C. J.—THE plaintiff, as the auction-purchaser of Nowara Mehal, would be entitled to recover possession of Mouzah Khureea, if he could show that it was a part of Nowara Mehal. The copy of the hukeekuts of the years 1209, 1214, and 1216, to which the Judge has referred, are not evidence. There is nothing to show for what purpose those hukeekuts were made out, or why copies only should be produced instead of the originals; nor is the roobakuree in the foreclosure case produced.

It appears to us that there is no sufficient evidence on the part of the plaintiff to rebut the evidence adduced on the other side to show that Mouzah Khureea was part of Khalissa Mehal, and that it was held by Dr. Lamb for many years as part of that mehal, and not part of Nowara Mehal.

If a particular mouzah has been held for many years as part of a particular mehal or zemindaree, the fact of such holding affords a strong presumption that it is part of that mehal, even as against a purchaser at a sale for arrears of revenue of another mehal who claims that part of the mehal purchased by him. It is not conclusive evidence against such auction-purchaser, nor would any length of adverse holding prior to his purchase preclude the auction-purchaser from recovering it, if he could show clearly that it belonged to the mehal which he had purchased. In this case there is no sufficient evidence to satisfy us that it was part of Nowara. The plaintiff, therefore, as the auction-purchaser of Nowara at a sale for arrears of revenue, had not made out his claim. As the purchaser of Khalissa, which he purchased by private sale, he has only the same rights as those from whom he purchased it. As the defendants and their father paid rent to the owner of Mehal Khalissa for the mouzah in dispute, the plaintiff, as the purchaser of Khalissa, cannot treat them as trespassers, and turn them out of possession.

The decision of the Lower Court must be reversed. The effect of this judgment is that the plaintiff is not entitled to recover as owner of Nowara Mehal, and that he is not entitled at present, as owner of Khalissa, to treat the defendants as trespassers. This judgment does not determine the extent of the rights which the defendants have under the owner of Khalissa Mehal. This suit, which is to recover possession, must be dismissed with costs.

Upon the appeal of the defendant (No. 299), the decree of the Lower Court is reversed, and a decree given for defendants with costs in that Court, and the costs of this appeal to be paid by the respondent.

The appeal of the plaintiff (No. 386 of 1866) is dismissed with costs to be paid by him to the defendant.

If the decree of the Lower Court has been registered, this decree must also be registered, otherwise it need not be registered. It would seem from the judgment that it has not been registered.

The 27th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Special Appeal—Costs.

Case No. 2372 of 1866.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 29th June 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 15th August 1865.

Achumbit Singh (Plaintiff), *Appellant,*

versus

Kunhya Lal Mohajun and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Kishen Kishore Ghose and *Greesh Chunder Ghose* for Respondents.

As a general rule, a special appeal will not lie on a question of costs alone, particularly when it is not shown that the Court has exercised its jurisdiction illegally or contrary to any rule having the force of law.

Kemp, J.—THIS appeal comes before us on a question of costs alone, and, as a general rule, such an appeal will not lie.

The special appellant has not shown that the Court has exercised its discretion illegally or contrary to any rule having the force of law.

The appeal must be, therefore, dismissed with costs and interest.

The 28th February 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Benamee lease (Allegation of)—Onus probandi.

Case No. 2880 of 1866.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 16th July 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 16th February 1866.

Saroda Mohun Roy Chowdhry (Plaintiff), *Appellant,*

versus

Shama Soonduree Dossia, guardian of Bama Churn Gooho, minor, and another (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Kishen Succa Mookerjee* for Appellant.

Baboos Mohinee Mohun Roy and *Kishen Dyal Roy* for Respondents.

Where there is an allegation that a lease is held benamee, it is not sufficient for the party in whose name the lease is drawn out to produce the document, but it is necessary for him to prove that he has the beneficial interest in the property.

Loch, J.—We think that the Judge has overlooked the documentary evidence filed by the plaintiff, and disposed of the case without reference to it or to the evidence given by the zemindars from whom the farm was obtained. No doubt, the legal title to the farm was in the defendants; but the zemindars, when examined, stated, so we are told, that the farm was not really given to them, and the plaintiff has filed receipts for rent which are not impugned by the defendants. Where there is an allegation that a lease is held benamee, it is not sufficient for the party in whose name the lease is drawn out to produce the document, but it is necessary for him to prove that he has the beneficial interest in the property. Now, if the receipts filed by the plaintiff came into his hands upon payment of rent by him to the zemindar, they tend to show that the beneficial interest was in him. It is, however, a question of fact for the Judge to dispose after examining the evidence, oral and documentary, and we remand the case to him for disposal, with reference to the above remarks.

The 28th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Ejectment—Enforcement of penalties not provided for—Limitation.

Case No. 2833 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 14th August 1866, affirming a decision passed by the Deputy Collector of that District, dated the 9th June 1866.

Tumeezooddeen Chowdhry and others (Plaintiffs), *Appellants,*

versus

Meer Surwar Khan and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose, Nil Monee Sein, and *Hem Chunder Banerjee* for Appellants.

Baboos Kalee Mohun Doss and *Greeja Sunkur Muzoomdar* for Respondents.

Penalties, when sought to be enforced, cannot be presumed or enforced when the deed is silent as to them.

Thus, where a lease did not stipulate for the ejectment of the tenant on failure to clear a defined area by a certain time, ejectment was not allowed.

Limitation was held to apply in such a case, the cause of action accruing when the defendant did not clear by the time specified.

Bayley, J.—The pleas in this special appeal are: (1.) That it was clearly the intention of the parties, landlord and tenant, in the deed of lease, that, if the tenant failed to clear a defined area by the end of 1258 B. S., the tenant should be ejected. (2.) That, where there is (as is here shown under the lease) the relation of landlord and tenant, no limitation can accrue.

We think both these pleas untenable. It is found below that no *express* stipulation for ejectment is to be discovered in the lease; and it is admitted here that this penalty is not in terms prescribed in the deed. But it is urged that, as the Government would oust the superior landlord if he failed to clear in time, the sub-contractor, with the landlord here, must be understood to have accepted a like condition in his lease. We would observe that, where it is asked that penalties should be enforced, we cannot

presume or infer them when the special appellant's deed is totally silent on the point. It is the special appellant's own fault that, where he provided a condition, he did not also provide a penalty for non-fulfilment of it.

On the *second* plea we think that, as the rule of limitation referred to in this plea is solely with reference to the position of landlord and tenant, as to rent being a constantly recurring cause of action, and there is *no* question of rent here, the rule applicable to one point of law cannot be extended to another and a totally different one. The cause of action here arose when the defendant did not clear by the end of 1258 B. S. The suit is brought after 12 years from that date. The Lower Appellate Court has then, in our opinion, rightly held limitation to apply.

In this view of this case, we dismiss the special appeal with costs.

The 28th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Pre-emption—Evidence (of custom)—Apportionment of purchase-money.

Case No. 2430 of 1866.

Special Appeal from a decision passed by the Judge of Jessore, dated the 28th July 1866, affirming a decision passed by the Moonsiff of that District, dated the 2nd April 1864.

Madhub Chunder Nath Biswas (one of the Defendants), *Appellant,*
versus
Tomee Bewah (Plaintiff) and others (Defendants), *Respondents.*

Babóo Mohinee Mohun Roy for Appellant.

Baboos Bungsee Dhur Sein and *Nuleet Chunder Sein* for Respondents.

The proceedings in two former suits, where, under similar circumstances, though the exercise of the right was disputed on other grounds, the right of pre-emption was admitted to exist, may be received in evidence in support of the custom.

A person claiming to exercise his right of pre-emption must take the bargain as it was made. Any apportionment of the purchase-money is altogether illegal.

Markby, J.—In this case it has been contended that the Judge has put a wrong construction on the remand order, and that the question which the Judge ought to have tried was whether the right of pre-emption existed by custom in Jessore on a purchase by Hindoos from Hindoos. But we are o opinion that the Judge has tried the righ issue, *viz.*, whether the right of pre-emptio exists where one of two Mahomedan co-shar ers sells to a Hindoo.

The *next* objection is that the Judge ha decided the issue on insufficient evidenc The evidence relied on in support of th custom were the proceedings in two sui where, under similar circumstances, thoug the exercise of the right was disputed o other grounds, the right of pre-emption w admitted to exist.

It is not for this Court, sitting in speci appeal, to decide on the sufficiency of th evidence, but only to decide whether or n any evidence existed upon which the Low Appellate Court could legally act. And w are of opinion that in this case there w such evidence. Two instances were pr duced, one in the year 1852, and the oth in the year 1862, in which the right w asserted and admitted to exist. These pr ceedings are good evidence in a matter public interest, such as the existence of custom of this nature, and such a case form a well-known exception to the usual ru which excludes *res inter alios acta* (s Taylor on Evidence, Section 1496); and, h a large number of such instances been pr duced, there is no doubt whatever that th Judge would have been justified in h finding. That the instances are only tw in number may be an objection to th weight of the evidence; but we cannot s that they are no evidence at all, and th Judge's finding on this point must, therefo be confirmed.

The *third* objection is that the Judge w wrong in decreeing a conveyance to th plaintiff upon payment of Rupees 71, and n Rupees 141, the price paid by the pu chaser. The Judge seems to have justifie his apportionment of the purchase-mone on the ground that the seller, though h professed to sell 5 annas, had only a ti to 2½ annas. But no such issue could h raised in this case; and the plaintiff, if h claimed to exercise his right of pre-emptio at all, must take the bargain as it was mad and any apportionment of the purcha money is altogether illegal. The decree o the Court below will, therefore, be amende by directing a conveyance to the plaintif on payment of Rupees 141, the full amou of the purchase-money. In other respect the decree is affirmed, and this appeal dis missed. Each party will pay his own cos in this Court.

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The 28th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Pre-emption—Evidence.

Case No. 2280 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 4th June 1866, affirming a decision passed by the Moonsiff of that District, dated the 17th August 1865.

Hunsraj Singh (Plaintiff), *Appellant,*

versus

Kash Beharee Singh and others (Defendants), *Respondents.*

Mr. A. A. Sevestre for Appellant.

Baboo Nil Madhub Sein for Respondents.

In a suit to enforce a right of pre-emption, where there is other evidence, and the Court can come to a distinct finding upon it, it is not incumbent on the Court to put the purchaser upon his oath. Where evidence is gone into, the Court must decide according to the view it takes of the evidence, any preference which may be given to the evidence for the person claiming the right of pre-emption being given only in the event of the evidence being very evenly balanced.

Macpherson, J.—THE plaintiff (the appellant before us), who sues to enforce a right of pre-emption, differs with the purchaser as to the price paid by the latter. The plaintiff alleges that the purchaser, in fact, paid a smaller sum than he professes to have paid. The Lower Courts have found in favor of the purchaser.

In special appeal it is contended that the decision of the Lower Court is bad in law, inasmuch as the evidence of the purchaser himself was not taken. It is argued that, by Mahomedan Law, where there is a difference as to the amount paid by the purchaser, it is absolutely incumbent on the Court to put the purchaser upon his oath. It is also contended that, as both sides went into evidence, the evidence for the plaintiff ought, according to Mahomedan Law, to have been preferred to that of the purchaser.

We are of opinion that there is no error in law in the judgment of the Lower Court. We think that, where other evidence is produced, and the Court can come to a distinct finding upon it, it is not incumbent on the Court to put the purchaser on his oath; and that, where evidence is gone into, the Court must decide according to the view it takes of the evidence, any preference which may be given to the evidence for the person claiming the right of pre-emption being given only in the event of the evidence being very evenly balanced.

In the Hedaya (page 577, Volume III. of Hamilton's Translation) it is said that, if the person claiming the right of pre-emption and the purchaser differ regarding the price, "*and neither of them be able to bring any evidence,*" the assertion of the purchaser must be credited in preference to that of the claimant, and that only the purchaser need be put on his oath. So in Macnaghten's Mahomedan Law, page 49, Chapter 4, Section 12, it is laid down that, when there is a dispute as to price, "*and neither have evi-*" *dence,* the assertion on oath of the purchas-" er must be credited." *See* also case No. 7 of Precedents appended to Macnaghten's Mahomedan Law, page 191, in the statement of which case, it is to be observed, it is expressly alleged that the question as to putting the purchaser on oath arose, because the evidence on both sides was "so equal as to form no ground for a determination." And in Baillie's Digest of Mahomedan Laws, page 489, there is nothing to lead to the conclusion that it was necessary to put the purchaser on his oath. We think it clear that, where there is other evidence, and the Court has no difficulty in deciding upon it, it is not necessary to put the purchaser on his oath.

The authorities we have referred to, after laying down that, where there is no other evidence, the oath of the purchaser is to be taken, go on to say that, if both parties produce evidence, that of the person having the right of pre-emption "*is preferable.*" The word always used is "preferable"; it is nowhere said that it is to be conclusive or necessarily to prevail. It appears to us that the law never was intended to be put higher than this, that, if the evidence was very evenly balanced, and the Court had great difficulty in knowing how to decide, a preference should be given to the evidence of the claimant of the right of pre-emption.

In the present case, evidence was produced on both sides, and the Court did not consider it evenly balanced, and had no difficulty in coming to a decision.

We dismiss this appeal with costs.

The 28th February 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Land-disputes—Section 318, Code of Criminal Procedure—Possession—Title.

Case No. 2836 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 16th July 1866, affirming a decision passed by the Moonsiff of Nowcolly, dated the 30th August 1865.

Rajessuree Debia (Plaintiff), *Appellant,*

versus

Brindabutty Debia and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Mutty Lal Mookerjee* for Appellant.

Baboo Gopal Lal Mitter for Respondents.

To set aside the effect of an order made by a Magistrate under Section 318 of the Code of Criminal Procedure, the plaintiff cannot sue for restoration of possession on the sole ground of previous possession without reference to title.

Pundit, J.—THE special appellant contends that the Lower Appellate Court should have confined itself to the question of plaintiff's, special appellant's, possession as lakherajdar previous to the award of the Magistrate under Section 318 of the Code of Criminal Procedure, and, on proof of it, restored possession to the plaintiff without trying his lakheraj title.

If the defendant, special respondent, had forcibly dispossessed the plaintiff, this plea might apply; but when a competent Court has put the defendant in possession, the only remedy left to the special appellant is to prove his right and title, and to recover possession by a regular suit.

To set aside the effect of an order under Section 318, plaintiff cannot be allowed to sue for restoration of possession on the sole ground of previous possession, without reference to title.

It also rather appears that the Lower Appellate Court has not decided the question of possession against the special appellant.

Thus, as we see no reason to interfere, we dismiss the special appeal with costs.

The 28th February 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Suit to recover possession of Land—Onus probandi—Limitation—Written Statement.

Case No. 2109 of 1866.

Special Appeal from a decision passed by Mr. H. R. Maddocks, Judge of Bhaugulpore, dated the 29th May 1866, reversing the decision passed by Baboo Nurottum Mullick, Principal Sudder Ameen of that District, dated the 15th July 1865.

Boolee Singh and others (Plaintiffs), *Appellants,*

versus

Hurobuns Narain Singh and others (Defendants), *Respondents.*

Mr. W. E. Peacock and *Baboo Kalee Mohun Doss* for Appellants.

Baboos Debendro Narain Bose, Kissen Sucr Mookerjee, and *Kally Prosonno Dutt* fo Respondents.

In a suit to recover possession on the allegation th the plaintiff had been dispossessed by the defenda the *onus* is on the plaintiff to prove his possessio the land in dispute within 12 years preceding the su

Where a plea of limitation was set up in the defe ant's written statement, and the first Court, consider the written statement to be prolix, directed the pen to run through a large part of it, the defendant, dissatisfi with this proceeding on the part of the first Court, appe ed to the Judge, complaining that no adjudication h been given on the plea of limitation. HELD that t power of a Court to deal with written statements wh appear to contain irrelevant matter or to be argume tative or unnecessarily prolix is regulated by Secti 124, Act VIII. of 1859; and that, as the plea of limitati must be assumed to have been properly before t Judge, he was bound to adjudicate upon it.

Jackson, J.—IT appears to me that th decision of the Lower Appellate Cou ought to be affirmed. The suit was t recover possession of 16 beegahs of lan alleged to belong to plaintiff's estate, al though surrounded by lands of defendant' estate. The suit was brought in January 1862, and the allegation was that the plaintif had been dispossessed by defendants on th 22nd of September 1850. On these allega tions, the Judge considered that it was for th plaintiff to show that he had been in posses sion of the land in dispute within 12 years preceding the suit.

The Judge was of opinion, considering that issue, that the plaintiffs had altogether failed to show that they had been in

possession of the land in question within 12 years next before the commencement of suit.

The first ground of special appeal in this case is to the effect that the defendant had not in fact set up the plea of limitation, and that the Judge only found it in the grounds of appeal to his Court. But it appears that the defendants did in fact set up this plea, and that it, with other pleas, was included in the defendant's written statement. But the Principal Sudder Ameen who tried the suit, looking at this written statement, observed that it was extremely prolix, and he thereupon most irregularly fined the vakeel who had filed it one rupee, and directed the pen to be run through a large part of the written statement, retaining only a small portion of it. The power of the Court to deal with written statements which appear to contain irrelevant matter, or to be argumentative or unnecessarily prolix, is regulated by Section 124 of the Civil Procedure Code. It appears that the defendants did not acquiesce in this proceeding on the part of the Principal Sudder Ameen, because in their grounds of appeal to the Judge they complained that no adjudication had been given upon their plea of limitation.

I think, therefore, that it must be assumed that the Judge had properly before him the plea of limitation, and that he was entitled, and, in fact, bound to adjudicate upon it.

The case appears to come very clearly within the observations of the Judicial Committee of the Privy Council in the case of Maharaja Koonwar Baboo Nilruttun Singh *versus* Baboo Nund Lal Singh, reported in VIII. Moore, page 221 of the Judgment. The words are: "The appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of defendants who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within 12 years next before the commencement of the suit, and, therefore, that he or some person through whom he claims was in possession during that period." Accordingly their Lordships proceeded in that case "to consider, in the first place, what evidence there is that the appellant or any person through whom he claims was in possession of the lands in question at any time within 12 years next before the commencement of the suit."

The Lower Appellate Court, having the whole evidence before it, has found as a fact that plaintiffs had not established their possession to the land in dispute within 12 years next before the suit, and it appears to me that this Court cannot interfere with that finding, and that the decision below must be, therefore, affirmed with costs.

Markby, J.—I concur.

The 1st March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Conservancy—Municipal Act, III. of 1864, Section 73, B. C.—Costs of clearing jungle.

Reference to the High Court by Mr. H. Bell, Judge of the Principal Court of Small Causes at Kishnaghur.

Lord H. Ulick Browne, Chairman of the Municipality, *Plaintiff*,

versus

Womesh Chunder Roy, *Defendant*.

Baboo Juggodanund Mookerjee for Plaintiff.

The Municipal Commissioners were held entitled, under Section 73, Act III. of 1864, B. C., to recover from the defendant the expense of clearing away any jungle which they found on his land upon his failure after notice to clear it himself within the time specified in the notice.

Case—THE Municipal Commissioners of the town of Kishnaghur sue the defendant under Section 73, Act III. of 1864 (Bengal), for expenses incurred by them in clearing of jungle two pieces of land in the defendant's occupation: one piece consisting of 7 beegahs in the village of Baraibudah; and the other piece consisting of 8 cottahs in the town of Kishnaghur.

The defendant pleads that he is not liable, as the notice required to be served under Section 73 was not served upon him by the Commissioners.

Section 73 is as follows: "Whenever "any lands or premises, being private pro- "perty or within any private enclosure, "appear to the Municipal Commissioners to

"be, by reason of thick or noxious vege-
"tation or want of drainage, in a state
"injurious to health, or offensive to the
"neighbourhood, it shall be lawful for the
"Commissioners to require, by notice in
"writing, the owner or occupier of the
"premises to clear and remove such vege-
"tation or drain such premises; and, if he do
"not, within one week after such notice,
"begin to cut, clear, and remove such
"vegetation, or to drain such land, and do
"not complete such work with due diligence,
"the Commissioners, their officers, and
"workmen, may, after 48 hours' notice, enter
"into the said premises, and do all necessary
"acts for the purpose aforesaid, as they
"shall think fit, and the expense incurred
"thereby shall be paid by the owner or
"occupier of such premises, and shall be
"recoverable as a debt due to the Commis-
"sioners."

It appears from the evidence of the Tax Darogah of the Municipality * * * * that the Medical Officer of the station was of opinion that sickness prevailed in consequence of the jungle with which the town was overgrown; and, accordingly, on or about the 25th of December 1865, a public proclamation was made in the bazaar, ordering all persons to cut down the jungle on their respective properties. As this proclamation produced no effect, on the 10th January 7,000 notices were issued under Section 73 of the Act, ordering all persons served with these notices to clear away their jungle within seven days.

The notices issued were as follows:——

1st Notice.

To *A. B.*, of ——— street, ———, owner of property No. —. Under the orders of the Municipal Commissioners you are hereby informed that you are required, within seven days from the present date, to cut down, root up, and remove all the jungle within your occupation. You are further required either to burn the jungle or to bury it under two feet of earth. Should you neglect to perform all that is required by this notice, you will incur the penalties prescribed in Act III. of 1864, Section 73.

Notice No. 2.

To *A. B.*—As you have neglected to comply with the orders issued to you by the Municipal Commissioners about the 15th of January last, notice is being given to you that the Municipal Commissioners' servants and coolies will, after 48 hours, enter upon your property, and carry into effect every thing which was required to be done under the former notice, and whatever expense is thereby incurred will be levied from you under Act III., 1864.

Municipal Commissioners' Office, 1866. } F. J. EARLE, M.D., *Vice-Chairman.*

The question which is now respectfully submitted for the High Court's consideration is whether these notices were legal or not.

It appears to me that, under Section 73, it is the duty of the Commissioners, before any jungle-cutting notice is issued, to satisfy themselves that the particular jungle to be cut is a thick or noxious vegetation injurious to health or offensive to the neighbourhood. But, before issuing these 7,000 notices, no such particular investigation was made. The evidence of the Tax Darogah on this point is as follows: "After the proclamation (*i. e.*, the public proclamation in the bazaar) was issued, the Vice-Chairman ordered me to serve with a notice to all persons who had not cut their jungle. The Committee did not institute a special enquiry in each case as to what particular jungle was to be cut: that was my duty: and, after I received the order to serve the notices, I went round part of the town myself, and sent the Tax Collectors over the other parts; and it was after this inspection by the Tax Sircars and myself that the notices were issued. I cannot say whether I satisfied myself that the defendant's land at Baraibuda was covered with jungle before the notice was issued, or whether the Tax Sircar found out that the land was covered with jungle. No list was made out for each division showing the several properties which were covered with jungle."

Now, it appears to me that the Municipal Commissioners had no authority under the law to delegate to their subordinates the power to issue notices. It was, in my opinion, the duty of the Commissioners to satisfy themselves, before the notice was issued, that the jungle required by each notice to be cut was a noxious vegetation injurious to health. It could not, I think, have been in the contemplation of the Legislature that Tax Darogahs and Tax Sircars should have the power to pronounce what jungle was injurious to health, and what not? Such power was given to the Municipal Commissioners alone, and could not be delegated by them to their subordinates; and the necessity for the careful exercise of this power by the Commissioners

themselves is strongly illustrated by the present case.

The defendant pleads that his premises were free from all thick or noxious vegetation injurious to health, and raises an issue as to the necessity of the Commissioners entering upon his premises at all. Now, where is this issue to be tried? It is an issue which certainly ought to be tried; but this Court has no authority to try it. The Commissioners have, under the law, full power to clear away any vegetation which *appears to them* injurious to health; and, before serving any notice upon the defendant, they were bound to satisfy themselves that the particular jungle which he was required to clear was a noxious and insalubrious vegetation.

In delegating to their subordinate Tax Darogahs and Sircars the power of deciding what jungle was insalubrious, and what was not, they have exceeded, in my opinion, the authority vested in them by the law. It was not sufficient for them to arrive at the general conclusion that the town was overgrown with jungle, and in consequence unhealthy. They were bound, before they called upon a man to incur the expense of clearing jungle, to satisfy themselves that the premises in that man's occupation were in a state injurious to health, or offensive to the neighbourhood. Each individual had a right to insist that the Commissioners should satisfy themselves of the state of his premises before serving him with a notice. It was not sufficient that the Tax Darogah and Sircars considered the premises unhealthy. The Commissioners, before issuing the notice, were bound in each case to satisfy themselves that the particular premises served under the notice were, by reason of thick or noxious vegetation, in a state injurious to the salubrity of the town. As they neglected to do this, I hold that the notices issued were illegal; and, subject to the confirmation of my order by the High Court, I dismiss the case.

The judgment of the High Court was delivered by—

Peacock, C. J.—It appears to this Court that the Municipal Commissioners are entitled to recover from the defendant the expense of clearing away any jungle which they found on his land. They cannot recover for clearing away anything but jungle. The suit was for the expenses of clearing jungle, and the order on the defendant was to clear jungle. The Judge, in determining whether the plaintiffs are entitled to recover the cost of what they did clear away by means of their officers, would have to ascertain whether those costs were incurred in clearing away jungle.

Now, it appears to us that the Commissioners had decided, upon the report of their Medical Officer, that sickness had prevailed in the town and suburbs in consequence of the jungle which was growing there, and they therefore issued a proclamation that all *jungle* should be cleared. The Judge says that they had no power to issue the notice calling upon the defendant to clear away the jungle on his particular spot of land, until the Commissioners had done that which Section 73 of the Municipal Act directed, namely, until they had ascertained whether there was noxious vegetation growing upon the defendant's land.

It appears to us that the Municipal Commissioners were not Judicial Officers, but that they, as Ministerial Officers looking after the health of the town, had to decide whether the jungle growing in the town and suburbs was noxious vegetation injurious to the health of the inhabitants of the town. On the report of the Medical Officer, the Municipal Commissioners decided that the jungle with which the town and suburbs were overgrown was injurious to the health of the inhabitants, and they therefore ordered the issue of a proclamation requiring the jungle to be cleared. On the failure of the inhabitants to comply with the proclamation, they directed their officers to issue notices to the inhabitants on whose lands there was jungle growing, calling upon them to clear the jungle within a certain time. Accordingly, a notice was issued to the defendant, and the jungle on his land not having been cleared away within the time specified in the notice, the Commissioners authorized their officers to issue a second notice that, after the expiration of 48 hours, the Commissioners' servants and coolies would enter upon the defendant's land, and clear away the jungle. They did enter accordingly after 48 hours, and, if what they cleared away was jungle, they are entitled to recover the expenses.

Section 21 of the Municipal Act, III. of 1864 of the Bengal Council, says: "The "Chairman or Vice-Chairman may from time "to time appoint all such overseers, clerks, or "subordinate officers or servants, as he shall "think necessary and proper to assist in "the execution of this Act, and may from

"time to time remove any such persons, and "appoint others in their places."

The Commissioners, then, were to be assisted by their officers and servants in causing all noxious vegetation which was growing in the town to be cleared. They were not bound like a Judicial Officer to summon each individual, and to sit and hear evidence on both sides in the presence of the parties concerned; nor were they bound to go to each particular spot of land personally and individually to ascertain, by evidence, or upon their own view, whether the jungle growing there was injurious to the health of the inhabitants or not. They had to ascertain in the best way they could, with the assistance of their officers, whether there was any jungle growing in the town which was noxious and injurious to health, and, if so, to have it removed; if they were obliged to clear away the jungle on the defendant's land in consequence of his non-compliance with the notice served upon him, he is liable to pay the costs incurred in doing so. The word "jungle" is defined by Wilson to be "a tract suffered to be overspread with vegetation."

It appears to us that the plaintiffs are entitled to recover from the defendant whatever expenses the Judge may find to have been incurred by them in clearing away any thick or rank vegetation which would fall under the definition of jungle on the defendant's land.

The 1st March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Jurisdiction—Enforcement of Act X. decrees—Limitation—Instalment-bond.

Reference to the High Court by Mr. H. Bell, Judge of the Principal Court of Small Causes at Kishnaghur.

Aghore Chunder Mookerjee, *Plaintiff*,

versus

Wooma Soonderee Debea and another, *Defendants*.

No one for Plaintiff.

Baboo Bhowaney Churn Dutt for Defendants.

As a general rule, a suit cannot be brought in a Civil Court to enforce a decree of a Revenue Court under Act X. of 1859. Such decrees can be enforced only by execution, and the limitation for proceedings to execute them is defined by Act X. itself.

Where a defendant agreed to pay the amount of a decree under Act X. by two instalments, and the remedy provided for the enforcement of the contract in the event of the defendant making default was the execution of the decree, and not a suit in the Civil Court—HELD that a suit would not lie in the Small Cause Court to recover the amount of the second instalment.

Case.—THE plaintiff attached the defendant's property in execution of a decree under Act X. of 1859. While the property was under attachment, a compromise was effected between the parties. A certain sum of money was paid down, and the balance, amounting to Rupees 378, the plaintiff agreed to take in two instalments payable as under:—

Rupees 150 in Pous 1271; and Rupees 228 in Cheyt 1271.

A petition, reciting the terms of the compromise, was presented to the Collector by the defendant's mooktear, and, with the sanction of the decree-holder, the property seized in execution was released from attachment. This petition was signed on behalf of the defendants by their mooktear, and is dated 3rd August 1864. The last instalment of Rupees 228 not having been paid, the plaintiff, on the 9th March 1866, applied to the Collector for execution of the balance due under his decree; but his application was rejected under Section 92, Act X. of 1859, as the original judgment was for a sum under 500 rupees, and more than three years had elapsed from the passing of the decree. The plaintiff now sues the defendants under the agreement of 3rd August 1864 to recover this last instalment of Rupees 228, for which he was unable, in consequence of the provisions of Section 92, Act X. of 1859, to take out execution in the Collector's Court.

The defendants plead that they are not liable, as the instalments due under the agreement of 3rd August 1864 were only recoverable by process of execution under the Act X. decree; and, as that decree was not executed within the period prescribed by Section 92, Act X. of 1859, the plaintiff is not entitled to recover. The defendant's petition of the 3rd August, after reciting the particulars of the case, is as follows: "The balance of Rupees 378 due to the decree-holder, we hereby promise to pay in the following instalments, namely, Rupees

150 in Pous 1271, and Rupees 228 in Cheyt 1271; and, should we make default in the payment of the instalments, we will pay interest at the rate of 12 per cent. upon the amount in arrear; and should the decree-holder experience any difficulty in realizing the money, the whole amount with interest is to be recoverable from us by carrying out the execution of the decree. We, therefore, pray that this petition may be filed with the papers of the case, and the attached property be released from attachment." This petition was signed on behalf of the defendants by their general mooktear, and agreed to by the decree-holder.

The question which is now respectfully submitted for the High Court's decision is, whether the plaintiff can sue under this agreement for the last instalment of Rupees 228, for which he was debarred from taking execution under the limitation prescribed by Section 92, Act X. of 1859.

I am of opinion that the plaintiff is entitled to recover. Money due under a decree is as much a debt as money due in any other way; and, although three years had elapsed since the giving of the decree, and the plaintiff was thereby debarred from his remedy under the decree, still the debt was one which was due to him and legally recoverable, unless barred by the general Law of Limitation. Now, I am of opinion that it will not be barred, provided that the petition filed by the defendant's mooktear on the 3rd August 1864 can be considered an acknowledgment in writing, reviving, under Section 4, Act XIV. of 1859, the right of action to the plaintiff.

The question, therefore, arises, Is the petition of the 3rd August such an acknowledgment as the Act requires? The words of Section 4 are as follows: "If, in respect of any legacy or debt, the person, who but for the Law of Limitation would be liable to pay the same, shall have admitted that such debt or legacy, or any part thereof, is due by an acknowledgment in writing *signed by him*, a new period of limitation shall be computed from such admission."

Under this Section, therefore, the admission must be made in writing, and signed by the *person* liable. Not a word is said, as in Section 19, of an acknowledgment by an agent. The petition of the 3rd August, upon which this suit is brought, was not signed by the defendants, but by their authorized agent. Is, therefore, the signature of their agent such an acknowledgment as Section 4 requires? I certainly think it is. The mooktear, in presenting the petition on behalf of the defendants, was acting within the scope of his authority, and for their benefit; and, after obtaining the release of their property from attachment, they clearly showed, by paying the first instalment of Rupees 150, that they had ratified the agreement which had been made by their mooktear with their concurrence and on their behalf. I, therefore, think that the signature of the mooktear on behalf of the defendants is a sufficient signature under Section 4 to revive the cause of action; and that the plaintiff, though debarred from his remedy under the Act X. decree, is nevertheless competent to sue for the instalment of Rupees 228 acknowledged to be due in the defendant's petition of 3rd August 1864; and, subject to the confirmation of my order by the High Court, a decree has been given for the plaintiff.

The judgment of the High Court was delivered by—

Peacock, C. J.—It appears to us that, as a general rule, a suit cannot be brought in the Civil Courts to enforce a decree of the Revenue Courts under Act X. of 1859. These decrees can be enforced only by execution, and the limitation for proceedings to execute decrees of that nature is defined by Act X. of 1859 itself.

Then the question arises, Whether there was a new contract in this case which the plaintiff can enforce by suit in the Civil Courts? If the contract of the defendant had been simply that, in consideration of the plaintiff's withdrawing the attachment, he, the defendant, would pay down a certain portion of the decree, and pay the remainder of the decree by two instalments, the plaintiff would have been at liberty, on default of payment according to the terms of the contract, to have sued in the Civil Courts for the enforcement of that contract; and, if the amount had been within the limit of the jurisdiction of the Small Cause Court, he might have sued in that Court. But, in this case, the contract specifically points out the mode in which the instalments, which the defendant agreed to pay, were to be enforced in the event of his not paying them. The contract says: "If the instalments are not paid, then you, in execution of that decree, will recover the whole amount of the instalments with interest by executing the decree." So that, by the terms of the contract by which the defendant agreed to pay the instalments, the remedy was pointed out for the enforcement of the contract in

the event of the defendant's making default. That remedy was the execution of the decree, and not a suit in the Civil Courts.

Under these circumstances we are of opinion that a suit will not lie in a Small Cause Court to recover the amount of the instalment which the defendant agreed to pay to the plaintiff in Cheyt 1271.

We may as well remark that, according to the date of the contract and the date of the decree, it appears that ample time remained to the plaintiff to enforce the decree in the event of the second instalment not being paid in Cheyt 1271 according to the terms of the contract.

The 1st March 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Jurisdiction—Review—Appeal.

Case No. 2595 of 1866.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Hooghly, dated the 24th July 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 25th April 1866.

Brojonath Koondoo Chowdhry and others (Plaintiffs), *Appellants,*

versus

Jumeeroonissa Bibee and others (Defendants), *Respondents.*

Baboo Mohendro Lal Seal for Appellants.

Baboo Khetturnath Bose for Respondents.

A Lower Court has no jurisdiction to review a judgment appealed from, nor has the Lower Appellate Court jurisdiction to entertain an appeal from the judgment so passed on review.

Glover, J.—This suit was originally brought in 1862 against a number of defendants, including Meah Jan, the father of the special respondent, for resumption.

All the defendants, except Meah Jan, who did not appear, alleged on that occasion that the land was veritable lakheraj, held as such from before 1790.

The Court of first instance dismissed plaintiff's suit; but the Judge on appeal held that no lakheraj title had been made out, and therefore decreed it.

In 1865 Jumeeroonissa Bibee, daughter of Meah Jan, applied to the Moonsiff for a review of his judgment of the 5th December 1863, on the ground that she had had no notice of the suit, and that her father had died before that suit was instituted. She pleaded on the merits that the land was lakheraj and her own property.

The Moonsiff, on this application, reviewed his former order, and gave Jumeeroonissa Bibee a decree.

And this order was afterwards upheld by the Principal Sudder Ameen on appeal.

It is now urged specially that the Moonsiff had no power to review his judgment, and that all the proceedings taken since the date of the first order on appeal have been without jurisdiction, and, consequently, illegal.

There can be no doubt that the case is so. Under Section 376 of Act VIII. of 1859 the Moonsiff had no authority to review his original order, inasmuch as that order had been the subject of an appeal to a higher Court, and had been decided on appeal. Equally the Principal Sudder Ameen had no power to take up the case on appeal from the Moonsiff, and try it on its merits, there having been no jurisdiction in the Court of first instance. It is argued by the special respondent that, as the Appellate Court has decided on the merits of his client's plea, the objection now taken is a technical one merely, and should not be allowed. But there is, we observe, a great difference between a Court's hearing a case in appeal when the parties have a right to be heard and granting a review of the same case, which is a matter solely within the discretion of the Judge, and no amount of subsequent enquiry into the merits of a case can cure a want of original jurisdiction.

We, therefore, reverse the last order of the Principal Sudder Ameen and also of the Moonsiff admitting a review, and restore the case to the *status quo*. Under the circumstances, both parties will pay their own costs in all the Courts.

The 1st March 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Sale of Putnee.

Case No. 2569 of 1866.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 30th June 1866, affirming a decision passed by the Moonsiff of that District, dated the 22nd March 1865.

Shuroop Chunder Bhoomick and others (Plaintiffs), *Appellants*.

versus

Rajah Pertab Chunder Singh and others (Defendants), *Respondents*.

Baboo Tarucknath Sein for Appellants.

Baboos Issur Chunder Chuckerbutty and *Bungsheedhur Sein* for Respondents.

A putnee sale under Regulation VIII., 1819, is invalid if there was no arrear of rent at the date of sale, whether notice of the fact had been given to the Collector or not at the time of sale.

Trevor, J.—Plaintiff sues to set aside the sale of his putnee talook which had taken place under Regulation VIII. of 1819, mainly on the ground that, at the time of the sale, there was no balance on the mehal, all arrears having been paid upon it into the sudder cutcherry of the zemindar at Paikparah some 12 days prior to the sale.

The defendant, zemindar, admits that the allegations of the plaintiff are correct.

The defendant, purchaser, pleads that the suit is a collusive one between the zemindar and the old putneedar, with a view of restoring the latter to possession; that the arrear of the rent was not paid into Paikparah till after the sale; and that the receipts are antedated; that, consequently, as there was an arrear at the date of sale, the present suit should be dismissed.

The first Court dismissed the plaintiff's suit. The Appellate Court found that, even if the money due was *bond fide* paid in before the sale as alleged by plaintiff, still, as there was ample time either for plaintiff or zemindar to stay the sale, and they failed so to do, the sale is not invalidated, the more especially as the sale was made in the manner and with the forms prescribed in Regulation VIII. of 1819.

Plaintiff now appeals specially, urging that the fact of no notice having been given if the payment cannot validate a sale, provided the payment were really made as alleged by him; and that, consequently, the case should be remitted, in order that the Judge may find whether there was any arrear or not, and, in case there was not, to give him, plaintiff, a decree.

We cannot find the precedent alluded to by the Judge; but think it clear that, if there was no arrear of rent at the date of sale, whether notice of the fact had been given to the Collector or not, the sale must be set aside. It is true that, by Clause 2, Section 14, Regulation VIII. of 1819, a summary enquiry may be made at the time of sale as to the fact of arrear or not; but it is not imperative on the putneedar to demand a summary enquiry; he may reserve the question for a regular suit; and, if on a regular suit it should appear that there was no arrear, then under Clause 1, Section 14 of the above cited law, the Court is to take care that the purchaser is indemnified against all loss which may have accrued in consequence of the sale which has been reversed by reason of there being no arrear remaining.

We remit the case to the Judge with directions that he will enquire into the *bona fides* of the payment alleged to have been made by the plaintiff at Paikparah on the 15th Kartick, 12 days before the sale, and pass whatever orders may eventually seem necessary, keeping in mind, if the sale should be reversed in consequence of there being no arrear, the last paragraph of Clause 1, Section 14, Regulation VIII. of 1819.

The 1st March 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges*.

Cross-decrees—Purchaser of Decree.

Case No. 305 of 1866.

Regular Appeal from a decision passed by Moulvie Syud Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 26th June 1866.

Mussamut Peeloo Chowdhrain and others (Defendants), *Appellants*,

versus

The Court of Wards, on behalf of Maharajah Luchmessur Singh, minor (Plaintiff), *Respondent*.

Mr. C. Gregory, Moonshee Ameer Ali, and *Baboo Dwarkanath Mitter* for Appellants.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondent.

Suit laid at Rupees 38,281-6-6.

Where execution of *A's* decree against *B* was stayed pending the passing of a decree in *B's* cross-suit—Held that no subsequent purchase of *B's* rights and interests in his cross-suit could be set up as a bar to *A's* right to attach the whole of the decree in the cross-suit in execution of his decree against *B*.

Markby, J.—The facts of this case are not in dispute. Mr. Anderson was, when this suit was brought, the manager appointed by the Court of Wards of the estate of Maharajah Luchmessur Singh Bahadoor, a minor; and it appears that in 1862 he made

a claim on behalf of the Maharajah against one Jhoomuk Chowdhry for arrears of rent due in respect of certain lands held in *theeka* by Jhoomuk Chowdhry during the lifetime of the late Maharajah. Jhoomuk Chowdhry admitted the claim, and gave to Anderson three bonds as securities for payment of the claim with interest. At the same time Jhoomuk Chowdhry was pressing a claim for Rupees 2,56,000 against the estate for various articles supplied to the late Maharajah, and Anderson gave to Jhoomuk Chowdhry a perwannah, stating that he would realize the amount due on the bonds out of any sums that might be found to be due by the estate to Jhoomuk Chowdhry in respect of this claim.

Subsequently, Anderson sued Jhoomuk Chowdhry upon these bonds. At that time a cross-suit was pending in the same Court which Jhoomuk Chowdhry had instituted against Anderson in respect of his claim on the estate for Rupees 2,56,000 as above mentioned. Jhoomuk Chowdhry objected to Anderson's suit that it was brought in violation of the terms of the perwannah, which suspended the right of action on the bonds until the amount due to Jhoomuk Chowdhry was settled. The Principal Sudder Ameen, however, thought that the perwannah was no bar to the suit, and on the 27th July 1863 gave Anderson a decree in that suit for Rupees 82,876-3-6; but, acting upon the discretionary power vested in him by Section 209 of the Code of Civil Procedure, he stayed the execution in that suit until the decree should be passed in the cross-suit.

Subsequently to these proceedings, Jhoomuk Chowdhry sold one-half of his rights and interests in his pending suit against Anderson to one Ramodheen, and Ramodheen was made a co-plaintiff in that suit; but the order for this purpose was made on the joint application of Jhoomuk Chowdhry and Ramodheen, without any notice of the application having been given to Anderson.

On the 29th February 1864, Jhoomuk Chowdhry obtained from the Principal Sudder Ameen a decree against Anderson for Rupees 76,566-13 in respect of his claim against the estate of the Maharajah. While this decree was under appeal, Ramodheen sold his interest in the suit to one Mussamut Peeloo Chowdhrain, but it does not appear that she was ever made a co-plaintiff. The decree of Jhoomuk Chowdhry was affirmed by this Court in December 1865.

Soon after this, Anderson proceeded to execute his decree by attaching the decree which had been obtained against himself in the cross-suit. Ramodheen and Peeloo Chowdhrain, however, objected that only half of the amount due under this decree could be attached by Anderson in respect of his decree against Jhoomuk Chowdhry, inasmuch as they were *bonâ fide* purchasers for valuable consideration of the other half. The claim of Anderson was, accordingly, rejected in the summary department to this extent, and he then brought the present suit to have his right declared to attach the whole of the decree in the cross-suit in execution of his decree against Jhoomuk Chowdhry, and also to set aside the sale by Jhoomuk Chowdhry to Ramodheen as a fictitious and collusive transaction intended to deprive him of his rights under his decree.

The Principal Sudder Ameen found that the sale to Ramodheen was real and *bonâ fide*, but held, nevertheless, that, until Anderson's claim under his decree was satisfied, neither Ramodheen nor Peeloo Chowdhrain could appropriate any part of the decree in the cross-suit. He accordingly directed this decree to be sold in execution of Anderson's decree without regard to the sale by Jhoomuk Chowdhry to Ramodheen, and by Ramodheen to Peeloo.

The question in appeal arises on the latter part of the decision only, and it is a simple question of law turning upon what is the true effect of the order of the Principal Sudder Ameen staying the execution of Anderson's decree, until it was ascertained what was due to Jhoomuk Chowdhry in the cross-suit.

It is to be remarked that this order was passed entirely for the benefit of Jhoomuk Chowdhry, and deprived Anderson of his ordinary right of executing his decree against the person and property of his debtor. After this order was passed, Anderson could not proceed to attach any part of the property of Jhoomuk Chowdhry, because execution, of which attachment is the first step, was stayed by the order. Even under the most favorable circumstances, and giving Anderson all he now asks for, still he will have been deprived of his ordinary rights as a decree-holder without any compensation; and, as Jhoomuk Chowdhry has recovered in the cross-suit less than the amount of Anderson's decree, it is very probable that Anderson may never realize the whole debt due to the Maharajah's estate. But, if we were

to hold, as is contended by the purchasers of Jhoomuk Chowdhry's decree, that Jhoomuk Chowdhry's rights over this decree were wholly unfettered by the order staying execution, we should place Anderson in a position which the Legislature can hardly have contemplated. For not only could Jhoomuk Chowdhry voluntarily alienate his rights in the cross-suit, but any person obtaining a decree against Jhoomuk Chowdhry, subsequent to Anderson's, could attach this portion of Jhoomuk Chowdhry's property, so as entirely to exclude Anderson.

I, therefore, think that the only equitable construction that can be put upon this order is that it specially appropriated the proceeds of Jhoomuk Chowdhry's suit to the satisfaction of Anderson's demand in precisely the same manner as if Anderson had obtained an order of the Court of that date attaching the rights and interests of Jhoomuk Chowdhry in his suit. I think that Anderson is in precisely the same condition as a creditor who has obtained an attachment by written order under the Act, in which case, undoubtedly, no subsequent purchase could be set up against the right of the attachment-creditor.

For these reasons I think that the order of the Principal Sudder Ameen directing that the decree be put up for sale, irrespective of the kubalas, is right, and that the appeal ought to be dismissed with costs.

I may observe that the question, whether the assignee of a decree takes it subject to the rights of set-off created by the first clause of Section 209, does not arise in this case (*see* 5 Weekly Reporter (Miscellaneous) 7; 6 Weekly Reporter (Miscellaneous) 72, and *ib.* 73).

Kemp, J.—I concur in this judgment.

The 1st March 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Jurisdiction of Civil Courts—Appointment of Manager by Court of Wards.

Case No. 277 of 1866.

Regular Appeal from a decision passed by the Officiating Principal Sudder Ameen of Mymensingh, dated the 9th May 1866.

Ranee Shurut Soonduree Debia (Plaintiff), *Appellant,*

versus

The Collector of Mymensingh, on behalf of Government, and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Debendro Narain Bose* for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondents.

Suit laid at Rupees 22,202-12.

The Court of Wards has authority, under Section 10, Regulation X., 1793, to determine the proper remuneration to be given to the manager of an estate under their charge, and the Civil Courts have no power to question the arrangements made by the Court of Wards.

Loch, J.—We dismiss this appeal with costs, as there are no grounds for interfering with the judgment of the Court below. The first point is abandoned by the appellant. The Court of Wards has, under the provisions of Section 10, Regulation X., 1793, authority to determine the proper remuneration to be given to the manager of an estate under their charge, and the Civil Courts have no power to question the arrangements that the Court of Wards may make.

The 1st March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Execution of decree—Claims to attached property.

Lowazima Miscellaneous Appeal from an order passed by Baboo Kedarnath Banerjee, Principal Sudder Ameen of East Burdwan, dated the 21st November 1866.

Greeja Bhoosun Mitter (Objector), *Appellant,*

versus

Kishen Kishore Ghosh (Decree-holder), *Respondent.*

Mr. C. Gregory for Appellant.

No one for Respondent.

A obtained a money-decree against *B* declaring certain properties belonging to *B* liable to be sold in satisfaction of it. Other decrees were subsequently obtained against *B*, in execution of one of which certain of these properties were sold (subject to the lien) and purchased by *A* himself, and, in execution of another, certain others were sold also (subject to the lien) and purchased by *C*. On *A* proceeding to execute his own

decree against *B*, *C* sought to have it declared that satisfaction should be entered upon it to the extent of the value of the property purchased by *A*. HELD that *C* was not entitled to appear in the execution-proceedings following upon a case to which he was no party.

AFTER consultation with one of my learned brothers, I have no doubt whatever upon this application. The case is this. One Kishen Kishore obtained a money-decree against Gyetree Debia, by which decree it was declared that 8 properties belonging to Gyetree would be liable to be sold in satisfaction of that decree. Subsequently, other decrees having been obtained against the same Gyetree, in execution of one of these, some of the properties in question were sold and purchased (subject to the lien) by Kishen Kishore himself; and, in execution of a second decree, certain others were sold also (subject to the lien) and purchased by the petitioner. It seems that Kishen Kishore is now proceeding to execute his own decree against Gyetree, and is executing it by the sale of the property which has been purchased by the petitioner. The petitioner applied to the Court below in the execution-case of Kishen Kishore *versus* Gyetree, to have it declared that satisfaction should be entered upon the original decree obtained by Kishen Kishore to the extent of the value of the property which Kishen Kishore had purchased. He admitted that the property which he himself had purchased was subject to the lien of Kishen Kishore's decree; but he contended that it was only subject to that lien to the extent of the balance after making allowance for the value of the property purchased by Kishen Kishore himself. This application having been refused by the Court below, he comes up here in appeal. The Deputy Registrar has refused to receive the appeal on the ground that the petitioner was no party to the execution-proceedings. It appears to me perfectly clear that the Deputy Registrar was right. The petitioner has acquired the rights of Gyetree in those properties which he purchased in execution. But he has not by that purchase acquired the right to represent Gyetree in the execution-proceedings on Kishen Kishore's decree. He might possibly have opposed the execution of that decree under Section 246 of the Code of Civil Procedure on the allegation that the property was in his hands, and could not be sold under certain circumstances. But that allegation he has not made, and, in fact, he admits that the property is liable to be sold. He might, also, if the property were taken and sold in satisfaction of Kishen Kishore's decree, possibly take other proceedings by regular civil suit against Kishen Kishore to establish his rights; but he certainly cannot be entitled to appear in the execution-proceedings following upon a case to which he was no party.

I cannot, therefore, order this appeal to be received as prayed.

The 1st March 1867.

Present :

The Hon'ble L. S. Jackson, *Judge*.

Appeal—Trial of separate issues.

Petition of the Court of Wards, as representing the estate of the late Rajah Pertab Chunder Singh, appealing against an order of the Judge of the 24-Pergunnahs passed on the 30th November 1866.

Mr. R. V. Doyne for the Petitioner.

An appeal will not lie from the separate determination of an isolated issue of law or fact before the taking of evidence on the remaining issues.

Deputy Registrar.—THIS is an appeal from an order in a *regular* suit passed in the course of the suit and relating thereto *prior* to the decree.

The suit is still pending on the file of the Lower Court.

According to the provisions of Section 363, Act VIII. of 1859, no appeal lies from any such interlocutory order, but "any error" or "defect," &c., in such an order, "affecting the merits of the case," &c., may be set forth as a ground of objection in the memorandum of appeal (from the final decree).

I beg to refer the appeal to the Judge presiding in the Miscellaneous Department for orders as to its admission or rejection.

Jackson, J.—In this case a suit was brought in the Civil Court of the 24-Pergunnahs against the late Rajah Pertab Chunder Singh, alleging him to have been a partner in the firm of Watson and Co., and seeking to make him liable for debts due from that firm. A separate issue was framed and tried by the Judge in the first instance, as to whether this defendant had, by his acts, made himself liable. The issue was decided in favor of the plaintiff, and the Court of Wards, representing the estate of the Rajah, seek to appeal against the decision.

I am of opinion that this appeal is not admissible.

The High Court at Madras, in a case cited in Mr. Broughton's Edition of the Code of Civil Procedure in a note on Section 332, observed that "it is a general principle of "law that no one is entitled to appeal unless "the right to do so is clearly given to him."

It will, therefore, be upon the Counsel for the petitioner to show that an appeal is distinctly given to him by the Code of Civil Procedure in this case.

I do not think that the terms of Section 363 of the Procedure Code referred to by the Deputy Registrar apply to this case. That Section appears to apply to what are commonly called interlocutory orders. That against which the petitioner now seeks to appeal is not, in this sense, an order passed in the course of a suit and relating thereto prior to decree. It is, in fact, a determination separately of one of the issues in the suit. That issue was one, the determination of which in favor of the defendant would have caused the dismissal of the plaintiff's suit, and would, therefore, have put an end to the proceedings. But, as it was only one of the issues in the suit, which the plaintiff had to substantiate, the judgment upon it alone in favor of the plaintiff would not, and could not, have been followed by a decree; and, in fact, the Judge then proceeded to require evidence on the remaining issues.

Appeals are allowed either against the decrees of Courts of Original Jurisdiction or against the decisions in regular appeal against orders of certain specified kinds. This is neither a decree nor a decision in regular appeal, nor one of the orders specified. Mr. Doyne observes upon the anomaly of leaving decisions of this kind without an appeal provided. The manner in which they came to be so left appears to me easily intelligible. The truth is that the Procedure Code has nowhere provided for the trial of a separate issue in a suit apart from other issues in the suit. The Code appears to contemplate that all the evidence in a suit should be heard, the exhibits perused, the witnesses examined, and the parties heard upon all the issues *seriatim*, and, when that has been done, the Court shall pronounce judgment. That is so provided by Section 183.

Section 186 then states that, "in all suits "in which issues have been framed, the "Court shall state its finding or decision "on each separate issue, unless the finding "upon any one or more of the issues be "sufficient for the decision of the suit."

In this case, if the Court, after having heard all the evidence, had been of opinion that the decision upon this one issue was sufficient for the decision of the suit, it might have contented itself with giving its determination on that issue; and, if that had been decided in favor of the defendant, the suit would have been dismissed, and thereupon the plaintiff, having had a final judgment given against him, would have been entitled to appeal.

Mr. Doyne refers to a precedent of this Court at page 91 of the 5th Weekly Reporter, and this precedent, he contends, is authority for the admission of an appeal in the present case. It appears to me that that case is clearly distinguishable from the present. In that case, the Court of first instance dismissed the plaintiff's suit on the ground of limitation. That decision having been taken in appeal to the Lower Appellate Court, that Court reversed the decision of the Court below, and remanded the suit for trial on its merits. A Full Bench of five Judges held, and most properly in my opinion held, that the decision of the Principal Sudder Ameen on the point of limitation "was not an order prior to decree." Clearly, that decision, although not a determination *of the suit*, was in the terms of Section 360—a determination *of the appeal*—because it reversed the decree of the Court of first instance, and ordered a trial upon the merits. It is quite clear that such a decision of the Appellate Court was a decree, or ought to have been embodied in a decree; and, if it was necessary to show that still further, it would appear from the terms of Section 351 which, being the Section relating to remands, says: "If the Lower "Court shall have disposed of the case upon "any preliminary point, so as to exclude any "evidence of fact which shall appear to the "Appellate Court essential to the rights of "the parties, and the decree of the Lower "Court upon such preliminary point shall "be reversed by the *decree in appeal*, the "Appellate Court may, if it think right to do "so, remand the case, together with a copy of "the *decree in appeal*, to the Lower Court," &c. That decree would unquestionably give the dissatisfied party a right to appeal specially to this Court. In the present case there has been no decree, and no determination of the suit, and, consequently, it appears to me that there cannot be, in this stage, any appeal to this Court.

It may be that to provide an appeal in exceptional cases of this kind would be a beneficial modification of the Code of Civil

Procedure. But it is for the Legislature to provide that modification, and not for the Courts to extend the Code by allowing a remedy not given by law; and obviously, before an appeal in such cases could be provided, it must be a course permitted by the Code to take up and decide separately in favor of plaintiff or defendant, an isolated issue of law or fact, before taking the evidence on the remaining issues.

This, as at present advised, I think, is not permitted by the Code.

The application before me is rejected.

The 1st March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Ministerial Officers (Appointment and removal of).

Petition of Kally Prosunno Chatterjee, appealing against an order of the Judge of Sarun, refusing to confirm him in his appointment as Nazir of the Court of the Principal Sudder Ameen of that District.

Baboos Poorno Chunder Shome and *Khetter Mohun Mookerjee* for Petitioner.

A Zillah Judge may refuse to confirm the appointment by a Subordinate Court of a disqualified person as a Ministerial Officer, or may rescind such an appointment if not made conformably to the rules prescribed by the High Court, and require the Subordinate Court to make a fresh appointment after observance of the rules. But he has no authority, after allowing an appointment to stand for 9 months, to displace the person so appointed, and to appoint another in his stead.

It appears to me that the order of the Judge in the case of the petitioner cannot be supported.

The appointment of nazir in the Principal Sudder Ameen's Court being vacant, the Principal Sudder Ameen issued a notification for the appearance of candidates, and on the 5th April last he selected the petitioner and appointed him to the office, transmitting the usual report to the Zillah Judge. The Zillah Judge, it appears, did nothing upon this report until the 29th December following, nearly nine months afterwards. During this time, I understand, the petitioner continued to discharge the duties of this office. On the date last mentioned, the Judge, taking into consideration the proceedings of the Principal Sudder Ameen and some other applications submitted both to the Principal Sudder Ameen and himself, recorded an opinion that the petitioner had not sufficient claims to be confirmed in the office, and that a preferable candidate was one Kassim Ali, who had been serishtadar in a Deputy Magistrate's office, and whose appointment had been, for some reason, abolished.

It appears to me that, in making this order, the Judge went beyond his authority. The purpose of requiring a report to be made by the Subordinate Courts of the appointments, which they make on their Ministerial Establishments, is to ensure compliance with the orders issued by this Court from time to time in such matters, and to provide against the appointment of improper persons.

I do not understand that, on receiving the report of the Principal Sudder Ameen, it would be competent to the Judge to review the proceedings of that officer, and to decide that some other person was the proper person to be appointed. If, indeed, a person, who was in any way disqualified from being appointed, had been chosen, the Judge might probably have refused to confirm his appointment; or if the rules prescribed by this Court for making appointments to the public service had been disregarded by the Principal Sudder Ameen, the Judge might rescind the appointment, and require the Principal Sudder Ameen to make a fresh appointment after observance of the rules. The Judge states in this case that the Principal Sudder Ameen had given too short notice for the appearance of candidates. The precise time is not stated; but it is quite clear that, if the time had been such as, in the opinion of the Zillah Judge, prevented candidates from coming forward, he might at once have annulled the proceedings, instead of allowing the appointment to stand for nine months, and then displacing the petitioner on the ground that another person was a preferable candidate.

The Judge says that the petitioner is a person of no experience. On the contrary, it appears that he has been, for some six years, in a more or less responsible character, serving under Government. The Principal Sudder Ameen, moreover, states that the petitioner is a person of intelligence and character; that he is quick at accounts; and that he enjoyed the special confidence of Mr. Macleod, the Deputy Collector, under whom he had been employed. It appears to me that an officer of that description, who has served for five or six years, was young, active, and trustworthy, and was quick at accounts, and who, besides his own vernacular language Bengali, had a competent knowledge

of English and Ordoo, was probably a preferable candidate to the person actually but irregularly appointed by the Judge.

For these reasons it appears to me that the Judge's order must be set aside, and the petitioner restored to the office to which he was appointed by the Principal Sudder Ameen.

I would remark on the hardship of allowing petitioner to stand appointed to an office for nine months, and then suddenly displacing him on such grounds as have been stated.

The 1st March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Jurisdiction—Appeal to Privy Council—Execution of decrees.

Hubeeboollah Khan, *Appellant to England,*

versus

Khajah Gowher Ali Khan and others, *Respondents to England.*

Moonshee Ameer Ali and *Baboo Romanath Bose* for Appellant.

Zillah Courts ought to hold their hands and refer to the High Court parties applying for execution of decrees which have been appealed to England.

LET a copy of the petition be sent to the Zillah Judge, with instructions to stay proceedings if the facts be as stated in the petition. No copy of the Judge's order has been laid before me, in which it appears that the Judge has refused to comply with the application. But, if the facts be as stated, the Judge should have been aware that, in such cases, it is the business of the Zillah Court to hold its hand, and to refer parties applying for execution of decrees which have been appealed to England, to this Court.

The 1st March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Purchaser of property in litigation—Reversal of sale—Mesne-profits.

Case No. 378 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 15th August 1866.

Umamoyi Burmoneea (Plaintiff), *Appellant,*

versus

Tarini Prasad Ghose (Defendant), *Respondent.*

Baboos Dwarkanath Mitter and *Umbica Churn Banerjee* for Appellant.

Baboo Obhoy Churn Bose for Respondent.

The purchaser of property actually in litigation, *pendente lite*, need not be made a party to the suit. The title acquired by the purchaser is subservient or subject to the rights of the parties in litigation.

A person cannot discharge himself from legal liability to refund moneys which he has received belonging to one man of whose title he has notice, by paying them to another.

Where a purchaser, by the institution of a suit for the reversal of the sale, had full notice of the defect of his title, the sale having been reversed in that suit, he was held liable for mesne-profits.

Norman, J.—THE plaintiff, who was ousted by her co-sharers in 1851, had brought a suit for the recovery of her share, and obtained a final decree in her favor in the late Sudder Court, on the 31st of December 1859, for possession with mesne-profits. Against this decision an appeal was presented to Her Majesty in Council, which was struck out on the 2nd of November 1863.

Pending the above litigation, a putnee talook, one of the subjects of the suit, was sold under Regulation VIII. of 1819, and purchased by the defendant in May 1858. In February 1859, Chunder Mohun and others, the plaintiff's co-sharers, brought a suit to set aside the sale of the putnee for irregularity, and obtained a decree on the 23rd of June 1863.

On the 11th of June 1866, the plaintiff brought the present suit for mesne-profits from May 1858, the date of the defendant's purchase, till April 1862.

The Principal Sudder Ameen dismissed the plaintiff's claim. He says that "the "talook was sold by auction, and purchased "by the defendant during the plaintiff's "dispossession from her share in it by her "co-sharers. It was not at all known at "the time that the plaintiff was a sharer. "On the 31st of December 1859, a final "decision was passed declaring her to be "a sharer, as appears from page 1659 of the "printed Reports of that year. Also wasi-"lat of the entire property, which was the "subject of that suit, has been awarded "against plaintiff's co-sharers. Under such "circumstances the plaintiff is entitled "to claim wasilat from her co-sharers only, "and not from the defendant. Further, as

"the decree by which the auction-sale has "been set aside, and defendant made liable "for wasilat, recognizes the right of five "co-sharers, and it is proved that the defend- "ant paid wasilat to all the co-sharers, it "was wrong and improper for plaintiff to "claim wasilat from the defendant when she "was entitled to receive it from her co- "sharers."

The plaintiff appeals.

Of the issues laid down by the Principal Sudder Ameen, the first which remains to be tried is, whether the plaintiff's claim or any part of it is barred by limitation.

It is admitted that the claim for wasilat for the years 1265 and 1266, having accrued more than six years before this suit, is barred.

As to the residue, several questions arise: *First.*—The plaintiff, who has been out of possession from the year 1851, did not bring this suit against the defendant till 1866; it may be suggested that, if a suit for possession would have been barred by limitation, the claim to wasilat, which is a mere incident of the right of possession, is barred also.

Secondly.—As the plaintiff's right is based on the assumed invalidity of the sale to the defendant, it may be suggested that the plaintiff, under Clause 3, Section 1 of Act XIV. of 1859, was bound to have sued within one year from the time when the sale became final.

The answer appears to be that the defendant having purchased *property which was actually in litigation* during the pendency of the suit, the plaintiff was not bound to make him a party to the suit. The title acquired by the defendant was subservient or subject to the rights of the parties in litigation. He was bound by the decree in the suit (*see* Story's Equity Jurisprudence, Sections 405, 406).

The rule appears to me not to be confined to purchases *from the parties to the litigation.*

It follows, then, *first*, that the defendant could not set up as a defence that the possession of his predecessors in the actual possession of the putnee, the plaintiff's co-sharers, was adverse to the plaintiff from 1851 down to the time when he himself acquired possession as a purchaser of the putnee tenure.

Secondly.—That, after the reversal of the sale, the defendant could not set up that he had no knowledge of the title of the plaintiff as a co-sharer. If he chose to pay the entire profits to the other five co-sharers, it was his own fault. A person cannot discharge himself from a legal liability to refund moneys which he has received belonging to one man, of whose title he has notice, by paying them to another.

The next point is, was the plaintiff, who had not herself sued to set aside the sale within one year, entitled to maintain this action?

It has been decided in numerous cases that one of the several parties, co-sharers in a putnee or dur-putnee talook sold for arrears of rent, or an estate sold for arrears of revenue, can sue for and may be entitled to maintain a decree for the reversal of the sale of such talook or estate.

In the case of Tarinee Pershad Ghose *versus* Baney Madhub Panday, 24th March 1865, 2 Weekly Reporter, page 248, it has been expressly decided by a Division Bench of this Court that the decree obtained by Chunder Mohun setting aside the sale under which the present defendant acquired his possession was a decree reversing the sale of the entire talook. If so, the plaintiff can avail herself of the decree obtained in that suit; and, as that suit was brought in due time, it is not open to the defendant to contend that the now plaintiff cannot question the sale, because no suit to reverse it was brought by her within one year.

Lastly.—As to the plaintiff's right to mesne-profits generally. We were referred to a case, Ranee Shurnomoyee *versus* Pertap Chunder Burrooa, S. D. Decisions for 1858, page 520, where the Court say: "We think, in "accordance with other systems of law, and "in opposition to the English doctrine on "the point, which recognizes no distinction, "that the period from which mesne-profits "should be granted must be determined by "the nature of the possession of the opposite "party, whether it be a *bonâ fide* posses- "sion or not—that is, a possession without "knowledge on the part of the possessor of "the defect of his own title. So long as a "party has a *bonâ-fide* possession in the "sense above given, we think he is not liable "to the legitimate owner for mesne-profits. "Immediately, however, he has notice of the "defect of his title, either by the institution "of a suit in Court for the recovery of the "land by another party claiming it as his "own, or in any other way, he ceases to be "a *bonâ-fide* possessor."

Without expressing any opinion as to whether that rule, which is in accordance with the principles of the Civil Law (*see* Domat Sections 1982, 1983 1984, &c.:

Digest, Book 22, Tit. 1, Section 25, § 1; Book 41, Tit. 1, Section 48) is correct or not, I may observe that it will not assist the defendant in the present case; because the institution of the suit for the reversal of the sale gave him full notice of the defect of his title more than six years before the present suit.

For these reasons I think that the plaintiff has a right to mesne-profits from the beginning of the year 1267, *i. e.*, from June 1860. The case must be remanded to the Lower Court to enquire into the amount thereof.

The suit will stand dismissed as to the mesne-profits of 1265 and 1266, and, in fact, as to all profits received prior to the 11th of June 1860.

The defendant will get his costs in all the Courts in respect of his answer to this portion of the claim.

These costs will be determined by the Lower Court, and dealt with by the ultimate decree.

Seton-Karr, J.—The facts out of which the present suit arises, though somewhat complicated, are not disputed, and are as follows:—

The plaintiff is the daughter of Bhoyrub Chunder Roy, one of six brothers who were known as the Nikasipara zemindars. As heir to her father, she, in 1855, brought a suit for the recovery of her share in the various property of the family, from which she had been dispossessed in 1851, and she gained a decree in the late Sudder Court on the 31st of December 1859, page 1659, S. D. A. Rep. By this she was to get possession of a share of *2a.* 13*g.* 1*c.* 1*k.* in the property of the family, which was thus declared divisible into six, and not into five shares.

Pending the above litigation, the putnee talook in regard to which the suit before us was brought was put up to sale for arrears of rent under Regulation VIII. of 1819, and was bought by the defendant Tarini Pershad on the 1st of Joisto 1265, or in May 1858.

Chunder Mohun Roy and others, being the shareholders of 5-6ths of the property, then sued, on the 5th of February 1859, to set aside the sale of the putnee, on the ground of irregularity, and obtained a decree to that effect on the 23rd of June 1863. The same shareholders, representatives of the five original brothers of the family, and as holders of five shares, appear to have next brought various suits for the mesne-profits of the estate accruing during the period, when the defendant, Tarini Pershad, was in possession by virtue of the sale, which was formally set aside by the decree of June 1863. These suits appear to have been compromised some time in Bysack 1272, and the defendant paid over mesne-profits to the plaintiffs in those suits.

On this state of things, the plaintiff, representing the sixth share in the putnee talook, has brought her suit against the same defendant, the purchaser of the putnee, for mesne-profits from 1265 to 1268; and the Lower Court has dismissed the suit, holding that, as regards the first two years 1265 and 1266, it is barred by limitation; that, when the sale took place, the plaintiff was out of possession, and that the defendant did not then know that she was a sharer. Finally, the Lower Court rules that the plaintiff may claim mesne-profits from her co-sharers, but that she has no right to claim it from the defendant.

In appeal against the dismissal, Baboo Dwarkanath Mitter, the pleader for the plaintiff, appellant, admits that there is nothing to be said as regards the years 1265 and 1266, inasmuch as the suit has been brought after the expiration of six years; but, as regards the subsequent years, Baboo Dwarkanath Mitter argues that there is no proof that the whole of the mesne-profits, representing six shares, was paid to, and taken by, the five co-sharers; and that, even if there were such proof, the defendant had no business to pay the plaintiff's share to the other shareholders, he having purchased, as the defendant did, with the full knowledge of the claim advanced by the plaintiff to her father's share in the property.

We have heard both sides at sufficient length; but, for my own part, I am clearly of opinion that the plaintiff has a right of action, and has brought her suit correctly, and that the case should be remanded to the Lower Court to ascertain and fix the amount of mesne-profits due to the plaintiff from the defendant. No evidence has been adduced on this head as yet.

In the first place, there is great weight in the contention for the appellant that the defendant bought with full knowledge of the plaintiff's claim. Her *lis pendens* was a declaration of her claim to all the world (*see* Story's Equity of Jurisprudence, Sections 405, 406). The Principal Sudder Ameen appears to me to be clearly wrong in laying stress on the fact that the plaintiff was no party to the decision which reversed the

sale of the putnee talook. It has been held by a Divisional Bench of this Court (Weekly Reporter, Vol. II, p. 240, 24th of March 1865) that a decision reversing a sale is in the nature of a judgment *in rem*; and the plaintiff appears to me as fully entitled to any claim she might prefer out of the reversal of the sale, as if she had actually joined the other five co-sharers in their suits.

Her own rights had previously been ascertained and settled by the judgment of the S. D. A. of December 1859.

In this state of things it is vain for the defendant to contend that he purchased at a putnee sale in the Collectorate, and in perfect good faith, and that he is not a wrong-doer. That he has not unjustly dispossessed the plaintiff, as the co-sharers have done, may be perfectly true. But the defendant was bound to take notice of the plaintiff's claim, publicly brought forward in a Court of Justice at the time of his purchase, and not long after recognized by the highest Court in the country; and the defendant had no business to pay away the plaintiff's share to the other shareholders. It is clear to my thinking that, if he did so pay six shares to five men when, under the razeenamahs, he ought to have only paid them five shares, he is still bound to make good her share to the plaintiff. If he only paid five shares, he is the more bound to pay up the sixth. This may be somewhat hard on the defendant; but it appears to me sound law, and a doctrine which the Courts are bound to recognize.

Of the cases quoted by the defendant's pleader as against the plaintiff's claim, *viz.*, S. D. A., 1850, p. 462; 1851, p. 748; and 1858, p. 520; the first two are not in any way in point, and the last is really against the defendant, for the Court there say that immediately a party "has notice of the "defect in his own title, either by the insti- "tution of a suit in Court, *or in any other* "*way*, he ceases to be a *bonâ-fide* posses- "sor." The case quoted from Hay's Reports, Vol. I., p. 268, is not at all in point, for in that case it was merely a question of responsibility on the part of the chief agent.

In this view of the case I would set aside the decision of the Lower Court, would declare the plaintiff entitled to her share in the mesne-profits from 1267, and would direct the Court to take evidence as to the amount of mesne-profits, and to record a fresh judgment on this point alone.

The 2nd March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Vakeels of High Court (entitled to appear in Calcutta Small Cause Court)—Power of High Court (to issue Mandamus to that Court).

Petition of Toolsee Doss Seal, a Vakeel of the High Court, dated the 28th February 1867.

Baboo Dwarkanath Mitter for Petitioner.

Vakeels of the High Court are entitled to be heard in the Calcutta Small Cause Court.

The High Court has the power to issue a mandamus to that Court for the purpose of compelling it to act conformably to law.

The Petition was as follows:—

"That on Tuesday, the 26th instant, your petitioner appeared as a pleader in the Calcutta Small Cause Court on behalf of the plaintiff in the case of Gooroo Doss Seal *versus* C. N. Mayer.

"That, upon your petitioner rising to address the Court on behalf of his client, the presiding Judge, Mr. Fagan, took a preliminary objection to your petitioner's right to appear and plead in that Court on behalf of any suitor, assigning, as his reason for refusal, that your petitioner was neither Barrister nor Attorney of the High Court, nor a pleader of the Small Cause Court, whereupon your petitioner retired, and the plaintiff conducted his own case in person.

"That, with reference to the objection so taken by Mr. Fagan, your petitioner submits that, as a vakeel of the High Court, your petitioner has, under Section 45 of Act XX. of 1865, the right and privilege of appearing and pleading in any Court in British India subordinate to the High Court, the Small Cause Court of Calcutta not being exempted.

"Your petitioner, therefore, humbly submits his case to your Lordships' consideration, and prays that such order as to your Lordships shall seem meet may be passed with the view of determining whether your petitioner and the other pleaders of the Appellate High Court are or are not eligible to practise as pleaders of the Small Cause Court."

h

The judgment of the High Court was delivered by—

Peacock, C. J.—Section 45, Act XX. of 1865, enacts as follows:—

"Every person now or hereafter enrolled as an advocate or vakeel on the Roll of any High Court under the Letters Patent constituting such Court shall, notwithstanding anything hereinbefore contained, be entitled as such to practise in any Court in British India other than a High Court on whose Roll he is not enrolled, or in any such Court, with the permission of the Court, and in any revenue office, subject, nevertheless, to the rules in force relating to the language in which the Court or office is to be addressed by pleaders or Revenue Agents. Provided that no such vakeel shall be entitled to practise under this Section before a Judge of the High Court, Division Court, or High Court exercising original jurisdiction."

Now, the Small Cause Court is, beyond all doubt, a Court in British India, and it is not a Court falling within any of the Exceptions referred to in the above Section. Further, by Section 47, the Act is to take effect in the territories under the Governments of the Lieutenant-Governors of Bengal and the North-Western Provinces respectively.

It is quite clear, then, that the Small Cause Court in Calcutta is a Court within the meaning of Section 45 in which vakeels of the High Court have a right to practise.

The Judge of the Small Cause Court refused to hear a gentleman who had been admitted and was on the Rolls of the High Court as a vakeel of the High Court. He went on and determined the cause in favor of the client of that vakeel. Consequently, it is unnecessary, and it would be useless and improper for us now, to issue a mandamus to the Small Cause Court commanding it to hear the vakeel in that case. But, if the case were still pending, and the Judge of the Small Cause Court still refused to hear him, we think that this Court would have the power, under the law now in force, to issue a mandamus commanding the Judge of the Small Cause Court to do that which it was bound to do by law, namely, to hear the vakeel.

The Small Cause Court of Calcutta was substituted for the Court of Requests which existed at that time, and is, as I understand the law, the same Court under a new name and with a different procedure and jurisdiction. The recital of Act IX. of 1850, by which the Court was established, declared that it was expedient to amend the constitution and practice, and to extend the jurisdiction of the several Courts established at Calcutta, Madras, and Bombay, for the recovery of small debts; and Section 1 enacted that the several Courts of Commissioners and of Requests for the recovery of small debts then holden in the Towns of Calcutta, &c., should be holden according to the provisions of that Act from and after such several days as should be declared within the said Towns by proclamation, &c.

Then Section 4 said: "The style of the several Courts holden under this Act shall be the Courts of Small Causes," &c.

I am of opinion that Section 21 of the Charter of the late Supreme Court is applicable to the Small Cause Court in Calcutta. That Section of the Charter ordained that, to the end that the said Court of Requests might better answer the ends of its institution, the said Court should be subject to the Supreme Court of Judicature at Fort William in Bengal, in such sort, manner, and form as the inferior Courts and Magistrates of and in that part of Great Britain called England are by law subject to the order and control of the Court of King's Bench; to which end the said Supreme Court of Judicature at Fort William in Bengal was thereby empowered and authorized to award and issue a writ or writs of mandamus, &c., directed to such Court, and to punish any contempt of a wilful disobedience thereunto by fine and imprisonment.

By Section 9 of the High Court Act (the 24 and 25 Vic., c. 104) it is enacted that each of the High Courts to be established under this Act should have and exercise all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of Original Civil and Criminal Jurisdiction beyond the limits of the Presidency Towns as might be prescribed thereby; and, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency should have and exercise all jurisdiction and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under this Act

at the time of the abolition of such last-mentioned Courts.

The Supreme Court was one of the Courts which were abolished, and we have shown that the Supreme Court, at the time of its abolition, had the power of issuing a mandamus to the Small Cause Court for the purpose of compelling it to act conformably to law.

We, therefore, think that this Court has the power to issue a mandamus to the Small Cause Court in Calcutta, to compel it to hear in a suit pending before it a vakeel of this Court. But, as the client of the vakeel in question has succeeded in his case, it is unnecessary for us to take any further measures, or to issue a mandamus to the Small Cause Court in this particular case.

We have no doubt that, after this intimation of the opinion of the High Court, the Judge of the Small Cause Court will re-consider the matter, and probably will come to the same conclusion as that at which this Court has arrived, namely, that vakeels of the High Court are entitled to be heard in the Small Cause Court.

The 6th March 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Judges.

Possessory suit—Section 15, Act XIV. of 1859—Onus probandi.

Case No. 2401 of 1866.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 22nd August 1866, reversing a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 9th February 1866.

Moulvie Maenooddeen (Defendant),
Appellant,

versus

Greesh Chunder Roy Chowdhry and others (Plaintiffs), *Respondents.*

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter* and *Romesh Chunder Mitter* for Appellant.

Baboos Sreenath Doss, Bhuggobutty Churn Ghose and *Chunder Madhub Ghose* for Respondents.

In a suit to establish title and recover possession from a person who has obtained possession under Section 15, Act XIV. of 1859, the defendant need not prove his title, and his possession cannot be dist the plaintiff gives proof of a better titl being on the plaintiff to prove everything.

Loch, J.—We think that the looked at this case from a wrong view. He has expected the def prove his title, whereas it was for t iff to prove everything. The obtained possession, rightly or under an order of the Moonsiff, accordance with the provisions of 15, Act XIV., 1859, and his possess not be disturbed, unless plaintiff gi of a better title. The Judge refer evidence of plaintiff's possessio though possession may, to a certai be an evidence of title, nothing as t iff's title has been found in this ca Judge has been satisfied with reco opinion that plaintiff had possessio even that possession appears to ha held jointly with the Collector fro defendant partly derives his title. Judge has also thrown the burden on the defendant which he should n done. Plaintiff must prove his title julkurs in dispute, clearly and fully, the Judge can look into the defe title. If he think that the plaint made out his case, he will call upon fendant to rebut it and substantiate h title. We remand this case to be di of in an entirely fresh judgment, with ence to the above remarks.

The 6th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macp
Judges.

Mesne-profits (Mode of calculating).

Case No. 875 of 1866.

Miscellaneous Appeal from an order ed by the Judge of Purneah, date 5th September 1866.

Mr. Charles Palmer (Decree-holder)
Appellant,

versus

Mohunt Bal Gobind Doss (Judgment-deb
Respondent.

Mr. C. Gregory and *Moonshee Ameer* for Appellant.

Mr. R. V. Doyne for Respondent.

In estimating the amount of mesne-profits w decree-holder could not give satisfactory evide to the rates at which he received rents and the tions he made, the judgment-debtor was held lia

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the amount stated in the Collector's jummabundee *minus* the cost of collection, leaving him to recover from Government what he has paid on account of revenue unless the sums so paid had already been refunded by Government to the decree-holder.

Loch, J. (Macpherson, J., concurring).—Looking at the jummabundee upon which the settlement of this estate is based, and which affords the only reliable clue to the assets of the estate, it is evident that the rates claimed by the decree-holder and even the average rate of Rupee 1 per beegah proposed to be given by order of the Judge, are too high, and not such as were realized from the tenants. The jummabundee was prepared in 1841, and the petitioner is entitled to mesne-profits for the period from 1842 to 1848. The assets, as shown by the jummabundee, amount to Rupees 2,807-4-2. Deducting from this the sum of Rupees 1,085, the revenue summarily settled, and Rupees 14-5 on some other account as done by the Judge, there remain Rupees 1,721-5-9, which the Judge describes as the rent to be paid by the Mohunt to Government. The principal upon which the Judge has estimated the amount of mesne-profits is not very clear. If the decree-holder cannot give satisfactory evidence as to the rates at which he received rents and the collections he made, the Collector's jummabundee may be accepted as giving the best approximation of the rates at which the tenants held the lands. Now, that jummabundee shows, according to the Judge, a gross assessment of Rupees 2,807-4-2, out of which had to be paid the charges of collection of the Government revenue. Deducting these, what remained as profit to the judgment-debtor? Nothing as far as I am able to make out, for the Judge says, as observed above, that from the jummabundee of Rupees 2,807 have to be deducted Rupees 1,085, the summary jumma, and another small item, leaving a balance of Rupees 1,721-5-9, which also is said to be the Government revenue. It appears to me that the judgment-debtor must be held liable for the amount of the jummabundee *minus* the cost of collection; and that, as the lands in question have been declared by the decree of the Privy Council and of the late Sudder Court to form part of a permanently-settled estate, he must pay over the balance to the decree-holder, applying to Government to recover with interest any sums paid by him on account of revenue. On the imperfect data before us, I see no other means of assessing mesne-profits, and a local investigation after so many years have passed could lead to no satisfactory results. I have made use of the figures which I have found in the Judge's own proceeding. These may or may not be quite correct; but the principle upon which I would give these mesne-profits would be by taking the Collector's jummabundee as the foundation, and making the judgment-debtor liable for the amount *minus* charges of collections, leaving him to recover from Government what he has paid on account of revenue, unless sums so paid have been already refunded by Government to the decree-holder. The case is remanded that the mesne-profits may be calculated accordingly.

The 6th March 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Limitation—Alluvial Land—Possession.

Case No. 2652 of 1866.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 18th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 1st February 1866.

Luckhee Debia Chowdhrain and others (Plaintiffs), *Appellants,*

versus

The Collector of Mymensingh and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Appellants.

Baboos Juggodanund Mookerjee, Sreenath Doss, and *Luleet Chunder Sein* for Respondents.

Limitation or adverse possession as to *chur* land may commence directly the land is in existence, and not from the time at which it becomes culturable—any proof of ownership would be sufficient to show possession.

Glover, J.—This was a suit to recover possession of certain chur lands as appertaining to plaintiff's Mouzahs of Gajoor and Gultea which had been finally diluviated in 1853.

The defendant in possession claimed them as portions of his diluviated Mouzah Katoree,

The Judge found that the plaintiff's suit was barred by limitation.

We see no reason to interfere with this finding in special appeal. The special respondent is admittedly in possession of the disputed land, and claims to have held it adversely to the special appellant for more than 12 years. Special appellant contends that limitation did not begin to run until such time as the chur lands became culturable; and that, as these lands did not become culturable until 1856, he is still in time.

But this is an error. Possession of land can commence directly the land is in existence, and does not date from the time on which it becomes culturable. Any proved act of ownership would be sufficient to show possession. Many churs, which are not, and will not be for years, culturable, yield *jow* and other brushwood with reeds which are valuable, and the right to which is often contested in districts like Mymensingh.

In the present case the Judge has found as a fact that the plaintiff has not been able to show possession any time within 12 years; in fact, that he has not shown any possession at all, whilst the defendant is and always has been in possession of the disputed chur —and with this finding no interference is possible in special appeal.

We, therefore, reject this application with costs.

The 6th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Money-decree—Property hypothecated for debt.

Case No. 3006 of 1866.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 13th August 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 25th April 1865.

Sheo Prosun Singh (Defendant), *Appellant,*

versus

Brojoo Sahoo (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Khetternath Bose* for Appellant.

Baboo Kalee Kishen Sein for Respondent.

Where property hypothecated for a debt is sold in execution of a money-decree passed under the bond hypothecating it without any additional order in the decree for enforcing the lien on the property, and the holder of a subsequent similar bond, who has obtained an order on his decree, directing the sale of the property, seeks to enforce *his* lien upon the property so purchased, the purchaser is entitled to go on the previous lien, as he not only stands in the shoes of the debtor, but has purchased all rights in the property hypothecated by the debtor when his hypothecation was made, and has thus also acquired the rights of the decree-holder to satisfy whose due the property was sold when this purchaser purchased.

Pundit, J.—THE special appellant urges that the plaintiff in this case is not entitled to enforce his lien on a bond (which bond is of subsequent date to that held by the special appellant) against the property of the special appellant.

It is a fact admitted that the special appellant purchased the property in execution of a decree obtained by a decree-holder for a debt due under a bond, hypothecating for the said debt the property itself, *before* the hypothecation of the same to the plaintiff, special respondent, under *his* deed.

This decree did not specify that the property was to be sold in execution of the decree. Plaintiff also obtained only a money-decree under his deed of date (as above stated) subsequent to the date of the bond given to the decree-holder at whose instance the property in dispute was sold. Plaintiff now sues the defendant, special appellant, as the party in possession of the property, and claims to enforce his own lien against the land in dispute. Plaintiff states that, though defendant purchased in execution of the decree the property in dispute, he did so only as property then hypothecated to plaintiff. Plaintiff urges that, there being no order in the decree to enforce the lien on the property, special appellant purchased only in execution of a decree for money, and so has purchased only the rights of the debtor as existing at the time of the sale, before which time there was the hypothecation to the plaintiff, and therefore defendant did not purchase any rights as existing in the debtor before the execution of the first bond. Plaintiff refers to several decisions of this Court which

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on the whole we read to decide that, when there are two creditors, each of whom by the terms of their respective bonds of different dates hold a lien upon a certain property as security for their respective debts, and the holder of the subsequent lien has obtained an order (either in the original decree or in an additional decree) declaring the property hypothecated liable to be sold in execution of *his* decree; whilst, on the other hand, the other creditor holds only a money-decree, the former is first entitled to sell the property hypothecated for the realization of *his* dues. These decisions, however, do not show that the latter cannot afterwards, on obtaining another decree directing the enforcement of his lien upon the said property, execute his lien against the said property, notwithstanding that it had been already sold before, because it is, of course, clear that a subsequent lien can never override, or extinguish, or prejudice the previous one.

These decisions also rule that, when a creditor under a bond hypothecating property obtains *only* a money-decree, he cannot execute his lien as against the property through that decree against a stranger who, subsequent to the creation of the lien, may have obtained the possession of the property; but that the decree-holder must proceed by fresh suit against such stranger also, and obtain a decree to enforce the lien against the property.

These decisions further show that the lien, as a lien, can never be extinguished until the debt is satisfied, or becomes affected by limitation. Further that, if a subsequent suit is brought by a creditor, who at first took out only a money-decree, or relief on the terms of the lien is asked against a third party on the ground of his being then in possession of the property hypothecated, in both cases, such third party is empowered to impeach the validity of the debt itself.

In this case plaintiff had impeached the validity of the debt alleged to be due to the special appellant, and, as a matter of fact, that plea was decided against the plaintiff.

But the Court's decisions do *not* rule that, when the property hypothecated is held by the debtor and is sold in execution of a money-decree (passed under a bond hypothecating it) without any additional order in the decree for enforcing the lien on the property, the purchaser in this sale is not in such a case competent to plead his previous lien with a view to obtain the property, when the holder of a subsequent bond seeks to enforce *his* lien decreed against the property.

It is argued by the plaintiff, special respondent, that such rights cannot be pleaded until an additional decree is obtained, and that, in fact, there can be no such right at all, as the lien is no longer in existence, having been extinguished by the sale made in execution of the previous decree.

We do not accept this argument. On the contrary, we think that both the decree-holder as well as the purchaser are entitled to go on their previous lien, because the first *held* it, and because the latter has paid the money by which the lien in favor of the former has been satisfied.

It is clear that the lien was a security for the realization of the debts *first* incurred by the debtor, with an agreement by him not to injure, by any subsequent act of alienation or incumbrance, the rights of the first creditor secured by this hypothecation of the property.

The special respondent then argues that the special appellant as a purchaser has not the same status to plead that the decree-holder would have (if his debt was not satisfied) against the validity of the subsequent hypothecation.

We hold that the purchaser does not only stand in the shoes of the debtor, but has purchased all rights in the property as hypothecated by the debtor when the first hypothecation was made, and has thus also acquired the rights of the decree-holder.

We may add that, if the purchaser had never been recognized as holding such rights, he would never be permitted to sue (as he is daily done by our Courts) to set aside fraudulent conveyances or leases made by the debtor previous to the sale in execution.

Our views in this matter are confirmed by the two decisions of this Court reported in page 110, Vol. III., and page 45, Vol. IV. of the Weekly Reporter.

This being our view on the facts here, it is not necessary, as it otherwise might have been, to examine the correctness or otherwise of the decisions of the Lower Appellate Court in respect to the *onus* on the issue of fraud, and the view of that Court requiring from the plaintiff more strict proof of his purchase being *bonâ fide*.

We, therefore, decree the special appeal with costs; and, reversing the decision of both the Lower Courts with costs, we uphold the decision of the Court of first instance, by which the claim of the plaintiff has been dismissed with costs.

The 6th March 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Suit for kubooleut at enhanced rent—Inconsistent claims to enhancement.

Case No. 2594 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 12th August 1866, reversing a decision passed by Baboo Chunder Mohun Roy, Deputy Collector of that District, dated the 31st May 1866.

Sreesh Chunder Doss, agent on behalf of Soodha Monee Dossia (Plaintiff), *Appellant,*

versus

Assimonissa and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Baboo Pearee Lall Roy for Respondents.

In deciding a suit for a kubooleut at enhanced rent for 5 years, the probable result of an exceptionally bad season should not be taken into consideration, but the average of the past 5 years.

Claims to enhancement on the basis of "increased produce" and "increased value of produce" are inconsistent and incompatible with one founded on an inequality between the rent paid by a tenant in the estate and that paid by a tenant on a neighbouring estate.

Glover, J.—This was a suit for a kubooleut at enhanced rent. The grounds of enhancement in the plaint were that the productive powers of the land had increased; that the value of the produce had increased; and that the rates paid were less than those of neighbouring ryots of the same class. There was also an allegation that the ryot held more land than he was entitled to.

The defendant set up various pleas: he claimed to hold the land at a "mokurruree" rent; declared that the productive power had not increased; and that, even had the value of produce increased, the zemindar could not sue him for the difference.

The Deputy Collector disposed of the plea of mokurruree adversely to the defendant, and for the rest (after deputing an Ameen to the spot) decreed for the plaintiff at rates considerably over what had heretofore been paid by the ryot.

Both parties appealed to the Judge who decided that the rent could not be enhanced at all.

We are of opinion that the Judge's decision was wrong and must be reversed. The plaintiff claimed a kubooleut for five years, and the Judge should have looked at the case with reference to that claim. Instead of doing so, he takes the plaint as a suit for a kubooleut for the current year only; and finding, when he tried the case, which was in the month of August, that the rains had been scanty, and the inundation low, and that there was no prospect of a good crop that year, dismissed the plaintiff's claim, arguing that, as there would be no increased produce that year, no enhancement was possible. Had the suit been merely for a kubooleut for the current year and no more, this reasoning might have been correct. But it was manifestly improper to decide a claim for a five years' kubooleut in this way, or to take the probable result of an exceptionally bad season, as a ground for refusing enhanced rent for five subsequent years, during which a copious rainfall and a high inundation might have altogether changed the ryot's prospects. The Judge ought to have taken the average of the past five years, and not that year only in which the suit was brought.

But we also think that the plaintiff must fail, to a certain extent, from the way in which he has chosen to bring his case. A claim to enhancement based on the increased productive power of land, or on the increased value of its produce, can only take effect in cases where the neighbouring rates of rent have not accommodated themselves to the altered state of circumstances—where, in short, all the ryots together are paying less than the fair rate of rent; and to such cases, the principle of the Full Bench Ruling of the High Court in the case of Thakooranee Dossee would apply. But where there already exists a guide to what is a fair rate of rent, the precedent is inapplicable.

Now the plaintiff, by asking in his plaint that the defendant should be made to pay the same rent as ryots in the neighbourhood, accepted that rent as a fair one, and one which had adapted itself to the alle[illegible] altered circumstances of the land, and th[illegible] by gave the go-by to his other ground[illegible] enhancement.

It is true that all three grounds entered in the plaint; but Section 17, Act [illegible] of 1859, in allowing a zemindar such a wid[illegible] latitude as to his grounds of enhancement, did not contemplate his using inconsistent or incompatible grounds. And we consider that claims to enhancement on the basis of "increased produce," and "increased valu[illegible]

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of produce," are inconsistent, and indeed incompatible with one founded on an inequality between the rent paid by a tenant on the estate, and that paid by a tenant on a neighbouring estate.

What the Judge ought to have done in the case as made by the plaintiff was to find whether the defendant paid a less rent than neighbouring ryots of the same class, for the same description of land. The Court of first instance took this point up and decided it, so that no further enquiry would seem to be necessary. The case will go back to the Judge for a determination of this issue on the evidence recorded by the Deputy Collector; and the costs in all Courts will follow the result of his decision.

The 7th March 1867.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Enhancement—Casual increased fertility of the land.

Case No. 2901 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 24th July 1866, reversing a decision of the Deputy Collector of that District, dated the 17th April 1866.

Kristo Mohun Pattur (Defendant), *Appellant,*

versus

Huree Sunkur Mookerjee (Plaintiff), *Respondent.*

Baboo Poornoo Chunder Shome for Appellant.

Baboo Nil Madhub Sein for Respondent.

A casual increase in the fertility of land is not a ground for permanent enhancement of rent.

Jackson, J.—This case has been very well argued by Baboo Poornoo Chunder [illegible]me for the appellant, and must be ad[illegible]ed to be a case not altogether free from [illegible]culty. But it appears to me that our [illegible]sion upon the special appeal may pro[illegible] upon a somewhat simple ground.

The notice of enhancement in this case was to the effect that, as the productive powers of the land had been increased from circumstances independent of the ryot's labor and expense, consequently the lands were not paying, and ought now to pay rent at the pergunnah rates, by which expression, possibly, the plaintiff meant rates equal to those paid for lands of a similar description and with similar advantages in the neighbourhood. An Ameen was deputed, and he measured the land, enquired into the rates, and made a report. The Deputy Collector, who tried the case, professing to agree entirely with the report of the Ameen, decided against the plaintiff, holding that there was no ground for enhancement of the defendant's rent. The case coming in appeal before the Zillah Judge, he also agreed so far with the Ameen that he thought the Ameen had given good grounds for enhancing the rent, and he therefore reversed the decision of the Deputy Collector. But the Judge has omitted to state the ground on which the Ameen's report in his opinion justified the enhancement of the rent; and it appears to me that, in point of fact, no ground, such as stated in the notice and the plaint, has been made out.

A question has been raised whether, in respect of a portion of the land which the defendant claims as his lakheraj, the plaintiff could be entitled to enhance, inasmuch as he has not succeeded in showing that rent had been paid on account of that portion of the land, and there has been some discussion as to the meaning of a part of the Judge's written judgment which bears on this point.

The Judge says: "Plaintiff brought a suit "for enhanced rent, and defendant objected "that part of the area held by him as "correctly stated by plaintiff is rent-free. "It remains for defendant to prove that "his plea is correct. There is no proof "that the land in suit is rent-free. The "sunnud mentions no boundaries, and the "copy of the register does not even mention "the estate. Therefore I am of opinion "that the rent-free plea is not proved, and "it is evident that the acknowledged rent of "Rupees 9 has been paid hitherto for the "whole area, *viz.*, 23 beegahs."

Upon this language of the Judge, the appellant's vakeel contends that the finding of the Judge as to a payment of rent upon the whole area, 23 beegahs, is merely an inference from the failure of the defendant to prove affirmatively his rent-free holding. On the other hand, it is contended by the respondent's vakeel, and it appears to me equally consistent with the language used, that, having first disposed of the defendant's plea of lakheraj, the Judge has afterwards independently held that the plaintiff's allegation of payment in respect of the whole

of the lands is also shown from the evidence. But, if it be true that the Judge has held that rent has, up to this time, been paid in respect of the whole area, 23 beegahs, that appears to me effectually to dispose of the sole ground on which the Ameen's report can be considered to authorize enhancement, *viz.*, that the defendant has been paying rent for a less quantity of land than he cultivates. He finds that that amounts to 27 beegahs, and he says that, according to the pergunnah rates, that area of land ought to bear a specified rent. If, therefore, this had been a case in which the plaintiff sued for enhancement, on the ground that the defendant held a larger quantity of land than he paid rent for, that would be a ground for enhancement, and the Ameen's report would apparently have sustained it. But the Judge has held whether, by way of inference or as an independent finding, that the rent has hitherto been paid for the whole area. Therefore this ground altogether fails, and it is moreover not a ground given in the notice. I find nothing whatever in the shape of circumstances having increased the productive powers of the land independently of the ryot's labor, except that the river has occasionally supplied water to a channel passing through the land in dispute, and, when the water thus passed over the land, increased fertility to some degree ensued. That is too casual a circumstance to form a ground for permanent enhancement.

It appears to me, therefore, that, as the case was laid in the Deputy Collector's Court, and as the Ameen found the facts, and the Judge found upon his report, no legal ground of enhancement, consistent with the notice and the plaint, is made out; and, therefore, whether the plea of lakheraj is well founded or not, the plaintiff ought not to have succeeded in this suit.

This being so, it is unnecessary for us to discuss a point which, I confess, appears to me one of extreme difficulty, namely, how, in cases where a zemindar claims enhancement of the entire land held by a ryot, and the ryot alleges part of his land to be rent-free, the zemindar is to prove (as he is required to do as the effect of the Full Bench Ruling in Goomain Kazee's case, Full Bench Rulings, Special Number, Weekly Reporter, page 115), that he has received rent in respect of the particular piece of land as to which the averment of lakheraj is made.

Cases have been shown to us posterior to that ruling, in which Divisional Benches of this Court, manifestly influenced by the difficulty of which I speak, have relieved the zemindar; and I am certainly inclined to think that the Full Bench Ruling might be usefully modified. It seems to me that it is extremely difficult to lay down any principle on the subject.

I think that the decision of the Judge must be reversed, and the decision of the Deputy Collector restored with costs.

Kemp, J.—I agree in the judgment of my learned brother to this extent, *viz.*, that in this suit rent cannot be enhanced on the ground stated in the notice. Beyond this, I do not consider it at all necessary to go in the present case. The appeal will be decreed with costs and interest.

The 7th March 1867.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Res judicata—Withdrawal—Section 97, Act VIII. of 1859.

Case No. 2900 of 1866.

Special Appeal from a decision passed by Mr. P. F. Carnegy, Officiating Deputy Commissioner of Kamroop, dated the 10th August 1866, reversing a decision passed by Baboo Mohun Chunder Buroo-ah, Sudder Ameen of that District, dated the 26th February 1866.

Luckhee Ram Doss and others (Defendants), *Appellants,*

versus

Joy Sunkur Gooho (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellants.

Baboo Obhoy Churn Bose for Respondent.

A suit struck off by reason of the defendant being then in jail on a criminal charge cannot be set up as *res judicata* in a subsequent suit, there having been no determination in favor of one party or the other; nor can it be treated as a case of withdrawal under Section 97, Act VIII. of 1859.

Kemp, J.—I THINK that there are no grounds for this special appeal. The suit which the defendant sets up as estopping the plaintiff from proceeding with the present suit was not withdrawn by the plaintiff in that suit under the provisions of Section 97 of the Code of Civil Procedure. It appears that the defendant in that suit being then in jail on a criminal charge, the case was disposed of; but no relief was given, nor was

there any determination of the suit. The second ground of special appeal which is based on Section 97, therefore, wholly fails.

As to the first ground, it appears that the special respondent's vendor was in possession of the estate when he conveyed it by a registered *kubala* to the special respondent. That *kubala* having been found to be an authentic document by the Court below, and having been duly registered according to law, invalidates the previous unregistered deed of conveyance to the special appellant.

The special appeal must, therefore, be dismissed with costs and interest

Jackson, J.—I am of the same opinion. The judgment referred to by the special appellant in this case is of an anomalous character. There is a copy of it on the record. It is not a decision in favor either of the plaintiff or the defendant in the suit. It merely records that, as the process of the Court could not reach one of the defendants, the Court for that reason puts an end to the suit. The defendant appears to have sought to avail himself of this judgment in the Court below by way of a plea of *res judicata*. He clearly could not do this, as there was no determination in favor of one party or the other.

He now seeks to treat it as a case coming under Section 97 of the Code of Civil Procedure. But, as the plaintiff in that suit did not withdraw from the suit either with or without the leave of the Court, Section 97 clearly does not apply.

Then, as to the *kubala* relied upon by the defendant, it is clear that the other defendant, being at the time in possession of the property in dispute, sold by a registered *kubala* to the plaintiff the property in question, and, by so doing, the previously executed unregistered *kubala* is invalidated.

On both grounds I concur in affirming the judgment of the Court below.

The 7th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Revival of Suit under Section 58, Act X. of 1859 (Effect of).

Case No. 2946 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 6th July 1866, reversing a decision passed by the Deputy Collector of that District, dated the 28th February 1866.

Brojonath Surmah Chuckerbutty and another (Defendants), *Appellants,*

versus

Anund Moyee Debia Chowdhrain (Plaintiff), *Respondent.*

Baboo Pearee Lal Roy for Appellants.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondent.

The revival of a suit under Section 58, Act X. of 1859, does not re-open the case as regards all the defendants, but only as regards the party who has applied to have his particular case revived and heard on the merits.

Loch, J.—We think that this appeal must be dismissed with costs. The revival of a suit under Section 58. Act X. of 1859, does not re-open the case as regards all the defendants, but only as regards the party who has applied to have his particular case revived and heard on the merits. The judgment passed after this suit was revived can only have the effect of releasing from the plaintiff's claim those parties who applied for the revival of the suit, and were successful in urging their plea of limitation.

The 8th March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Sale Law (Act I. of 1845)—Right of auction-purchaser—Enhancement (of rent of tenant other than a ryot or cultivator).

Case No. 2888 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 24th July 1866, affirming a decision of the Deputy Collector of that District, dated the 26th March 1866.

Juggodeshury Dossia (Defendant), *Appellant,*

versus

Uma Churn Roy (Plaintiff), *Respondent.*

Baboo Khetternath Bose for Appellant.

Baboos Mohinee Mohun Roy and *Bhuggobutty Churn Ghose* for Respondent.

An auction-purchaser, under Act I. of 1845, is not entitled to sue to enhance the rent of a tenant, not being a ryot or cultivator, without his consent.

Quære.—Whether the auction-purchaser is entitled to take free of all incumbrances created by the defaulting proprietor.

Peacock, C.J.—The plaintiff sues for rent at an enhanced rate for a portion of the year 1272. He states in his plaint that he

served notice of his intention to enhance in Cheyt 1270, the grounds of enhancement being that the productive powers of the land had increased in consequence of the city of Beauleah having been washed away, and that the defendant was holding the land in question at rates lower than those paid for other lands in the village. The premises held by defendant consisted of a house, homestead, garden, tank, unoccupied building ground, and land occupied with graves.

The plaintiff claimed under a purchaser at a sale in 1854 for arrears of revenue, and one of the issues raised was whether, the mehal having been sold at an auction-sale for arrears of revenue, the incumbrances created by the defaulting proprietor could remain in force.

That issue was disposed of very summarily by the Deputy Collector, who says that, "the mehal having been put up to sale by "auction for arrears of revenue, the incum- "brances created by the defaulting proprie- "tors cannot remain untouched."

The defendant purchased the premises from Moulvie Abdool Ally. The Judge treats the case as a very simple one. He does not enquire as to the effect of the incumbrances as against the auction-purchaser and those claiming under him, but finds that there was no legal presumption of a fixed tenancy, as it appeared by the defendant's own title-deed that the land was obtained by the Moulvie not earlier than 1235 B. S.

The sale law in force at the time of auction-purchase was Act I. of 1845.

Section 26, Clause 4, of that Act contains, amongst other exceptions, the following, *viz.:* Lands held under *bond-fide* leases, at fair rents, temporary or perpetual, for the erection of dwelling-houses or manufactories, or for mines, gardens, tanks, canals, places of worship, burying grounds, clearing of jungle, or like beneficial purposes, such lands continuing to be used for the purposes specified in the leases.

The Lower Courts should have found whether the tenure of defendant fell under any of the exceptions in that Clause.

No written lease to Moulvie Abdool Ally was produced to show whether he held the land under a lease for the erection of the dwelling-house and other buildings, or for the construction of the garden and tank. It was not actually necessary that the lease or grant should be in writing to bring the case within the exceptions above referred to. Evidence showing that the house and other buildings were erected, and that the garden and tank were constructed, and that the auction-purchaser or those claiming under him had continued to receive the old rent without objection or claim to enhance, would be evidence from which it might be inferred that the grant of the land was for the purpose for which it was used, and that it was a rent which was reasonable at the time when the grant was made.

It is not necessary to remand the case for the purpose of trying whether the tenure falls within any of the exceptions in Clause 4, Section 26, Act I. of 1845; for, assuming that the auction-purchaser and those claiming under him were not bound by the tenure created in 1235, it does not follow that the landowner is entitled to sue at an enhanced rate without any acquiescence on the part of the tenant.

Section 26 enacts that the purchaser at a sale for arrears of revenue shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement, and shall be entitled, after notice given under Section 10, Regulation V., 1812, to enhance at discretion (anything in the existing Regulations to the contrary notwithstanding) the rent of all under-tenures in the said estate, and to eject all tenants thereof (with the exceptions above noticed).

The words to enhance the rent, &c., and to eject, &c., in the above Section cannot mean to enhance and eject at the same time, but must mean to enhance or to eject according to the circumstances of the case.

The tenant was not a ryot or cultivator, and the landowner could not enhance the rent without his consent. It is possible that he might have annulled the tenure and ejected the tenant, if the latter would not consent to enhancement. But, by receiving rent, the auction-purchaser and those claiming under him have treated the defendant as a tenant. It is unnecessary to determine whether, by the receipt of rent, they have ratified the tenure, and have precluded themselves from ejecting the tenant after proper notice to quit, for the suit is not to eject, but to enhance.

It is unnecessary in this view of the case to advert to the mistake of the Lower Courts in treating the decree passed before Act X. of 1859 in the suit against Lakhal Chuprassee, the tenant of the adjacent land, as binding upon the defendant as to the rate which he ought to pay.

The decisions of both the Lower Courts will be reversed, and a decree entered for the defendant to receive his costs in both the Lower Courts, and the costs of this appeal, with interest from this date.

The 8th March 1867.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Appeal—Section 11, Act VI. of 1862, B. C.—Standard pole of measurement.

Case No. 3086 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. E. W. Molony, Officiating Judge of Moorshedabad, dated the 30th July 1866, affirming a decision passed by Mr. J. B. Pratt, Deputy Collector of that District, dated the 25th April 1866.

Rakhal Doss Mookerjee (Plaintiff), *Appellant,*

versus

Tunoo Puramanick (Defendant), *Respondent.*

Mr. A. T. T. Peterson and *Baboo Umbica Churn Banerjee* for Appellant.

Mr. R. E. Twidale for Respondent.

No appeal to the Judge, or no special appeal to the High Court, will lie from the decision of a Deputy Collector under Section 11, Act VI. of 1862 B. C., on the question of the standard pole of measurement.

Jackson, J.—THIS was a case of an application by a zemindar under Section 9, Act VI. of 1862 B. C., to obtain the assistance of the Collector in the survey and measurement of the lands of his estate. The plaint sets forth that he was desirous of measuring the lands by what was called "procholeet russee" (which expression may be taken to be synonymous with the standard rope or pole of measurement), and that, on his proposing to make such measurement, the ryots had refused to allow him to make such measurement, and declared their intention to make a disturbance if the zemindar's people went on their grounds to measure. On this application, the Collector appears to have proceeded as required by Section 9, and to have framed various issues; and one of the issues which he framed was, what was the proper standard pole of measurement in use in the Pergunnah, and he came to a judicial determination upon that issue of the proper standard. This particular determination was made the subject of an appeal to the Zillah Judge. The Zillah Judge went into the question, and confirmed the decision of the Deputy Collector. This decision being adverse to the zemindar, he now prefers a special appeal on the same point to this Court.

On that special appeal, a preliminary objection is preferred by Mr. Twidale for the respondent to the effect that, on such a point, neither regular nor special appeal will lie; and he refers to a decision of a Divisional Bench of this Court in which it happens that my learned brother Kemp and myself were the Judges, and we held that an appeal would not lie on this point.

Mr. Peterson, on the other hand, contends that the determination of this question, namely, what is the standard pole of measurement, being a part of the judicial finding of the Deputy Collector, is necessarily open to appeal.

We observe that Sections 9 and 10 of Act VI. of 1862, which is to be read with Act X. of 1859, are subject to this provision which is to be found in the concluding portion of Section 10, "save as aforesaid, "the decision of the Collector on all matters "enquired into and determined by him "under this or the last preceding Section "shall be final, unless the same shall be "reversed on appeal therefrom to the Civil "Court." Those words, therefore, expressly give an appeal to the Civil Court upon all questions determined by the Collector under Sections 9 and 10, while no such provision is annexed to Section 11. It appears to me that the question properly arising under Section 9 in this case was, whether or not the zemindar was entitled to measure the lands, and upon his determination of that question, an appeal undoubtedly would lie.

Section 11 provides that measurements made under this Act shall be made by the standard pole of measurement.

It appears to me that the question under this Section is one of which the judicial determination would properly arise in executing the award of the Collector.

Mr. Peterson refers to the anomaly and inconvenience of admitting the decision of a Collector or Deputy Collector, on the question of the standard pole of measurement, to be final. It appears to me that there will really be no inconvenience at all. It is really of not the least practical consequence to the ryot what the zemindar finds to be the area of his holding, until the zemindar goes on under Clause 3 of Section 17, Act X. of

1859, to enhance his rent upon the ground that he holds more land than he has been paying rent for. When the zemindar sues to enhance under such circumstances as that, it must then be open to the ryot to contest the issue whether, in point of fact, he has been so holding more land, and he will then have an opportunity of establishing judicially in the face of the zemindar and of the Court what the standard pole of the Pergunnah really was. It appears to me, therefore, that the inconvenience and anomaly adverted to by the learned Counsel do not really arise, and that there could be really no practical inconvenience in allowing the Collector to determine in execution of his award the question of the standard pole of the Pergunnah.

In this case the Deputy Collector has, as I think, unnecessarily imported this matter into his decision upon an application under Section 9. That does not appear to me to alter the law on the matter, or to give a right of appeal which the law does not allow. I therefore think, whether he decided it on the trial under Section 9, or afterwards, the decision of the Deputy Collector as to the standard pole is not a matter open to appeal. As it happens, the Judge who entertained the appeal has not altered the decision of the Deputy Collector. That being so, it is unnecessary to record any further decision on this matter beyond this, that the decision ought not to have been appealed against, and, consequently, that there can be no special appeal.

The special appeal in this case is dismissed with costs

Kemp, J.—Without going into the question of convenience or inconvenience from the absence of an appeal from an order under Section 11, I entirely agree with my learned brother that no appeal lies to the Judge or this Court in special appeal.

The 8th March 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Resumption—Lakheraj—Limitation.

Case No. 2824 of 1866.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 17th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th December 1865.

Gopal Chunder Shaha and others (Plaintiffs), *Appellants,*

versus

Bhabo Tarinee Dossee, mother and guardian of Ashootosh Chunder and others, minors, and others (Defendants), *Respondents.*

Baboo Rajendurnath Bose for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

A zemindar suing for resumption of alleged invalid lakheraj land under Section 19, Regulation X. of 1793, is not limited to time, provided he can prove that, at some time subsequent to the Decennial Settlement, the land sought to be resumed was part of his mâl estate, and had paid rent.

Glover, J.—This was a suit for resumption of alleged invalid lakheraj land, and was remanded by this Court in accordance with the Full Bench Ruling in the case of Kaminee Debee.

The first Court held that there was no proof that the land had formed part of the zemindar's mâl estate; but the Judge, without going into that question, dismissed the suit under the ordinary Law of Limitation, the plaintiff's purchase of the estate having taken place so far back as 1817.

There can be no doubt that the Judge, in so deciding the case, was wrong. In the Full Bench Ruling cited, it was distinctly laid down that a zemindar, coming under Section 19, Regulation X. of 1793, was not limited to time, provided that he could prove that, at some time subsequent to the Decennial Settlement, the land sought to be resumed was part of his mâl estate, and had paid him rent. The plaintiff in this case did sue under that Section of the law in compliance with the order of this Court on remand, allowing him permission to file an amended plaint; and the point to be decided first was, whether he had proved receipt of rent at any time subsequent to 1790. If he failed in that, he would, of course, as his purchase at a sale for arrears of revenue took place in 1817, be out of time; if he succeeded, the defendant would be called upon to prove his lakheraj.

There is evidence, both oral and documentary, to prove this point on the record. The Judge has passed no opinion upon it, and this Court sitting in special appeal cannot. We, therefore, remand the case to the Judge to find on that evidence whether the zemindar has proved receipt of rent since 1790 or not. Costs will follow the result.

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The 8th March 1867.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Limitation—Plaint (Filing and registry of).

Case No. 2710 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 31st July 1866, affirming a decision of the Sudder Ameen of that District, dated the 23rd September 1864.

Syed Irtaza Hossein (one of the Defendants), *Appellant.*

versus

Hurry Pershad Sing and others (Plaintiffs), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Juggodanund Mookerjee for Respondents.

Where a plaint was duly filed with a deed of conveyance on which the plaintiff sued annexed to it, and the Judge, instead of registering the plaint, began to enquire into the sufficiency or otherwise of the stamp on which the deed was engrossed—HELD that the time for considering the question of stamp-duty was not when the document was produced with the plaint, but when the document was to be received in evidence on behalf of the plaintiff; and that in computing limitation, the suit must be considered to have been instituted on the day when the plaint was filed, and not the day when it was registered.

Kemp, J.—THIS suit was remanded on the 6th June 1866, to try the issue in bar which had not been disposed of in the decision first appealed against. This issue has now been tried, and the suit has been decreed in favor of the plaintiff (respondent) overruling the issue in bar.

The only contention now before us in special appeal is that, as the cause of action accrued on the 15th June 1861, the date of the Magistrate's award under Act IV. of 1840, and the suit was instituted on the 27th June 1864, assuming that date to be the date of institution, the suit would be beyond time.

It appears that the suit in question was *bond fide* instituted on the 10th June 1864; and the plaintiff, under the provisions of Section 39, Code of Civil Procedure, filed with his plaint a deed of conveyance on which his suit was based. It was at that stage of the case unnecessary for the Court to enquire into the sufficiency or otherwise of the stamp on which the deed was engrossed. The question whether the stamp was sufficient or not would have to be considered when any objection was offered to the reception of the document in evidence. The time, therefore, spent by the Court from 10th June to the 27th June 1864 in considering whether the stamp was sufficient or not, and the delay in registering the plaint until that point was considered, can in no respect be held prejudicial to the plaintiff so as to bar his suit.

We have also been shown a decision of a Divisional Bench of this Court, dated 9th May 1865 (3 Weekly Reporter, p. 1) which ruled that there is nothing in the law declaring that the date of registry shall be taken to be the date of the institution of the suit.

For these reasons I think that the suit was not barred, and that the decision of the Lower Court was correct. The appeal will, therefore, be dismissed with costs and interest.

Jackson, J.—I am of the same opinion. This was a suit by a party bound by an order of the Magistrate made under Act IV. of 1840. Consequently, by Clause 7, Section 1 of Act XIV. of 1859, the period of limitation applicable to the suit was three years from the date of the final order. The final order of the Magistrate, it seems, was made on the 15th June 1861, and, therefore, it was necessary to institute the suit on or before the same day in 1864. It appears that the plaint was duly filed, with the *kubala* on which the plaintiff sued annexed to it, on the 10th June 1864. The Judge of the Court of first instance, being under the impression that it was his duty at that time to determine the amount of stamp-duty and penalty leviable on the *kubala*, took time to consider what amount he should levy. He decided that point finally on the 27th June, and, therefore, the plaint was registered.

It is quite clear, as pointed out by my learned brother Kemp, that the time at which the question of stamp-duty had to be considered was not the time when the document was produced with the plaint, but when the document was to be *received in evidence* on the plaintiff's behalf. At that time it would be open to the defendant to object to the document as insufficiently stamped; and the Court might then, under Section 17 of the Stamp Act, X. of 1862, determine whether or not it would receive any and what amount of stamp-duty. It is quite clear that the plaint was filed with this document, and, consequently, the suit instituted on the 10th June, and was, therefore, within time.

The 8th March 1867.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Section 4, Act X. of 1859—Presumption of uniform payment from Permanent Settlement.

Case No. 2783 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of 24-Pergunnahs, dated the 21st August 1866, affirming a decision passed by Moulvie Azeemooddeen Khan, Deputy Collector of that District, dated the 29th June 1865.

Rakal Doss Tewaree (Defendant), *Appellant,*

versus

Kinooram Holdar (Plaintiff), *Respondent.*

Baboo Nil Monee Sein for Appellant.

Baboo Debendro Narain Bose for Respondent.

Section 4, Act X. of 1859, does not require that, in a suit for enhancement, the ryot should specifically claim to hold from the time of the Permanent Settlement in order to obtain the benefit of the presumption enacted by that Section. On proof of payment of a uniform rent for 20 years, the presumption imperatively arises, unless the contrary be shown, that the rent has been unchanged from the time of the Permanent Settlement.

Jackson, J.—It appears to me that this case must be once more remanded to the Zillah Judge. When the case was last before this Court, it was remanded to him for the purpose of a clear finding as to the payment of rent at a uniform rate for a period of 20 years before the institution of the suit. The Judge has now in effect, having the appeal again before him, declined to go into that question; and he records his opinion that proof of payment of rent at a uniform rate for 20 years preceding the suit is only material when it refers to the allegation that the rent has been uniform from the time of the Permanent Settlement.

Now, whether this opinion of the Judge is in itself consistent with the law or otherwise, it certainly is opposed to several decisions of this Court, which are to be found reported in the 5th Weekly Reporter, Act X. Rulings, page 53; the 4th Volume of the same publication, page 25; the 3rd Volume, page 133, and elsewhere. The effect of those decisions, it appears to me, is clearly this: That, where there is a case set up by the defendant (without binding him to close adherence to technical forms of pleadings) by which it appears that it was his intention to avail himself of the benefit of Section 4, Act X. of 1859, the Court is bound to enquire into the circumstance of payment of rent at one uniform rate for 20 years; and, if that circumstance be proved, to give the defendant the benefit of the presumption which arises from the fact.

The terms of the Section cited are these: "Whenever, in any suit under this Act, it "shall be proved that the rent at which "land is held by a ryot in the said pro- "vince has not been changed for a period "of 20 years before the commencement of "the suit, it shall be presumed that the "land has been held at that rent from the "time of the Permanent Settlement, unless "the contrary be shown, or unless it be "proved that such rent was fixed at some "later period."

That is a provision which applies to any description of suits brought under the Act, and the effect of it appears to be this: that when, in any such suit to which the fact is relevant, the ryot tenders proof and succeeds in proving that he has paid rent at one uniform rate for 20 years, then the presumption imperatively arises, unless the contrary be shown, that the rent has been unchanged from the time of the Permanent Settlement; and, upon that presumption so arising, the defendant is entitled to the whole legal consequences of that state of things. If, therefore, it be a suit for enhancement, and the tenant says, "I offer proof," and he succeeds in proving that he has held at one uniform rate for 20 years, then the Court is bound to go on and to presume that the land has been held at that rent from the time of the Permanent Settlement. As in that state of things the ryot would be entitled to a pottah at the rate at which he has been holding, he clearly cannot be enhanced. It is perfectly clear to me in this case that the defendant did mean to set up that defence. He says in one paragraph of his written statement: "I "have been holding for upwards of 20 "years at one uniform rate, and, consequent- "ly, with reference to Sections 4 and 16, "Act X. of 1859, the plaintiff's suit having "incurred (what he calls) tumadee, ought "to be dismissed." Now, the person who put in and probably framed this written statement was not a regular legal practitioner, and was not a lawyer, and probably was not acquainted with the precise meaning of the word "tumadee"; and whether he considered the bar to arise in the shape

of limitation, or in some other way, to show that the suit of the plaintiff was not maintainable, is of very little consequence. The act which he stated was precise, and the presumption which the law requires to be drawn from that fact is also precise. The Court is bound to enquire into the fact, and to make the presumption, and to give defendant the benefit of it.

It is, therefore, necessary once more to remand the case to the Zillah Judge, in order that he may decide that issue of fact.

Kemp, J.—I quite concur.

The 8th March 1867.

Present :

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Jurisdiction—Possession and mesne-profits—Limitation (Section 30, Act X. of 1859).

Case No. 3096 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dinagepore, dated the 25th of August 1866, affirming a decision of the Moonsiff of that District, dated the 28th May 1866.

Surbessur Dey and others (Defendants), *Appellants,*

versus

Fukeer Mahomed Sircar (Plaintiff), *Respondent.*

Baboo Doorga Dass Dutt for Appellants.

Baboo Bama Churn Banerjee for Respondent.

A suit against a landlord for possession and mesne-profits is cognizable by the Civil Court.

The limitation prescribed by Section 30, Act X. of 1859, applies only to suits instituted under that Act.

Jackson, J.—It appears to us that both points urged in special appeal are invalid.

As to the *first* point, namely, that the suit* was not cognizable by the Civil Court, the Principal Sudder Ameen appears to have decided in accordance with a precedent of this Court, which is to be found in Sutherland's New Reports for 1864, January Part, Act X. Rulings, p. 3. We are bound by the authority of that decision, and we must, therefore, affirm the judgment of the Principal Sudder Ameen upon that point.

The *second* point is that limitation applied to this case, inasmuch as the suit was brought after the expiration of one year from the accruing of the cause of action. That is a period of limitation prescribed by Section 30, Act X. of 1859. It is scarcely necessary to say that it applies to suits under that Act. The present suit is not one instituted under Act X. of 1859. Consequently, that rule of limitation does not apply.

The decision of the Lower Court is affirmed with costs on all points.

* A suit against a landlord for possession and mesne-profits.

The 8th March 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale (under Act VIII. of 1835 and Clause 7, Section 15, Regulation VII., 1799)—Tuppa right.

Case No. 2763 of 1866.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of Chittagong, dated the 27th of June 1866, reversing a decision of the Moonsiff of that District, dated the 24th April 1865.

Mussamut Zeenut Bebee (Plaintiff), *Appellant,*

versus

Mussamut Rahatoonissa and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Semble.—A *tuppa* right is annihilated by a sale held under Act VIII. of 1835, and Clause 7, Section 15, Regulation VII., 1799.

Seton-Karr, J.—The only point raised before us is that the Principal Sudder Ameen is wrong in holding that the plaintiff's tuppa right was swept away by the sale held under Act VIII. of 1835, and the provisions of Clause 7, Section 15 of Regula-

tion VII. of 1799. The Principal Sudder Ameen has relied on a decision of a Divisional Bench reported at page 197, Vol. III. of the Weekly Reporter, to the effect that under-tenures and incumbrances are annihilated by sales of tenures for arrears of revenue held under the above Acts. The pleader for the appellant has not been able to show us that the sale in the case before us was for arrears of rent, and not for arrears of revenue; and he has not been successful in adducing any precedent to the contrary effect, or in proving the ruling of the Principal Sudder Ameen to be erroneous.

We, therefore, do not perceive any cause for interference, and we dismiss the appeal with costs.

The 8th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Mortgage—What profits to be accounted for by mortgagee in possession.

Case No. 2781 of 1866.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 8th of August 1866, reversing a decision of the Deputy Commissioner of that District, dated the 7th November 1865.

Rughoonath Roy (Defendant), *Appellant,*

versus

Baraik Geereedharee Singh and others (Plaintiffs), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Lukhee Churn Bose for Respondents.

A mortgagee in possession of the mortgaged land, who, instead of letting it to ryots, and realizing the rent in the ordinary way, cultivates it himself, is not responsible or liable to account for the whole of the profits arising to him by farming the land, but only for such profits as he would have realized had he let it to a tenant, or as the mortgagor would have realized had he let it.

Norman, J.—This is a suit for the possession of village Chooteo, Pergunnah Kakra, with mesne-profits. The defendant had a mortgage on the village for a loan of Rupees 800. The plaintiff alleges that the amount of the loan had been liquidated out of the profits which the defendant realized during the time that he was in possession.

The Lower Appellate Court gave the plaintiff a decree, with mesne-profits from the date of suit, finding that the whole amount of the mortgage-money had been liquidated before the plaint was filed.

Several points have been taken in appeal before us. *First* of all it is argued that the defendant is not in possession of 14 kharees of land, as found by the Lower Appellate Court; and the defendant attempts to make use of a certain decision in a suit between two persons called Bhenga Sahee and Julloo Sahee, by which it is said that 10 kharees of land were adjudged to them: also of an admission made by the plaintiff's father on the 21st of June 1841, and a decision in an Act IV. case. It is said that the decision and admission and proceedings in the Act IV. case show that these two people Bhenga Sahee and Julloo Sahee were in possession of 10 kharees of dhan-land in the village. But on examination it appeared that these people had 5 kharees of rice-land, and a certain portion, apparently 5 kharees, of other land, and therefore the said decision and admission did not show that the Moonsiff's finding that the plaintiff was in possession of 14 kharees is incorrect.

Secondly, it was objected that the Judicial Commissioner had allowed to plaintiff in account the profits of 5 powahs of land called *munjaus* which, in the first ten years after the mortgage, the defendant had himself held and tilled.

It appears to us that, in addition to the rent, or a sum equivalent to the rent of the lands, the Judicial Commissioner has charged, as against the defendant as mortgagee in possession, profits which he made by the cultivation of those lands. We are disposed to think that this is erroneous—that a mortgagee in possession of the land, who, instead of letting it to ryots and realizing the rent in the ordinary way, cultivates it himself, is not responsible or liable to account for the whole of the profits arising to him by farming the land, but only for such profits as he would have realized had he let it to a tenant, or as the mortgagor would have realized had he let it.

We, therefore, recommended the respondent to deduct the extra rent allowed by the Judicial Commissioner, with respect to the profits of the 5 powahs of land. He has consented to our recommendation, and that leaves the decision of the Court below correct and unimpeachable. The result is that the plaintiff will be entitled to a decree for possession of the land with mesne-profits

from the 21st of September 1865, which appears to be the period at which, if the extra profits of the land had been deducted, the mortgage would have been paid off.

Each party will bear his own costs of the special appeal to this Court; and, in the Courts below, the plaintiff will get his costs of the suit, at the lower valuation at which the decree will now stand. The defendant will also get his costs in the Lower Courts, in proportion to the amount of claim dismissed.

The 8th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale Certificate (Construction of).

Case No. 2352 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 30th of July 1866, affirming a decree of the Principal Sudder Ameen of that District, dated the 8th March 1866.

Sheik Moula Buksh (Plaintiff), *Appellant,*

versus

Moonshee Kuruck Lall and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* for Appellant.

Moonshee Ameer Ali and *Baboo Dwarkanath Mitter* for Respondents.

Mere inaccuracy of language or misdescription will not vitiate a sale-certificate. The intention of the parties must be looked to.

Norman, J.—In this case the plaintiff, Sheik Moula Buksh, sues for possession of a certain *talook* called Bikram Beelas, which he purchased at a sale by auction in execution of a decree against one Ajoodhya Persaud.

The Lower Courts have treated his right as restricted to a *Mouzah* Bikram Beelas, excluding a certain other Mouzah called Munipore Khurratah. We find that, by a specification of the property in the tabular statement under Section 213 of Act VIII. of 1859, the execution-creditor prayed that the "rights and share of the judgment-debtor "in *Talook* Bikram Beelas, an appendage of "Talook Munipore Khurratah," should be attached, and together with the application be put in an authenticated extract from the register of the Collector's office, specifying the name of the mehal as *Talook* Bikram Beelas, containing two mouzahs, Bikram Beelas and Munipore Khurratah. It is stated that the sudder jumma of the former was Rs. 298, and that of Munipore Khurratah Rs. 232; total Rs. 530. The order for attachment under Section 235 directed that the rights and share of the judgment-debtor in *Talook* Bikram Beelas, "*muttalik*" (construed as belonging or appertaining to) Munipore Khurratah, should be attached as the property of the judgment-debtor. In the proclamation of sale under Section 249, in the list of the property sold, was mentioned *Talook* Bikram Beelas, "muttalik Munipore Khurratah at a jumma of Rs. 530," and the sale-certificate stated that "Bikram Beelas, *do hissa*, appertaining to Munipore Khurratah," as described in the proclamation of sale, were sold. The word "*talook*" does not appear to have been originally inserted in the sale-certificate, but it was added at a subsequent date apparently on the application of the purchaser, and afterwards again struck out.

The real question, then, is, What part of the property of Ajoodhya Persaud passed to the purchaser under the circumstances? Now, it appears that there is only one *Talook* Bikram Beelas, and this talook was undoubtedly sold, and, in the proclamation of sale, it was stated to have a sudder jumma of Rs. 530. What was bought, therefore, was the *entire* talook with the jumma of Rs. 530. It is argued that the Mouzah of Munipore Khurratah was excluded. We cannot treat the word "*muttalik*" as if it were "*sewaee*" (or excepting). We cannot give it the force of excepting Munipore Khurratah, without, by so doing, destroying the force of the word "talook" before Bikram Beelas, and making the statement of the sudder jumma at Rs. 530 an absurdity. It is quite clear that no one selling Mouzah Bikram Beelas would have stated that it bore a sudder jumma of Rs. 530, when the portion of it that he wanted to sell was capable of being separated as bearing a distinguishable jumma of Rs. 298. It is perfectly clear to our minds that what the party intended to sell, what the bidders competed for, and what the plaintiff did actually buy, was certainly the *entire talook*. The expression "*muttalik*" Mouzah Munipore Khurratah must be treated as mere inaccuracy of language or misdescription.

We find an English case which very closely resembles this. (Good title *dem.* Radford *vs.* Southern, 1 Maule and Selwyn's Reports,

page 299.) This is a case that has been repeatedly under the consideration of the Courts in England, and recognized over and over again as sound law.

The decree of the Lower Court will be reversed, and the plaintiff declared entitled to a decree for the whole talook of Bikram Beelas. The appeal will be decreed with costs and interest, and the plaintiff will also recover his costs in the Courts below.

The 9th March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge.*

Section 5, Act XXXV. of 1858—Lunatics.

Petition of Maharajah Juggernath, zemindar of Pergunnah Palkote, in Chota Nagpore, complaining of the proceedings instituted under Act XXXV. of 1858, at the instance of the Petitioner's nephew, by the Deputy Commissioner of Lohardugga, in reference to the alleged lunacy of the Petitioner, and praying that, if such proceedings are necessary, they may be conducted, and the witnesses examined, either by the High Court or by the Judge of Gya.

Mr. R. T. Allan for Petitioner.

Section 5, Act XXXV. of 1858, never intended that an alleged lunatic should be summoned into a public Court as a witness, and subjected to examination as a witness by the vakeel of the person on whose petition the enquiry was instituted.

Peacock, C. J.—It appears to this Court that this is a case which ought to be transferred. We think that the Deputy Commissioner certainly made a mistake in allowing this gentleman to be examined by the vakeel of his nephew, as if he had been a witness under cross-examination.

Section 5, Act XXXV. of 1858, says that "the Civil Court may require the alleged "lunatic to attend at such convenient time "and place as it may appoint for the purpose "of being personally examined by the Court, "or by any person from whom the Court "may desire to have a report of the mental "capacity and condition of such alleged "lunatic."

This Clause never intended that an alleged lunatic should be summoned into a public Court as a witness, and subjected to examination as a witness by the vakeel of the person on whose petition the enquiry was instituted. We think that it will be more satisfactory, looking at the whole case, that the matter should be transferred to the Judge of Gya, and that Judge be requested to conduct the enquiry himself, so that, in case of necessity, the matter may come before this Court as a regular appeal on the facts, and not as a special appeal merely on a point of law.

Let a precept be also issued forthwith to the Deputy Commissioner, to stay all further proceedings in his Court, and to transfer the case to the Judge of Gya.

The 9th March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Ministerial Officers (Transfer of).

Case No. 79 of 1867.

Miscellaneous Appeal from an order passed by Mr. W. T. Tucker, Judge of West Burdwan, dated the 20th June 1866.

Hurro Gobind Biswas, *Appellant.*

Baboo Nil Madhub Sein for Appellant.

A Zillah Judge is not competent to remove a mohurir from one Moonsiffee without any fault of his, and to subject him to loss by requiring him to go to a distant Moonsiffee.

It appears that the petitioner was a mohurir upon the establishment of the Moonsiff in the district of West Burdwan; and that for some reasons not connected with the petitioner himself, but with some other ministerial officer in that district, the Judge thought fit to remove the petitioner from the mohurirship which he held in the Chowkey Bishenpore, and to appoint him without his consent to be mohurir of another Moonsiffee. The petitioner complained to the Judge, protesting against this removal; but the Judge passed no order upon his petition, except that orders had been already made for his transfer, and that no further order could be passed.

I do not see that the Judge was competent to remove the petitioner without any fault of his from the appointment which he held, and to subject him to loss by requiring him to go to a distant Moonsiffee.

Let the Judge be called upon to state the reasons which, in his opinion, justify that proceeding.

The 9th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Transferable tenures—Khoodkasht ryots who have built houses on their lands.

Case No. 2784 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 14th of August 1866, affirming a decision of the Moonsiff of Sulkea, dated the 28th March 1866.

Chunder Coomer Roy (Plaintiff), *Appellant,*

versus

Kadermonee Dossee and another (Defendants), *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Bama Churn Banerjee for Respondents.

There is nothing unreasonable in the custom by which the tenure of a khoodkasht ryot, who has built a pucca house on his land and has acquired a right of occupancy under Section 6, Act X. of 1859, is transferable.

Norman, J.—THIS is a suit by an owner of land to cancel the transfer of a jote by a ryot, who resided and had built a pucca house upon the land. The purchaser alleges that the ryot from whom he took held under a pottah bearing date the 5th of Kartick 1226.

Both the Lower Courts think that the pottah is doubtful and not proved. But they say that it is proved; that, by the custom of the country, tenures such as that now in question are transferable; that many tenures similar to the present have been sold and purchased in the same manner. This appears to be a completely satisfactory determination of the question to be tried between the parties. There is nothing unreasonable in the custom by which the Khoodkasht ryot, who has built a pucca house upon the land, and has acquired a right of occupancy under Section 6 of Act X. of 1859, should have power to put in a new tenant in his place. The custom is proved, and there is no ground for questioning the title acquired under the purchase in the present case.

The result, therefore, is that this special appeal must be dismissed with costs and interest.

The 11th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Government Revenue (Liability of defaulting co-proprietor's Putneedar to pay).

Case No. 845 of 1866.

Miscellaneous Appeal from an order passed by the Officiating Principal Sudder Ameen of Hooghly, dated the 8th September 1866.

Bykuntnath Acharjee (Decree-holder), *Appellant,*

versus

Gooroo Churn Bose and others (Judgment-debtors), *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboo Kalee Prosuno Dutt for Respondents.

One proprietor having paid his own and his defaulting co-proprietor's share of the Government revenue to save the estate from sale—HELD that the former could recover from the latter his share of the Government revenue, but that he could not recover it from the latter's putneedar who was entitled to all the profits of the putnee after payment of rent to his lessor; and that, even if the putneedar had not paid rent to the lessor, that was a question between him and his lessor only.

Loch, J.—GOOROO CHURN, the respondent in this appeal, brought a suit for the possession of a zemindaree against his co-sharer and the putneedars, one of whom is the appellant in this case, and obtained a decree for possession. On appeal to the High Court, Gooroo Churn's claim was reduced to a 6-annas share, the remaining 10 annas being declared to be the property of the appellant's lessor. Appellant, in execution of his decree, applied to be put in possession and to obtain mesne-profits for the period during which Gooroo Churn had held possession under the decree of the first Court. Possession was given to the appellant, but mesne-profits were refused; but, on appeal to the High Court, the appellant was held to be entitled to mesne-profits. The respondent then urged that he was entitled to a set-off on account of the Government revenue which he had paid, which should be deducted from the mesne-profits payable to the appellant, and the case was remanded by this Court for determination of the follow-

ing points: Whether the Government revenue was or was not payable by the putneedar under the terms of the lease? Whether the respondent had paid the Government revenue during any portion of the time for which mesne-profits are recoverable by the putneedar, and whether the putneedar had paid his rents for the same period to the zemindar, and whether those rents include the Government revenue? The Principal Sudder Ameen finds that the respondent did pay in Government revenue; that the putneedar is not bound to pay the Government revenue; that he did not, during the period of the respondent's possession of the whole estate, pay the rent, and he disbelieves the statement that, on the judgment of the High Court being passed, the putneedar paid in the rents for three years with interest to his lessor, whose name had not then been registered in the Collector's books as proprietor of a 10-annas share, and he also rejects the receipts of 1269 as unproven. The Principal Sudder Ameen also rejected the plea of the putneedar that he was liable to the respondent for the Government revenue only to the extent of his putnee, which comprised nine villages. He found further that there was no proof that the disputed putnee was in the benamee of the zemindar of the 10 annas, and he directed that the amount of the Government revenue paid by the respondent, on account of the 10-annas proprietor, should be deducted from the mesne-profits payable to the putneedar.

As the Lower Court has found that the putneedar is not a benamee for his lessor, a finding not questioned by the opposite party, and as he further finds that the putneedar was not bound to pay the Government revenue, I do not think that the putneedar can be held liable to pay to the respondent out of the mesne-profits decreed to him any sum paid on account of Government revenue by the respondent for his defaulting co-partner. The respondent and the putneedar's lessor are co-proprietors. To save the estate from sale on account of arrears of Government revenue, the respondent paid his share and his defaulting co-proprietor's share of the revenue. The putneedar has nothing to do with that. All he is bound to do is to pay his stipulated rent to his lessor. The respondent can recover money paid for his co-proprietor by separate action from him, but cannot recover from the putneedar, who is entitled to all the profits of the putnee after payment of rent to his lessor. And, even if the putneedar have not paid rent to the lessor, that is a question between him and his lessor. His failure to pay rent gives his lessor a right of action against him, but does not make the putneedar responsible to the respondent for sums paid by him on account of Government revenue due by his co-proprietor, the lessor of the appellant putneedar. I would reverse the order of the Lower Court with costs.

Macpherson, J.—I concur.

The 11th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Possession—Lease—Declaratory decree.

Case No. 2954 of 1866.

Special Appeal from a decision passed by Baboo Juggobundhoo Banerjee, Principal Sudder Ameen of Nuddea, dated the 29th June 1866, reversing a decision passed by Baboo Gopeenath Bose, Sudder Ameen of that District, dated the 28th December 1865.

Umanund Roy and another (Defendants), *Appellants,*

versus

Sreekishen Banerjee (Plaintiff) and another (Defendant), *Respondents.*

Baboo Obhoy Churn Bose for Appellants.

Baboos Sreenath Doss, Bhuggobutty Churn Ghose, and *Doorga Doss Dutt* for Respondents.

Where a plaintiff sued, while his lease was still running, to recover possession of certain julkurs, and the lease expired after action brought but before decree—HELD that the decree, instead of directing actual possession to be given, should have merely declared his right to possession up to the date on which his lease expired.

Macpherson, J.—THE substantial issue tried in the Court of first instance was whether these julkurs did or did not appertain to Cossimpore. The Lower Appellate Court finds as a fact that they did.

We see no error in law in the judgment appealed against, except that, under the circumstances, the decree should not have directed actual possession to be given to the plaintiff. The appellant contends that the plaintiff is not entitled to recover possession, as his lease had expired before the decree was made which ordered that possession should be given to him. His suit was

brought in the beginning of 1272, while the term of the lease was still running, and he was then undoubtedly entitled to sue for and recover possession for the unexpired portion of his lease. But, after the date of the expiry of the term, of course no actual possession could properly be given to the plaintiff; although, his right having been declared, he would be entitled to recover mesne-profits for the time he was out of possession. The decree must be altered. It must declare the plaintiff's right to possession up to the date on which the lease expired, and must give him mesne-profits for the time he was kept out of possession, whether before or after the institution of the suit. It is said that, as the zemindar, who is a defendant, is in the same interest with the plaintiff, there may (for the zemindar's benefit) be a decree in plaintiff's favor for possession, even though the term of the lease has expired. But that cannot possibly be. The plaintiff's case must stand or fall on its own merits; and we cannot in this suit determine what the zemindar's rights are.

The appellant further says that the plaintiff admitted to the Collector in a certain petition that he was in possession up to 1270, and that the Principal Sudder Ameen was wrong in giving mesne-profits for a period prior to that year. What the plaintiff says in his plaint, however, is that he was ejected from two of the julkurs in 1268, and from the others in 1270. Thus, in what he is said to have admitted to the Collector, there is nothing inconsistent with his present claim.

The decree of the Lower Court must be altered as above indicated, and the parties will respectively bear their own costs of this appeal.

The 11th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Evidence.

Case No. 2941 of 1866.

Special Appeal from a decision passed by the First Principal Sudder Ameen of 24-Pergunnahs, dated the 9th July 1866, reversing a decision passed by the Moonsiff of Satkhirah, dated the 28th December 1865.

Huronath Sircar and others (Plaintiffs), *Appellants,*

versus

Preeonath Sircar and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Oopendur Chunder Bose* for Appellants.

Baboo Anund Chunder Ghosal for Respondents.

Admissions, &c., by the parties in a former arbitration may be used in evidence in a subsequent suit.

Macpherson, J.—It appears to us that this case must be remanded for re-trial. The decision of the Lower Appellate Court is defective, inasmuch as it does not dispose of the whole of the plaintiff's claim, but only of so much of it as relates to that portion of the land which lies between the defendant's house and the tank. The Court must decide also as to the lands which it describes as being beyond the cross-walls on the west.

The Lower Court is also wrong in law in what is a material point, *viz.*, in holding that none of the evidence or proceedings before the arbitrator can be looked at as evidence in this suit. No doubt, as the question at issue in this suit was not before the arbitrator, the award is in no way conclusive, nor is the evidence on which it was based. But, so far as the parties to this suit or those under whom they claim were parties to the arbitration-proceedings, any admissions made by them (*e. g.*, any map filed by them as correct) may be used as evidence (though of course not necessarily as conclusive) against them now.

The case is remanded for re-trial with reference to the above remarks.

The 11th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Joint Hindoo Family—Presumption of joint property—Son-in-Law.

Case No. 362 of 1866.

Application for review of judgment passed by the Hon'ble Justices Bayley and E. Jackson, on the 11th June 1866, in Special Appeal No. 59 of 1866.

Dossee Monee Dossee (Special Appellant), *Petitioner,*

versus

Ram Chand Mohur (Special Respondent), *Opposite Party.*

Baboo Mohendro Lal Shome for Petitioner.

Baboo Bama Churn Banerjee for Opposite Party.

The presumption of Hindoo Law as to joint property cannot apply in a case where the property is claimed through a son-in-law living in the house of his father-in-law.

Pundit, J.—We think that the Lower Appellate Court has erred in this case in placing the *onus* upon the special appellant as far as she pleads a purchase by *her* or by her father. If she had any occasion to claim through her mother (the daughter of Ras Beharee), and if plaintiff, as the grandson of Mothooranath (the brother of Ras Beharee), had established that the two branches of the family were still joint, or at least joint up to the time of the acquisition of the properties in dispute, the *onus* might have been thrown upon the defendant, special appellant, claiming a separate purchase.

The presumption of Hindoo Law cannot apply to this case where property is claimed through a *son-in-law* who appears only to have lived in the house of his father-in-law, and not to be of joint family and funds in any legal sense of the term.

The first Court was equally wrong in throwing the *onus* upon the special appellant as regards the property for which it had given a decree to the plaintiff, without requiring any proof from him that it was the estate of Ras Beharee, and was held at all by his widow. In respect to this property, the Lower Appellate Court should see what proof plaintiff has given to entitle him to a decree.

We, however, hold that, for the lands admitted by the special appellant to have been held *in lease* by Ras Beharee, but which are stated to have been resumed by the landlord for arrears of rent due from Ras Beharee, and for which a *new lease* is stated to have been afterwards obtained by Gooroo Doss, the father of the special appellant, from the landlord, the *onus* has rightly been thrown upon the special appellant.

With regard to this *leased* property, and all others for which a decree has been given to the plaintiff, we see that the Lower Appellate Court has failed to enquire whether Ras Beharee or his widow was in possession so as not to bar plaintiff's claim by limitation, or whether (as the special appellant urges) it is not proved that neither Ras Beharee nor his widow was in possession, but that for a long period, or from the time of the acquisition of the respective properties in dispute (from strangers), the father of the special appellant and she herself have been in possession.

Possession is a material point in this case, with a view properly to decide the title of the plaintiff, even if the special appellant had to prove her own title.

We, accordingly, reverse the decree of the Lower Appellate Court, and remand the case to that Court, to re-try the appeal of the special appellant and the cross-appeal of the plaintiff, with reference to the above remarks.

We also think it proper to order that, if, in execution of the decrees of the Lower Appellate Court, any change of possession in the property in dispute has taken place, or any costs have been realized from the special appellant, all these proceedings should be set aside, and all parties forthwith restored to the same position in which they stood to each other before the Lower Appellate Court had decreed the case.

The 11th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

Relinquishment of land—Rent—Ejectment—Enhancement.

Case No. 326 of 1866 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Patna, dated the 19th July 1866.

Cazee Syud Mahomed Azmul and others (Defendants), *Appellants,*

versus

Chundee Lall Pandey and another (Plaintiffs), *Respondents.*

Mr. R. E. Twidale, Moonshee Ameer Ali, and *Baboo Romanath Bose* for Appellants.

Baboo Dabendro Narain Bose for Respondents.

Suit laid at Rupees 3,000.

The mere fact of a tenant relinquishing the land will not excuse him from payment of rent if he is otherwise liable, unless he makes some terms with his landlord.

A landlord, by taking rent from a party [illegible] him for arrears of his predecessor's rent, acknowledges him as a tenant, and cannot eject or enhance him except according to law.

Jackson, J.—In this case two grounds of appeal were argued before us by Mr. Twidale, the vakeel of the appellant. One

relates to the plea of limitation, which was raised before the Lower Court, and overruled by the Deputy Collector. Mr. Twidale contended that the Court below came to a wrong conclusion on this point; and that the Deputy Collector ought to have held that the dispossession by the defendant had taken place more than one year before the date of suit; and that, consequently, the suit was barred under Section 30 of Act X. of 1859.

It appears to me that it is not shown that the dispossession had so taken place. The plaintiff himself has been examined, and distinctly states that the dispossession was within one year previous to suit.

A statement of the plaintiff in a former suit is referred to, from which it appears that, at the time of making that statement on the 18th of September 1865, the plaintiff had already been dispossessed from the land.

The expression used is somewhat vague; "*chhin lia*," that is, that the defendant *forcibly* took possession; no doubt it seems to refer to manual dispossession. But, even if it be allowed that the dispossession was admitted to have been sometime before September 1865, that would not be at all necessarily more than one year prior to date of suit. The suit was instituted on the 26th of June 1866; and it is very probable that the dispossession took place at sometime in the interval between the 26th of June and the 18th September of the preceding year.

The evidence on this point is rather conflicting: on one side, we have the plaintiff himself and his witnesses; and, on the other, the karpurdauz and three of the ryots. The evidence on both sides seems to me to be so equally balanced that I could not take upon myself to say upon the evidence on paper before us that the Deputy Collector was not correct in saying that the evidence of the plaintiff's witnesses was more trustworthy than that adduced by the defendant, and that his decision on this point ought to be reversed.

The next ground taken is that the plaintiff had voluntarily surrendered the land; and it is contended for appellant that his witnesses proved that the plaintiff had, of his free will, relinquished the tenure, and that a settlement was made thereon with Mussamut Gungo, who is described as the kept woman of the deceased Bhowanee Pandey.

It is suggested that the plaintiff had been induced to give up the land from his inability to pay the rent, and to escape the consequences of a decree obtained against him for arrears of rent. But it is evident that the mere fact of his relinquishing the land would not excuse him from payment if he were otherwise liable unless he had made some terms with his landlord. But in that case it is probable that a written agreement would have been come to, on the one side to secure immunity from further demand, and on the other to shut out the plaintiff from all claim upon the land.

On this point, also, I do not see that we can interfere with the judgment of the Court below.

There is another point to which our attention has been called by Moonshee Ameer Ali who appeared with Mr. Twidale for the appellant, namely, that there has been no proof shown of Bhowanee Pandey's mourosee title.

As to this we think it is not material whether any mourosee title is proved or not. The plaintiff took this jote in succession to his uncle who indisputably had held it for many years. The defendant, by taking rent from him, and by suing him for arrears of his uncle's time, had acknowledged the plaintiff as a tenant; and, if he afterwards desired to enhance or to eject him, he ought to have proceeded in a legal measure, and not have ousted the plaintiff in the manner that he did. Under all these circumstances, therefore, I am of opinion that the order of the Court below must be affirmed, and this appeal dismissed with costs and interest.

I have a few words to add as to the irregular manner in which this appeal has come before this Court. The original value of the suit was Rupees 7,000. The respondent, defendant, objected that this was a gross over-valuation, and the Deputy Collector reduced the value to Rs. 3,000, a decree being given by which costs were awarded on that amount. The defendant presented his appeal to the Zillah Judge of Patna. The Judge recorded on the back of the Memorandum a declaration that he was not competent to entertain the appeal, but that it must be presented to the High Court, and that original Memorandum of appeal with the remark endorsed upon it by the Judge has been received without objection by the Officer of this Court, and laid before the Court for trial. Moreover, the Memorandum itself, intended as it was for presentation to the Zillah Court, is drawn in direct contravention of the provisions of Section 334 of the Code of Civil Procedure, the grounds of appeal being extremely lengthy and argumentative. For both these reasons it

appears to me that the Memorandum of appeal ought, on its presentation in the office, to have been laid before the Judge in the Miscellaneous Department who would have determined whether the appeal should be admitted or rejected. It is unnecessary now to go further into this matter, as no objection has been raised regarding it by the respondents. I merely make these remarks for the future guidance of the officers of the Court.

Seton-Karr, J.—I entirely concur in the remarks of my learned colleague, and, with regard to the point of limitation, I would add that the plaintiff's first statement in the rent-suit may very probably have referred to the new settlement between the defendant and Mussamut Gungo which is said to have taken place in Jeyt 1272.

The act of dispossession in Kartick now spoken of by the plaintiff, in his deposition in this case, refers to the actual and tangible entry upon the land by the defendant with ploughs and bullocks, and therefore I think that the two statements may have been perfectly reconcileable; and it was moreover the business of the defendant to have cross-examined the plaintiff on the point of alleged discrepancy, with reference to his former statement. As regards the question of mourosee title, the order of the Lower Court is simply one for the re-instatement of the plaintiff, and not one which adjudicates on the mourosee tenure.

The 11th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Limitation—Sale in execution—Suit by claimant of attached property.

Case No. 2240 of 1866.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 29th June 1866, affirming a decision of the Moonsiff of Munglecote, dated the 8th September 1865.

Rutnessur Kundoo (one of the Defendants), *Appellant,*

versus

Majeda Bebee (Plaintiff), *Respondent.*

Baboo Umbica Churn Banerjee for Appellant.

Mr. C. Gregory and *Moulvie Murhumut Hossein* for Respondent.

Where a person's claim to attached property was not rejected, but the sale took place subject to it—HELD that he could sue to establish his right to the property at any time within 12 years, Clause 3, Section 1, Act XIV. of 1859, not applying to such a case.

Norman, J.—THIS is a suit instituted on the 21st of April 1865 to establish the right of the plaintiff to 3*a.* 5*g.* of a talook in Towjee No. 217 purchased by them from one Sreenath Roy, and for the reversal of an order, dated the 30th of July 1863, rejecting the plaintiff's claim, and a sale in execution under an attachment for realizing the amount of a certain fine from Sreenath Roy.

The defendant pleaded that the suit was not brought within one year from the date of the order rejecting the claim, and was, therefore, barred by the conjoint operation of Section 246 of Act VIII. of 1859, and Clause 3, Section 1, Act XIV. of 1859.

We find, however, that the Court, in passing the order of the 30th of July, had made no investigation, and pronounced no decision as to whether or not the land was in the possession of the party against whom the execution was sought as his own property. It simply ordered that, "this being a matter of share, the sale should take place," notice being given of the plaintiff's claim to purchasers at the sale. The plaintiff's claim was not rejected, but the sale took place subject to it.

There was no legal order or decision under Section 246 which bound or affected the plaintiffs, or which they were under any necessity to set aside, and the plaintiffs were, therefore, at liberty to sue within the period given them by Clause 12, *viz.*, 12 years. *See* Syed Afzul Khan *versus* Kanhya Lall, 2 Weekly Reporter 263; Monohur Khan *versus* Toylokonath Ghose, 4 Weekly Reporter 35; Ram Gopal Roy *versus* Nundo Gopal Roy, 4 Weekly Reporter 42; Sreemutty Dossee *versus* Shebanee Debea, 5 Weekly Reporter 123.

In Sheikh Khoda Buksh *versus* Purmanund Dutt, 5 Weekly Reporter 213, we do not know exactly what the facts were. The case was not argued on the part of the respondent but there appears to have been a decision *de facto* under Section 246.

Clause 3, Section 1 of Act XIV. of 1859, does not apply to or affect the plaintiff's claim, because, being no party to the decree, the sale does not directly bind or affect him. The sale may and does stand; it binds such interests as Sreenath Roy possessed.

We, therefore, affirm the decision of the Lower Court, and dismiss the defendant's appeal with costs.

The 17th March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Limitation—Sale in execution—Suit to recover possession of lands sold.

Case No. 1137 of 1866.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of Beerbhoom, dated the 31st January 1866, modifying a decision passed by Moulvie Golam Batool Tumkin, Sudder Moonsiff of that District, dated the 12th July 1865.

Baboo Pertaub Chunder Chowdhry and others (Plaintiffs), *Appellants,*

versus

Baboo Brojo Lall Shaha and others (Defendants), *Respondents.*

Baboos Gopal Lal Mitter and *Nil Madhub Sein* for Appellants.

Baboo Sreenath Doss and *Tarrucknath Sein* for Respondents.

The plaintiff having been dispossessed under a certificate of sale which was not conformable to or warranted by the sale itself, and having made no complaint to the Court which was executing the decree, is entitled to bring his suit for confirmation of his title, and to be restored to the possession of the property from which he was ousted at any time within 12 years from the time of his dispossession.

This case was referred to a Full Bench by Kemp and Markby, JJ., with the following order:—

Referring Order.—THIS was a suit for confirmation of title over a share in an ancestral zemindaree and for possession with mesne-profits.

The plaint sets forth the respective shares of the plaintiffs, and also states the extent of the share of the judgment-debtor, Shamdyal Chowdhry, whose rights and interest were sold in execution of a decree and purchased by the defendant No. 3 on the 2nd of June 1862. It is further alleged that, from the 5th Maugh 1269, the defendants have taken possession of the share of the plaintiffs, together with the share belonging to the judgment-debtor. Hence this suit for confirmation of title with possession and mesne-profits.

The Court of first instance, the Sudder Moonsiff of Beerbhoom, held that the suit of the plaintiffs was not barred, inasmuch as the provisions of Clause 3, Section 1, Act XIV. of 1859, were inapplicable, the suit not being brought for the reversal of a summary order, but for the establishment of title; and that for such a claim twelve years was the proper period. On the merits, for reasons which it is unnecessary to enter into, he dismissed the plaintiff's suit.

Both parties appealed: the plaintiffs on the merits, and the defendants under Section 348 of the Code, objecting to the finding of the Moonsiff on the issue in bar.

The Principal Sudder Ameen observes that "it is not denied that the defendant "No. 3 purchased the disputed property at a "public auction on the 2nd of June 1862, "and that he took possession of it on the 17th "January 1863, corresponding with the 5th "of Maugh 1266 B. S.; that it also appeared "that the plaint in this suit was filed on the "30th of January 1865, or 18th Maugh 1271 "B. S. Hence it is clear that the suit was "brought after the lapse of 2 years 7 months "and 27 days from the date of the sale, and "of 2 years and 12 days from the date of de-"livery of possession; that it had been laid "down by the High Court in the cases of "the appellants, Bebee Suboorun and Ram "Gopal Roy and others, decided respect-"ively on the 16th January and 12th Septem-"ber 1865 that, if a plaintiff be evicted by a "Court of Justice, he should bring his suit "within one year; but that, where the plaintiff "has received a mere nominal possession, or "where the plaintiff has been dispossessed in "some other way, the suit for recovery of "possession may, according to the general "rule, be instituted within 12 years. But in "this case it is clearly apparent from the re-"ceipt given after the delivery of seizin on "the 5th of Maugh 1269 B. S., and filed by "the defendant No. 3, that he was placed in "possession of a *1a.* *15g.* *2c.* *2k.* share of "lot Bedarpore by beat of drum, and the "planting of bamboos on the 5th of March "1269 B. S. It was, therefore, incumbent "on the plaintiffs to bring their suit within

"one year from the above date." But, as they have done so after a lapse of 2 years and 12 days from that date, their suit was barred. The suit and appeal of the plaintiffs were dismissed without going into the merits.

In special appeal it is contended that the Principal Sudder Ameen is wrong in law, inasmuch as this is not a suit for the reversal of a sale, but for the recovery of immoveable property with mesne-profits, on adjudication of the title of the plaintiffs; that the period of limitation is 12 years from the date of the cause of action. The prayer of the special appeal is that the suit be remanded for trial on the merits.

There can be no question that the defendant No. 3 has purchased nothing but the rights and interest of his judgment-debtors, the heirs of Shamdyal Chowdhry. Possession was given to the defendant according to the provisions of Section 264 of the Code of Civil Procedure, that is to say, by proclaiming to the occupants of the property by beat of drum, or in such other mode as may be customary, that the right, title, and interest of the defendant, *i. e.*, the judgment-debtor, had been transferred to the purchaser. If the purchaser, under cover of this proclamation and *pro formâ* delivery of possession, take possession of property not belonging to his judgment-debtor, the said property being immoveable property, the suit against the purchaser is governed, in as far as limitation is concerned, by the provisions of Clause 12, Section 1, Act XIV. of 1859, which is to this effect: "To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of the Act applies, the period of twelve years from the time the cause of action arose."

This was not a suit to set aside the sale of any property sold in execution of a decree of the Civil Court; for the property of the plaintiffs was not sold, but simply the rights and interests of the judgment-debtor. If, then, in taking possession of those rights, the purchaser, either by his own act, or through the intervention of the Court, take possession of immoveable property belonging to a third party, the suit to recover such property may be brought at any time within 12 years from the time the cause of action arose, that is to say, from the date of ouster.

A Divisional Bench of this Court has held in the case of Ramgopal Roy and others, plaintiffs, appellants, *versus* Nundo Gopal Roy, reported in Volume IV., Weekly Reporter, page 42, Civil Rulings, "that, if it be shown that the property was taken and the plaintiffs dispossessed by the Court, whether the Court was right or wrong, the injured party must sue within one year." As we differ in opinion with the learned Judges who decided that case, we direct that this appeal be submitted for the decision of a Full Bench on the following point:—

A party purchasing the rights and interests in immoveable property of a judgment-debtor in execution of a decree evicts by act of the Court a third party whose rights are independent of the rights of the judgment-debtor. In such case must the injured party sue within one year from his cause of action, or can he bring his suit within the ordinary period, *viz.*, any time within 12 years from the date of his cause of action?

The judgment of the Full Bench was delivered by—

Peacock, C. J.—In this case a decree for the payment of money was obtained against Shamdyal in the Court of the Sudder Moonsiff of Moorshedabad. The decree was sent to the Moonsiff of Beerbhoom for the purpose of being executed; and it appears that, in executing that decree, the proclamation, which was issued under Section 249, Act VIII. of 1859, declared that the right, title, and interest of Shamdyal in certain property specified therein would be sold. The property was put up to sale under that proclamation, and the defendant became the purchaser. At the time when he made the purchase, and when he fixed the amount which it would be worth his while to give for that which was about to be sold, he knew that he was purchasing only the right, title, and interest of Shamdyal.

Proceedings went on until it came to the granting of a certificate of sale under Section 259, and then by some error (whether intentional or not, it is unnecessary to decide), it was recited in the certificate of sale that the plaintiff's ancestor Kistodyal, as well as Shamdyal, were defendants in the suit, and that the interests of the defendants in that suit had been sold; so that, in fact, instead of declaring that only Shamdyal's interests in the property had been sold, it was declared that the interests of the plaintiff's ancestor, as well as Shamdyal's interests, had been sold under the decree.

In carrying out the execution under Section 264 of the Procedure Code, the

property being in the possession of ryots, a copy of the certificate of sale would have to be affixed, and a notice given to the occupants of the land that the right, title, and interest of the defendants had been transferred to the purchaser. Coupling the notice with the copy of the certificate of sale, it would appear that notice was given to the occupants of the property that the interests of the persons who were described in the certificate of sale as the defendants had been sold.

By putting the auction-purchaser into possession in that manner according to Section 264, it may be said that the plaintiff or his ancestor was dispossessed of his interest in the property under the execution of the decree; and he might, if he had pleased, have applied, within one month from the date of such dispossession, to the Court by which the decree was executed, and complained of his having been so dispossessed; and the Court, under Section 269 of Act VIII. of 1859, would have enquired into the matter and passed such order as it considered proper. If the Moonsiff, upon his making such application, had decided that his interest had been properly sold, or that of which he had been dispossessed actually belonged to Shamdyal, he could not have appealed against the order, but might, within one year from the date of that order, have brought a regular suit for the purpose of establishing his right.

This suit is now brought by the plaintiff for confirmation of his title, and to recover possession of the property of which he was dispossessed; and the question referred to us is whether the plaintiff is barred by Clause 3, Section 1, Act XIV. of 1859.

That Clause fixes the period of limitation to suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Court not established by Royal Charter when such suit is maintainable at one year from the date at which such sale was confirmed, or would otherwise have become final and conclusive if no suit had been brought.

But this suit is not brought to set aside the sale of the property. It is brought merely to confirm the plaintiff's title, and to restore him to possession.

It is contended on the part of the defendant that the suit, although it has not been brought to set aside the sale, is substantially a suit to set aside the sale of the plaintiff's interest, because the plaintiff cannot be put into possession until that sale has been set aside. It appears to us that the Clause referred to does not apply to suits for setting aside certificates of sale, but only to suits for setting aside sales.

The sale took place under the proclamation and was completed, and the certificate ought to have been a true certificate of the sale which actually took place. There was no necessity to set aside the sale, because Shamdyal's interests alone had been sold, although the certificate stated that the plaintiff's ancestor's interests had also been sold; and in a regular suit for confirmation of title and for restoration of possession, it was competent to the plaintiff to show what the sale really was, and that the certificate was wrong. The period of limitation for the suit for confirmation of title and for restoration of property is 12 years under Clause 12, Section 1, Act XIV. of 1859. Therefore, so far as Act XIV. of 1859 goes, the plaintiff is not barred by limitation.

But, it is further contended on behalf of the defendant that, according to a decision of Mr. Justice Steer, reported in the 2nd Weekly Reporter, Civil Rulings, page 55, the plaintiff or his ancestor had no right, when he was dispossessed by the notice given to the ryots that his interest had been sold, to lie by, and that he ought, under Section 269 of Act VIII. of 1859, to have complained of his dispossession to the Court by which the decree was executed; and that, if he did not do so, he would have only the same period from the date of dispossession to bring his action as he would have had under that Section from the date of the order if he had complained to the Court under that Section, and the Court had decided against him, *i. e.*, one year.

We are of opinion that the plaintiff or his ancestor was not bound to complain under that Section. If he was bound to complain, and has only the same time to bring his suit as he would have had if he had made his complaint, the period of limitation would seem to be one month from the date of dispossession, for Section 269 requires the person who is dispossessed, if he intends to make a complaint, to make that complaint within one month from the time of his having been dispossessed. Mr. Justice Steer does not say that he would be bound by the period of one month, but by the period of one year from the time of his dispossession. The period of a year, which is fixed by Section 269, is not to date from the time of dispossession, but from the date of the order made under the complaint. Where no com-

plaint is made, there can be no order; and it would be impossible to ascertain whether the suit was brought within one year from the time at which the order would have been made if a complaint had been preferred; and there is no reason for saying that, if there is no order from which the year is to date, the period of one year must be reckoned from the date of the dispossession, instead of from the date of the order which, if a complaint had been made, must have been subsequent to the dispossession, and, in some cases, a considerable time after it.

It, therefore, appears to us that the ruling of Mr. Justice Steer to this extent is not correct, and that a party is not bound to make an application under Section 269 unless he please. If he choose to make an application, and a decision against him is passed upon that application, he is not entitled to appeal against the order, but must bring a regular suit to establish his right within one year from the time of the order. But if he does not choose to apply to the Court which is executing the decree for a summary decision, but prefers to bring a regular suit in ordinary course, then the period of limitation prescribed by Clause 12, Section 1, Act XIV. of 1859, is the period by which he is bound.

It is also urged that the decision by Mr. Justice Trevor and Mr. Justice Campbell (4th Weekly Reporter, Civil Rulings, p. 42) is rather opposed to the present view of the Court. But all that that case decided was that, when a man is dispossessed by a Court in execution of an auction-sale, he must sue within one year to reverse the sale-proceedings. The facts of that particular case are not sufficiently detailed to enable the Court to say precisely what was intended. If a person makes an application under Section 269 of Act VIII. of 1859, and the Court decides against him by holding that he was properly dispossessed, that may be said to be a dispossession by a Court. If that is what was intended by a dispossession by the Court, then the case is right. But the case would not fall within Section 1, Act XIV. of 1859, but within Section 269, Act VIII. of 1859.

There may possibly be other cases of dispossession by a Court in which it may be necessary to set aside the order of the Court before a regular suit to recover possession can be maintained. It is not necessary to express any opinion upon that point at present. It is sufficient to say that, in the present case, the plaintiff having been dispossessed under a certificate of sale which was not conformable to, or warranted by, the sale itself, and having made no complaint to the Court which was executing the decree, has a right to bring his suit for confirmation of his title, and to be restored to the possession of the property from which he has been ousted, within 12 years from the time of his dispossession.

With this intimation of the opinion of the Full Bench, the case will be sent back for further orders to the Division Court, which referred it for our opinion.

The 12th March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Limitation—Sale in execution—Suit to recover possession of lands sold.

Case No. 1625 of 1866.

Special Appeal from a decision passed by Baboo Russick Lall, Officiating Principal Sudder Ameen of Rungpore, dated the 14th March 1866, affirming a decision by Nusseerooddeen Mahomed, Moonsiff of Oonipore, dated the 11th September 1865.

Baboo Jodoonauth Chowdry (Plaintiff), *Appellant,*

versus

Radhamonee Dossee (Defendant), *Respondent.*

Baboos Khetternauth Bose and *Sreenath Doss* for Appellant.

No one for Respondent.

The plaintiff, having been dispossessed under a sale in execution against other parties, is entitled to sue, to establish his title and to recover possession at any time within 12 years from the time at which he was dispossessed, according to Clause 12, Section 1, Act XIV. of 1859.

This case was referred to a Full Bench by Bayley and Shumbhoonath Pundit, JJ., with the following order:—

Referring Order.—The grounds taken in this special appeal by the pleader before us are—

First.—That the cause of action arose to plaintiff on the 22nd January 1852, when the claim of plaintiff in the summary proceedings in the Execution Department were overruled, and that thus limitation bars the suit.

Second.—That, as plaintiff sues to recover property sold in execution of a decree in the year 1854, he should, under Clause 3, Section 1, Act XIV. of 1859, have sued within one year from the date of suit, and, not having done so, is barred by the Law of Limitation.

Third.—That the Lower Appellate Court has wrongly put the burden of proof on defendant, special appellant.

With reference to the *first* plea, we are of opinion that the mere order rejecting a claim would not be the date of the cause of action; but, with reference to the *second* plea, it is, in our view, a doubtful question if the dispossession following the sale in execution of a decree would or would not create the cause of action.

On the one hand, a case is cited to us, Volume 4, page 42, Weekly Reporter, Civil Rulings, Trevor and Campbell, JJ., in which it is held that a party dispossessed by the result of a sale in execution must sue within one year of such dispossession.

On the other hand, we perceive from a judgment of Kemp and Markby, JJ., dated September 6th, 1866, No. 1137 of 1866, that, differing from the above-cited judgment of the other Division Bench, they have referred the matter to a Full Bench.

We ourselves rather incline to agree with Kemp and Markby, JJ., considering that only where the circumstances are such in each individual case that the right sought *cannot* in any way be adjudicated by a Civil Court, except through the medium of a suit directly to reverse the sale, a suit must be brought within one year; but that, wherever the circumstances are such that the right sought *can* be adjudicated without a suit directly to reverse the sale, the limitation under Clause 3, Section 1, should not be applied.

Refer to Full Bench.

The Judgment of the Full Bench was delivered by—

Peacock, C. J.—The plaintiff in this case was dispossessed under a sale in execution of a decree against Hurree Ram and others. The plaintiff's property was not liable to be sold under that execution; and he brings his suit now to establish his title and to recover possession. That suit is brought within 12 years from the time at which he was dispossessed. It appears to the Court that the suit is brought within proper time, and that the period of limitation is 12 years from the time of dispossession according to Clause 12, Section 1, Act XIV. of 1859.

It is said that there had been a summary order made in this case in which it was determined between the plaintiff and the execution-creditor in the former case that the plaintiff's property was liable to be sold under the decree. But there was no summary order in this case. If the Court had summarily decided that the property was liable to be sold, then it would be necessary to get rid of that summary order, and the suit must have been brought within one year from the date of that order according to Clause 5, Section 1, Act XIV. of 1859, or within two years from the time of the passing of Act XIV. of 1859 under Section 18 of that Act.

But, so far from there being a summary order in this case, the Court refused to make any summary order, and they gave their reasons for such refusal. They referred to the Circular Order of the Sudder Court of the 10th June 1862, and stated that the rights and interests of the defendants in the property would be sold, and that intimation of the plaintiff's claim would be given at the time of sale. The rights and interests of the debtors under the decree having been sold, that did not pass the plaintiff's interests, if he had any, in the property; and, if he was dispossessed having an interest in the property, he is entitled to bring his suit within 12 years from the time of dispossession. Consequently, the suit is not barred by limitation.

The case which was cited from 4th Weekly Reporter, Civil Rulings, page 42, and which was decided by Mr. Justice Trevor and Mr. Justice Campbell, to which we have already adverted in the decision just* passed in Special Appeal No. 1137 of 1866, is not applicable to the present case.

This case will be returned to the Division Bench which referred it for our opinion, in order that that Court may pass such further orders as are necessary.

* *See ante*, p. 253.

The 12th March 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Sale—Fraudulent Concealment.

Case No. 280 of 1866.

Regular Appeal from a decision passed by Baboo Koonj Lal Banerjee, Principal Sudder Ameen of Hooghly, dated the 19th May 1866.

Pearee Mohun Soor (Plaintiff), *Appellant,*

versus

Abdool Sobhan Chowdhry (Defendant), *Respondent.*

Baboo Dwarkanath Mitter for Appellant.

Mr. R. V. Doyne and *Baboo Chunder Madhub Ghose* for Respondent.

Suit laid at Rupees 30,660-1-12.

Where a vendor, knowing that he had no right or title to property, or being cognizant of the existence of incumbrances or of latent defects materially lowering its value, sold it and neglected to disclose such defects to the purchaser—HELD that there was a fraudulent concealment vitiating the contract.

Glover, J.—THE facts of this case are to a great extent undisputed.

The plaintiff purchased from the defendant on the 7th of Magh 1270 B. S. certain rent-free and other lands in Pergunnah Boro-Paikan for Rupees 25,000, paid the money, and got possession.

Shortly afterwards, one Shib Kishen Dan sued the defendant for specific performance of a contract, under which he had engaged to sell the above lands to him (Shib Kishen), and eventually got a decree, the result of which was that the plaintiff was ousted from his purchase.

He now sues to recover from his vendor Abdool Sobhan Chowdhry the 25,000 rupees paid to him, with interest, on the ground that he was fraudulently kept in ignorance of the previous contract with Shib Kishen Dan.

The defendant admits the payment of the 25,000 rupees from Pearee Mohun, but alleges that the latter knew of the *bynanamah* entered into with Shib Kishen at the time he purchased the property.

He contends, moreover, that he gave the plaintiff possession of the lands, and, by so doing, performed all his part of the contract, and that the plaintiff has no claim to recover the purchase-money.

The Principal Sudder Ameen took this view of the case. He considered that Pearee Mohun was, at the time of his purchase, cognizant of the bynanamah previously given to Shib Kishen, and that the principle of "*caveat emptor*" applied.

The only point for consideration in appeal is, "Did the plaintiff (appellant) purchase with knowledge of the bynanamah conveyed to him by the vendor, or was there a fraudulent concealment on the part of the respondent?"

That Pearee Mohun had notice from Shib Kishen Dan to the extent that there was another person claiming preference under a bynanamah is, we think, established by this Court's decision in the case of Shib Kishen *versus* Abdool Sobhan (3 Weekly Reporter 103), in which the bynanamah was upheld, both as against the vendor and the present appellant who was a co-defendant in that suit; and the learned Counsel for the respondent, Mr. Doyne, argues from this that, as the appellant had notice of the bynanamah, though that notice came from a third party, and as there was no warranty of title given by the vendor, Pearee Mohun cannot recover. He was put on his guard by the notice, and had every opportunity of making enquiry; and if, after that, he still chose to complete his purchase, he did it at his own risk, and is not protected; he bought with his eyes open, thinking to make a good bargain, and cannot now resile, because he finds that, owing to Shib Kishen's success in the civil suit, it has turned out a bad one.

After hearing the argument on both sides, we are of opinion that the respondent, the vendor, was guilty of fraudulent concealment as regards the property sold by him to the appellant, and that the latter is entitled to get back his purchase-money.

Admitting, as we are bound to do, that Pearee Mohun received notice of Shib Kishen's claim from Shib Kishen himself, this would not affect the position of the contracting parties; for Pearee Mohun was not bound to rely on the gratuitous representations of a third party, or to believe that the bynanamah had been entered into merely because Shib Kishen chose to say so. It might have had the effect of inducing Pearee Mohun to make some further enquiry previous to settling, and this it appears to have done, for the evidence of the broker Debee Churn Ghose shows that, at the time of the purchase, the appellant was distinctly told by his vendor that there was no incumbrance on the property, and nothing to stand in the way of his purchase. But the appellant was not bound to make such enquiry.

Then, was this concealment of the bynanamah on the part of Abdool Sobhan fraudulent? And did it induce the other party to enter into a contract which he would not have done, had the real circumstances of the case been divulged to him?

It is quite clear from the evidence, and the fact is not denied, that, at the time Abdool Sobhan took the appellant's money, he had already entered into a contract to sell the same land to Shib Kishen Dan, and had received Rupees 2,500 as earnest-money. It is equally clear that he never told the appellant of this arrangement, but throughout gave him to understand that the property was still in his power. It is contended on his behalf that he considered the bargain previously made with Shib Kishen null and void, in consequence of the latter's having failed to pay the purchase-money within the stipulated time, and that the concealment, therefore, was an innocent mistake, and no fraud.

But this argument, we think, is untenable. It cannot be that Abdool Sobhan was acting in good faith under a mistake, or that he thought himself under no contract to Shib Kishen, when he sold to the appellant; for in the suit brought against him by the Dan plaintiff, he denied the bynanamah filed by Shib Kishen altogether, and set up another deed according to which he asserted that the Dan had failed to perform his part of the contract He knew perfectly well the nature of the claim against him, and that it was opposed to his own false statement of facts, and he could not, therefore, have supposed that the man, who had already paid him Rupees 2,500 as earnest-money, would quietly withdraw his claims, or that the land was free for him to sell to another.

We look upon his present contention as a further attempt to repeat the fraudulent conduct which was exposed and defeated in the former suit by the decree of this Court.

It remains, then, that there was at the time of sale a defect in the respondent's title of a nature that the purchaser could not, by the greatest care and attention, discover for himself; and that, after Pearee Mohun had got some inkling of it from a third party, the respondent quieted his fears by a fresh declaration that there was no incumbrance in the way of his purchase.

It has been held (*vide* Addison on Contracts, page 131) that, where a vendor, knowing that he had no right or title to property, or being cognizant of the existence of incumbrances, or of latent defects materially lowering its value, sold it, and neglected to disclose such defects to the purchaser, there was a fraudulent concealment vitiating the contract.

In the present case there can be no doubt that the information as to Shib Kishen's previous bynanamah was of a nature that ought to have been communicated, and that the respondent, by concealing it, acted fraudulently, and rendered his contract with Pearee Mohun void. Under such circumstances, it is clear that the principle of *caveat emptor* will not apply.

We, therefore, reverse the decision of the Principal Sudder Ameen, and declare the respondent, Abdool Sobhan, liable to the appellant for the full amount of the purchase-money with interest.

The 12th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for damages for abuse.

Case No. 2868 of 1866.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of Chittagong, dated the 31st August 1866, reversing a decision passed by the Moonsiff of that District, dated the 7th July 1866.

Osseemooddeen (Plaintiff), *Appellant,*

versus

Futteh Mahomed (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

No one for Respondent.

An action will lie for damages for mere abuse.

Pundit, J.—THE Lower Appellate Court is wrong if it thinks that, with reference to the decision of the late Sudder Court of Ahmed Buksh, no action at all will lie for damages on the ground of mere abuse.

The decision of the High Court, dated 13th of August 1864, page 19, Volume I. of the Weekly Reporter, shows that such an action does lie in the Civil Court.

It is within the power of the Lower Appellate Court to decide the extent of injury, and to decide whether 20 Rs. or anything less is the proper damages for the same.

Remand accordingly.

The 12th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Pre-emption.

Case No. 2878 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 28th July 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 30th December 1865.

Teeka Dharee Singh (Plaintiff), *Appellant,*

versus

Mohur Singh and others (Defendants), *Respondents.*

Moulvie Syud Murhumut Hossein for Appellant.

Baboos Kishen Succa Mookerjee and *Kali Kishen Sein* for Respondents.

The Mahomedan Law of pre-emption was never intended to apply to a case in which the purchaser is not a stranger, but one who is already either a shareholder or a neighbour.

Pundit, J.—THE special appellant pleads that both the Lower Courts err in rejecting his claim of pre-emption, on the ground that the vendor is not a stranger, but one who also had a right of pre-emption if anybody else had purchased.

Special appellant refers to the case of Roshun Mahomed and others (13th February 1867, page 150, Volume VII., Weekly Reporter) in support of his plea. In this case the point whether the plaintiff there could or could not sue the vendor in the case was neither taken nor decided.

The pleader then quotes another decision quoted in the aforesaid decision. That decision assumes all pre-emptors to be claiming the right of pre-emption together, not one of them or some of them against the rest, and decides that, in such a case, each person takes an equal share, and not in proportion to his former share when the pre-emptors are shareholders. Neither this decision nor the text of the Hedaya upon which it is based support plaintiff's present claim.

Both the Lower Courts were presided over by two Mahomedan Moulvies, and the special appellant's pleader, also a Moulvie, cannot quote any text of law in support of his claim.

The very fact of the purchaser not being a stranger, but one who is already either a shareholder or a neighbour, proves that the Mahomedan Law of Pre-emption never intended to apply to such a case.

We accordingly, see no reason to interfere, and reject the special appeal with costs.

The 13th March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Sale of tenure under Section 105, Act X. of 1859 (Effect of).

Case No. 992 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. G. G. Balfour, Judge of Chittagong, dated the 14th December 1865, reversing a decision passed by Mr. C. A. Kelly, Deputy Collector of that District, dated the 22nd March 1865.

Shahabooddeen (Plaintiff), *Appellant,*

versus

Futteh Ali and another (Defendants), *Respondents.*

Baboo Greeja Sunker Muzoomdar for Appellant.

Baboo Nobo Kishen Mookerjee for Respondents.

In a sale for arrears of rent under Section 105, Act X. of 1859 (not affected by Section 16, Act VIII. of 1865 B. C.), the sale is not free of incumbrances created by the defaulter before the sale, unless the right of selling or bringing to sale the tenure for an arrear of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure.

This case was referred to a Full Bench by Peacock, C. J., and L. S. Jackson, J., with the following orders:—

Peacock, C. J.—IF the sale of the tenure in this case was free from incumbrances, it must also be free from admissions made by the former holder of the tenure, and the purchaser at the sale is not bound by them; otherwise a holder of a tenure might create by an admission an incumbrance which he could not create by actual conveyance. It appears to me, however, that a sale of this under-tenure was not a sale free from incumbrance, and that the admission made by the former holder of the tenure in the solehnamah was evidence as against the purchaser of the tenure, and that the decision of

the Judge was right. Satkowree Mitter's case (page 626, Sudder Decisions for 1851) seems to me to be a correct ruling. In that case the Sudder Court held that Section 11, Regulation VIII. of 1819, which says that the sale is to be free from incumbrances, applies to sales made under Section 8 of that Regulation. But, as there are several conflicting decisions,* we express no final opinion in the case, but refer it for the decision of a Full Bench.

Jackson, J.—I concur.

The Judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The plaintiff was an auction-purchaser of a Nowabad talook in Chittagong called Moonshee Hossein Alee. He purchased under a decree for arrears of rent due in respect of the said talook from the former holder of the talook to the ijaradar under the Government of the village in which the talook is situate, and which comprises several other Nowabad talooks.

The plaintiff sued to enhance the rent of the defendant, who claimed to hold the talook free from further enhancement under a solehnamah granted by the former holder Hossein Alee to the predecessor of the defendant, by which he agreed to take no more rent from the defendant's predecessor than the amount which he, the said Hossein Alee, paid to Government as revenue.

The sale took place under Section 105, Act X. of 1859; and the plaintiff contends that he is not bound by the solehnamah granted to the defendant's predecessor by the former holder Hossein Alee, inasmuch as the talook, having been sold under Section 105, Act X. of 1859, for arrears of rent of the talook, was sold free from incumbrances.

The Deputy Collector held that the sale was free from incumbrances, and accordingly assessed the defendant at what he considered a fair rent. Upon appeal to the Judge of Chittagong, the Judge overruled the decision of the Deputy Collector, upon the ground that, although the plaintiff was not bound by the provisions of the solehnamah, still there was a recital in the solehnamah that the land had been held for more than 20 years upon the same terms; and, consequently, he thought that the defendant was not liable to have the rent enhanced in consequence of his having held for more than 20 years upon those terms.

The case came before the 1st Division Bench, who held that, if the sale of the tenure was free from incumbrances, it must also be free from admissions made by the former holder of the tenure, and that the purchaser at the sale was not bound by them; and they remarked that, if the case were determined otherwise, a holder of a tenure might create by an admission an incumbrance which he could not create by actual conveyance. It then became necessary to determine whether a sale of the talook under Section 105, Act X. of 1859, was a sale of the estate free from incumbrances, or whether it was merely a sale of the tenure subject to any incumbrances which the former holder of the tenure had created.

Several conflicting cases were cited to the 1st Bench when the case was before it, and, in consequence of these decisions, the case was referred by the 1st Bench to a Full Bench for the purpose of having the question determined, whether a sale under Section 105, Act X. of 1859, was free from incumbrances, or whether the tenure in the hands of the purchaser was subject to incumbrances created by the defaulter.

Several Regulations have been referred to. The first is Regulation VII. of 1799, Clause 1, Section 15 of which declares that "any "zemindar, talookdar, or proprietor, or "farmer of land, to whom an arrear of rent "may be due from a dependant talookdar, "kutkinadar, jotedar, or other under-tenant "of whatever denomination, which cannot "be realized by distraining the personal "property of such under-tenant, and his "surety (if he shall have given security), "is at liberty, after demanding such arrear "from the defaulter and from his surety, if "forthcoming, or without any express de-"mand if he have reason to believe that the "defaulter or his surety is prepared to "abscond, to cause the immediate arrest of "such defaulter and his surety in the manner "following."

Clause 7 of the same Section provides that, "if the defaulter be a dependant talookdar, "or the holder of any other tenure which, "*by the title-deeds or established usage of "the country*, is transferable by sale or "otherwise, it may be brought to sale, by "application to the Dewanny Adawlut, in "satisfaction of the arrear of rent, and the "purchaser will become the tenant for the "new year."

* Vol. 6, p. 15, Weekly Reporter, Act X., Rulings. Vol. 3, p. 197, Weekly Reporter, Civil Rulings.

By Act VIII. of 1835 the power of the Dewanny Adawlut to sell in satisfaction for arrears of rent was transferred to the Collectors of Revenue.

Clause 7, Section 15, Regulation VII of 1799, to which we have adverted, does not in express terms say whether, when a tenure is sold under its provisions, it is sold free from or subject to incumbrances which may have been created by the former holder.

Section 8 of Regulation VIII. of 1819, by which putnee talooks were recognized, enacts that zemindars, *i. e.*, proprietors under direct engagements with the Government, may apply in the manner therein pointed out for periodical sales of any tenures *upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure;* and Clause 1, Section 11 of the same Regulation, declares that any talook or saleable tenure sold under the rules of that Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assigns, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held.

Clause 3 of the same Section, however, provides that nothing therein contained shall be construed "to entitle the purchaser "of a talook or other saleable tenure inter- "mediate between the zemindar and actual "cultivators to eject a khoodkasht ryot or "resident and hereditary cultivator, nor "to cancel *bond fide* engagements made "with such tenants by the late incumbent "or his representative, except it be proved "in a regular suit to be brought by such "purchaser for the adjustment of his rent "that a higher rate would have been de- "mandable at the time such engagements "were contracted by his predecessor."

So that, although sales of tenures for arrears of rent due under them, made under the provisions of Regulation VIII. of 1819, were free from all incumbrances, there was the proviso which protected resident cultivators who held under engagements made *bond fide* with them by the former incumbent, provided that, at the time when the engagements were made, as high a rent was reserved as was demandable at that time.

It is to be remarked that Section 8 applied to the sale of those tenures only upon which the right of selling or bringing to sale for arrears of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. If the engagements contained a stipulation to that effect, then the proprietor might apply to have the tenure sold in the manner provided by that Section; and by Section 11 the sale was declared to be free of incumbrances.

It was not at that time expressly stated whether a sale of a tenure of the nature defined in Section 8 of Regulation VIII. of 1819, if sold by any other process than that prescribed by Clauses 2 and 3 of that Section, was free of incumbrances created by the former proprietor of the tenure or not, and consequently Regulation I. of 1820 was passed to clear up any doubt upon that subject.

That Regulation recited that, "whereas "it has been omitted to provide in the rules "of Regulation VIII. of 1819, whether in "case the proprietor of an estate paying "revenue to Government should desire to "bring to sale a saleable tenure of the na- "ture defined in Clause 1, Section 8 "of that Regulation, for the realization of "arrears of rent due thereupon, by any legal "process other than that prescribed by "the 2nd and 3rd Clauses of the said Section, "such sale should be made in the public man- "ner provided for the periodical sales therein "described; and whereas it was consonant "with justice and was intended by the said "Regulation that, in every case of the sale "of such tenures for arrears of the zemin- "dar's rent, the sale should be public for "the security of the interests of the owner "of the tenure sold, which object can in no "manner be duly secured, except the sales "to be so made be conducted by an officer of "Government in the same manner as the "periodical sales provided for by Section 8 "of the said Regulation: the following ad- "ditional rule has accordingly been passed "by the Governor-General in Council to "take effect from the date of its promulga- "tion."

Clause 1, Section 2, enacted that, "when- "ever the proprietor of an estate paying re- "venue to Government shall desire to cause "any tenure of the nature of those described "in Clause 1, Section 8, Regulation VIII. of "1819, to be sold for arrears of rent due to "him on account thereof, and shall, under "any summary process authorized by the "general Regulations, have acquired the right "of causing such sale to be made, the same

"shall be conducted, after application from "the zemindar, by the Registrar or Acting Re- "gistrar of the Zillah or City Court, or, in his "absence, by the person in charge of the "office of Judge of the District, in the "mode prescribed by Regulation VIII. above "quoted for periodical sales."

Clause 2 of the same Section enacted that 10 days' notice of the sale should be given: and then Clause 3 enacted that "the "rules of Sections 9. 11. 13, 15, and 17, "Regulation VIII. of 1819, are extended to "all sales made after the manner herein "provided."

So that, whenever a sale of any of the tenures of the nature described in Section 8, Regulation VIII. of 1819, took place, whether the sale was made under the provisions of that Section or under any summary process authorized by the general Regulations, the sale was subject to the provisions of Section 11, and was consequently free of all incumbrances, except those referred to in Clause 3, and, amongst others, the tenures of cultivating ryots who had engagements entered into with them by the former proprietor at rents which were as high as were demandable at the time when the engagements were entered into.

Still the law which rendered the sales free from incumbrances was confined to tenures of the nature defined in Section 8, Regulation VIII. of 1819, *viz.*, tenures upon which the right of selling or bringing to sale for arrears of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenure, and did not apply to the other class of tenures described in Clause 7, Regulation VII. of 1799, *viz.*, tenures saleable by the usage of the country.

That being the state of the law when Act X. of 1859 was passed, it was enacted by Section 105 of that Act that, "if the decree "be for an arrear of rent due in respect of "an under-tenure which, by the title-deeds "or the custom of the country, is transfer- "able by sale, the judgment-creditor may "make application for the sale of the tenure, "and the tenure may thereupon be brought "to sale in execution of the decree, accord- "ing to the rules for the sale of under- "tenures for the recovery of arrears of rent "due in respect thereof contained in any "law for the time being in force."

That Section in effect incorporated the provisions of Section 15, Regulation VII. of 1799, and Sections 8 and 11 of Regulation VIII. of 1819; and by incorporating those provisions, it substantially enacted that all tenures of the description mentioned in Section 8, Regulation VIII. of 1819, were to be sold free from incumbrances according to the stipulation of Section 11 of that Regulation. There was no law in force according to the rules of which any tenures other than such as were of the nature defined in Section 8 of Regulation VIII. of 1819, *viz.*, tenures upon which the right of selling or bringing to sale for an arrear of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenures were to be sold free of incumbrances.

Section 105, Act X. of 1859, applies not only to the class of tenures specially mentioned in Section 8, Regulation VIII. of 1819, but also to those which are transferable by the custom of the country. Those which were transferable by express stipulation, and came within the class defined in Section 8, Regulation VIII. of 1819, would be sold free from all incumbrances, except such incumbrances as were described in Clause 3, Section 11, Regulation VIII. of 1819. There being no provision that other tenures not so transferable were to be sold free from all incumbrances, they would consequently, after the sale, be subject to incumbrances.

There were two classes of tenures saleable for arrears of rent under Section 15, Regulation VII. of 1799, *viz.*, those in which the tenure was saleable by the stipulations in the title-deeds, and those which were saleable by the established usage of the country. The former only were included in Section 8, Regulation VIII. of 1819; and it was only in respect of them that the sale was declared by Section 15 of that Regulation to be free from incumbrances.

The question is, whether the tenure in this case is one which falls within the class of tenures described in Regulation VIII. of 1819 or not? No evidence was given as to the terms of the document under which this tenure was created. It appears to be referred to by the Record-keeper of the Collectorate as having been created in August 1847.

It appears to the Court that we ought to know whether a right of sale for arrears of rent was specially reserved in the engagements interchanged on the creation of the tenure If such a right was specially reserved, then coupling Section 105 with the other Sections to which I have referred, the Court are of opinion that the sale would be

free from incumbrances. If there was no such stipulation, then it would not be free from incumbrances. We, therefore, think that the case ought to go back to the Division Bench by which it was referred to us, in order that it might be ascertained whether the lease contained such a stipulation or not. If it did not contain such a stipulation, the defendant is entitled to the benefit of the solehnamah, and consequently the plaintiff's suit must be dismissed. If, on the other hand, the lease contains such a stipulation, then the sale under the decree was free from incumbrance, and the defendant is not entitled to the benefit of the solehnamah.

But the defendant in his defence in this case set up that there was no *bond fide* sale of the tenure under the decree of the Court for arrears of rent. He set up that the decree and sale under it were all a pretence and sham for the purpose of getting rid of the solehnamah. Therefore, if it should appear to the Division Bench that there was a special reservation that the tenure was to be saleable for arrears of rent, then, having been sold free from incumbrance, the case must go back to the first Court, to raise and try the issue whether or not the decree and sale under it were *bond fide* or fraudulent for the purpose of getting rid of the solehnamah.

The law of this case does not depend merely upon our construction of the Regulations to which I have referred. There are decisions of the Sudder Court upon the construction of those Regulations which show what was considered to be the law at the time when Section 105, Act X. of 1859 was passed.

The principal decision is the case decided by the Sudder Court in 1851 (*see* the Decisions of that year, page 626). In that case the Court said: "Clause 1, Section 11, Regu- "lation VIII. of 1819, attaches extensive legal "consequences as regards the avoidance of "under-leases or tenures to sales made un- "der the rules of that Regulation. Regula- "tion I. of 1820 applies the rules of Section "11, Regulation VIII. of 1819, to sales of "tenures of the nature of those described in "Clause 1, Section 8, Regulation VIII. of "1819, *viz.*, tenures upon which the right of "selling or bringing to sale for an arrear of "rent may have been specially reserved by "stipulation in the engagements interchanged "on the creation of the tenure. The gantee "tenure referred to in this case does not "come under the above description. The "sale of such tenures is made under Act "VIII. of 1835, under which no powers "analogous to those of Clause 1, Section 11, "Regulation VIII. of 1819, are conveyed to "their purchasers."

That decision was in accordance with the view which we have now taken of the construction of the Regulations prior to Act X. of 1859.

In a subsequent case (S. D. A. Rep., 1859, page 389), Mr. Sconce, differing from the other Judges, thought that the decision of 1851 was correct, and therefore upheld it.

The other two Judges (Messrs. Raikes and Loch) did not actually dissent; but they said that it was unnecessary to decide the point, as it did not arise in that particular case, inasmuch as the certificate of sale expressly stated that it was the rights and interests of the defaulting tenant alone which had been sold. That decision cannot be taken as a decision in affirmance of this view, but only as a dictum of Mr. Sconce in affirmance of the decision of 1851.

Several decisions have been cited to-day as being at variance with the decision of 1851: but, in most of those cases, the point does not appear to have been raised before the Court as to whether the tenure was one which came within the meaning of Section 8, Regulation VIII. of 1819, as containing an express reservation of the right to sell or not. At any rate, the point was not brought to the notice of the Court, nor was the case decided by the Sudder Court in 1851 referred to.

In one of the cases to which reference has been made from the 3rd Weekly Reporter, Civil Rulings, p. 197, the matter was brought to the attention of the Judges; and, though the decision of 1851 was cited, they dissented from it, and, therefore, that case is in direct conflict with the decision of 1851. Mr. Justice Bayley and Mr. Justice Campbell in that decision said: "On a full considera- "tion of this case, we dissent from the doctrine "laid down by the decision of the late Sudder "Court in the case of Satcowree Mitter "(page 626 of 1851) to the effect that a sale "of a tenure under Act VIII. of 1835 does "not convey the tenure free from all incum- "brances, but only the rights and interests "of the debtors. Looking to the general "policy of the Revenue Laws, to the terms "of Regulation VII. of 1799, Section 15, "Clause 7, to those of Regulation VIII. of "1819, Section 18, Clause 4, and Act VIII. of "1835, also to the analogy and presumption "derived from the re-enactment of those "provisions contained in Section 105, Act X. "of 1859, we think that the sale of a tenure "for arrears of current revenue is a good sale

"of the tenure itself, and carries the rights "of all interested in it, giving to the pur- "chaser the tenure in the shape in which it "was originally created, and destroying all "rights of all persons holding either jointly "with or under the debtor as undivided "sharers or sub-tenants not otherwise pro- "tected."

Although the greatest respect is due to the learned Judges who decided that case, we cannot concur with them in the reasons which they have given for dissenting from the decision of the Sudder Court of 1851. It appears to us that the case of a tenure, which is not expressly made saleable for arrears of rent by the documents by which the tenure was created, is not governed by the general policy of the revenue laws, nor saleable free from incumbrances by Regulation VII. of 1799.

We have shown that it does not fall within Section 8 of Regulation VIII. of 1819. Act VIII. of 1835 merely transferred the power of selling from the Dewanny Adawlut to the Collectors of Revenue. We cannot see what analogy or presumption can be derived from the enactment contained in Section 105 of Act X. of 1859. If Act X. of 1859 was a mere re-enactment of the former laws, it does not extend the provisions of the old laws to cases which did not fall under them.

Reading Section 105, Act X. of 1859, as enacting that the under-tenures therein described may be brought to sale in execution of a decree for arrears of rent due in respect thereof according to the rules "for the sale of under-tenures for the "recovery of arrears of rent due in respect "thereof contained in any law for the time "being in force;" and referring to those laws to which we have adverted as the laws which were then in force, and to the Sudder Decision of 1851, it appears to us that, unless there was a stipulation in the documents by which the tenure was created, providing for the sale of such tenure for arrears of rent, the tenure was not sold free from incumbrances.

It has been argued that Section 105, Act X. of 1859, must have been intended to be a general declaration by the Legislature that all sales, under the provisions of that Section, were to be sales free from all incumbrances. But, if we were to give that construction to the Section, we should have no means of protecting that class of tenants who are protected by the proviso in Clause 3, Section 11, Regulation VIII. of 1819, which was extended to sales under Regulation I. of 1820 by Clause 3, Section 2 of that Regulation.

The question which we are determining is not so important now as it was before the passing of Act VIII. of 1865 of the Bengal Council; because, by Section 16 of that Act, it is enacted that "the purchaser of an under- "tenure sold under this Act shall acquire "it free of all incumbrances which may "have accrued thereon by any act of any "holder of the said under-tenure, his re- "presentatives or assigns, unless the "right of making such incumbrances shall "have been expressly vested in the holder "by the written engagement under which "the under-tenure was created, or by the "subsequent written authority of the person "who created it, his representatives or "assigns."

That Section contains a proviso in almost the same words as Clause 3, Section 11, Regulation VIII. of 1819: "Provided that "nothing herein contained shall be held to "entitle the purchaser to eject khoodkasht "ryots or resident and hereditary cultivators, "nor to cancel *bond fide* engagements made "with such class of ryots or cultivators "aforesaid by the late incumbent of the "under-tenure or his representatives, except "it be proved, in a regular suit to be "brought by such purchaser for the adjust- "ment of his rent, that a higher rent would "have been demandable at the time such "engagements were contracted by his pre- "decessor."

Section 16, Act VIII. of 1865 of the Bengal Council, seems to have been enacted for the very purpose of getting rid of the difficulty which has now arisen upon the construction of Section 105 of Act X. of 1859. All tenures sold under the provisions of Section 16, Act VIII. of 1865 of the Bengal Council, for arrears of rent, are sold free from incumbrances, but subject to the proviso in that Section, which is in the same words as that contained in Clause 3, Section 11, Regulation VIII. of 1819.

It has been contended that, by virtue of Act VIII. of 1865 of the Bengal Council, the sale in this particular instance was free from incumbrance. But Section 16 applies only to purchasers of under-tenures sold under that Act. The sale of the under-tenure in question was before that Act. That under-tenure was sold under the law as it then existed, that is, Section 105, Act X. of 1859.

The case will go back to the Division Bench which referred it, with the above expression of our opinion, and the docu-

ment by which the tenure was created will be sent for from the office of the Collector for the purpose of being inspected by the Division Bench, who, after inspecting that document, will finally decide the case.

The 13th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Sale in Execution—Endowment.

Case No. 700 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 20th July 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 4th May 1866.

Juggurnath Roy Chowdhry (Decree-holder), *Appellant,*

versus

Kishen Pershad Surmah *alias* Rajah Baboo (Judgment-debtor), *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Respondent.

A judgment-debtor's right as *shebait* to perform the service of an idol cannot be sold in execution of a decree; nor can his right to the surplus profits of the *sheba* be sold so long as that right is unascertained and uncertain.

Loch, J.—I THINK the Judge is right in setting aside the order of the first Court, directing the right of performing services in the temple to be sold in execution of the decree; but the decree-holder urges before us that the judgment-debtor enjoys a beneficial interest in the landed property which forms the endowment. What is the extent of that beneficial interest he cannot say; but he urges that, be it what it may, he has a right to have it sold in execution. We are informed that the profits of the endowment are intended for the support of the worship of the idols; that the judgment-debtor, after paying the necessary expenses, appropriates the remainder for his own benefit, and it is the right to receive this surplus which the creditor wishes to sell. We are not shown, however, that the debtor has any right to appropriate such surplus, or what is the annual amount of that surplus, whether it is fixed or contingent; and the mere fact of the debtor appropriating the profits of a mehal of which he is a trustee creates no right in him which may be sold or transferred to another. The thing itself is also of so uncertain a nature that its sale would be a source of constant litigation. The rents and profits may be sufficient only for the support of the temple services, or the surplus after paying the charges may be considerable. It may fluctuate year by year; and a stranger purchasing such a right, if legally saleable, would be obliged to enforce that right by annual litigation to discover what he had to receive. I think, therefore, that the sale of such an undefined right, if right it can be called, should not be allowed, and reject this petition with costs.

Macpherson, J.—Under a decree for a personal debt, it is sought to sell the judgment-debtor's right as *shebait* to perform the service of a certain idol, and also to sell his right to the surplus proceeds of the *sheba*. I am of opinion that the right to perform the service cannot be thus sold. Such a sale would practically destroy the endowment, or have the effect of defeating the whole object of its creation. There would be no guarantee that the service would be properly kept up; for the purchaser, whoever he might be—even if a Mahomedan or a Christian—would have the right of performing the worship of this Hindoo idol.

The application to attach and sell the surplus profits of the *sheba*, or such portion of the proceeds of the *debuttur* lands as the *shebait* appropriates to his own use, also fails. For there is nothing before us to show what those profits are, or that there are any profits in which the judgment-debtor takes a beneficial interest, or to which he is personally entitled. A wholly vague and uncertain right—the existence of which is doubtful, and the extent of which, if ascertainable, has in no degree been ascertained—cannot be sold in execution of a decree.

There may be cases in which, if the endowment is merely nominal and is not *bonâ fide*, the property will not be treated as set apart for religious purposes (*see* Gunga Narain Sircar *versus* Brindabun Chunder Kur Chowdhry, III. Weekly Reporter 142). But that is not the present case. Nor is the case of Prannath Pauray *versus* Sree Mongula Debia (V. Weekly Reporter 176) in point; for all that the Court decided in that case was that execution was rightly issued in accordance with the terms of the decree under which it was issued. I would dismiss this appeal with costs.

The 13th March 1867.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Lunatic Enquiries.

Case No. 4 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 3rd October 1866.

Busrut Ali Chowdhry, *Appellant,*

versus

Eshan Chunder Roy, mookhtear on behalf of Arfanissa Chowdhrain, *Respondent.*

Baboos Otool Chunder Mookerjee and *Kalee Mohun Doss* for Appellant.

Baboo Juggodanund Mookerjee for Respondent.

Applications made under Sections 2 and 3 of the Lunacy Act, XXXV. of 1858, must be verified.

Loch, J.—We think the whole of these proceedings must be quashed, as the applications to the Judge have not been verified. Another Division Court in a judgment in which we concur (5 Weekly Reporter, pages 54 and 55, Miscellaneous) have held that an application made under Sections 2 and 3, Act XXXV. of 1858, must be verified. We, therefore, reverse the order of the Judge, and give the petitioner his costs to be realized from the mookhtear Eshan Chunder (who made the first application) and from Government from the date on which the Government pleader appeared in the case.

The 13th March 1867.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Attachment—Sale—Execution of decree by another Court.

Case No. 17 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Hooghly, dated the 7th December 1866.

Mooktakeshee Debee (Decree-holder), *Appellant,*

versus

Kunuck Monee Debee and others (Judgment-debtors), *Respondents.*

Mr. R. T. Allan and *Baboo Doorga Doss Dutt* for Appellant.

No one for Respondents.

Where an attachment is made under Section 235, Act VIII. of 1859, the only further process required to bring the property to sale is the due issue of the proclamation of sale. If the property be not within the jurisdiction of the Court, whose duty it is to execute the decree, the course to be followed by the decree-holder is that prescribed in Sections 285 and following.

Loch, J.—We think that the order of the Lower Court must be upheld, as the proceedings under which the attachment was made were contrary to law and altogether irregular. It appears that, in execution of a decree of the Burdwan Court, a proceeding was sent by the Principal Sudder Ameen of that Court to the Courts of the neighbouring districts, directing attachment to be made of certain property belonging to the judgment-debtor. The Judge of Hooghly, to whom one of these applications was sent, caused attachment to be made through the Nazir of his Court on 11th May 1864, and sent a return to the Burdwan Court, and struck the case off his file. Application has now been made to the Principal Sudder Ameen of Hooghly to sell the property formerly attached. He has refused to do so, because he thinks that, where property has been attached to prevent alienation, it must be again attached previous to sale, and that the issue of a proclamation of sale is insufficient. We think the Principal Sudder Ameen is altogether wrong in the reasons he has given. An attachment made under Section 235, as the attachment in the present case is said to be, is made in execution of a decree, and the only further process required to bring the property to sale is the due issue of the sale-proclamation. But, as the property in question was not within the jurisdiction of the Court, whose duty it was to execute the decree, the course which should have been followed by the decree-holder was that prescribed in Sections 285 and following of the Code of Procedure. The Principal Sudder Ameen of Burdwan acted irregularly in directing an attachment to be made by the Judge of Hooghly in the manner he did, and the latter officer's proceedings complying with that order were likewise irregular. The attachment made not being made as the law requires, the property cannot now be sold. For these reasons we dismiss the present appeal.

The 14th March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge.*

Mahomedan Law—Re-marriage—Evidence—Presumption.

Case No. 3068 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 26th of September 1866, affirming a decision of the Sudder Moonsiff of that District, dated the 10th March 1866.

Akhtaroon-nissa (Defendant), *Appellant*,

versus

Shariutoollah Chowdhry (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboo Dwarkanath Mitter* for Appellant.

Mr. C. Gregory and *Baboo Judoonath Mookerjee* for Respondent.

In a suit by a Mahomedan to compel the defendant to rejoin him as his wife, a mere declaration by the defendant in a mortgage-deed executed by her, that she was the wife of the plaintiff, would not be evidence of the removal of the legal impediment to the re-marriage created by the divorce; neither can a presumption be drawn from the fact of the re-marriage, that the impediment had been removed, and that the defendant had again become lawful to the plaintiff after re-marriage.

Peacock, C. J.—THIS was a suit brought by the plaintiff against the defendant to compel her to rejoin him as his wife. The plaintiff and defendant are Mahomedans. They had been previously married, and the plaintiff had divorced her by pronouncing three divorces.

It is laid down in the Hedaya, Vol. I., page 301, Book 4, Chapter 6: "If a man pronounce three divorces upon a wife who is free, or two upon a slave, she is not lawful to him until she shall first have been regularly espoused by another man, who, having duly consummated, afterwards divorces her or dies, and her edit from him be accomplished, because God hath said: 'If he divorce her, she is not after that lawful to him (that is, after a third divorce) until she marry another husband.'" *See* also Sale's Koran, Chapter 2, page 26: "Ye may divorce your wives, and then either retain them with humanity, or dismiss them with kindness. But, if the husband divorce her a third time, she shall not be lawful to him again until she marry another husband. But, if he also divorce her, it shall be no crime in them if they return to each other, if they think they can observe the ordinances of God," that is to say, if there be no settled aversion on either side, *id. note.*

The plaintiff alleges in his plaint that he and the defendant re-married on the 19th Cheyt 1269 under the Mahomedan Law, and that, up to the 16th Assar 1272 B. S., they lived together as man and wife.

It was found as a fact by the Lower Appellate Court that a re-marriage took place, such as is ordained by Mahomedan Law; and that it was to be presumed that they would not have an illegal connection: and a decree was given that the defendant should join her husband. From this decree the defendant appeals upon the ground that there was no proof that, after the plaintiff had divorced her, she was married to another man who had divorced her. It is contended on the part of the respondent that this might be lawfully presumed from the fact of the re-marriage and cohabitation under it; and that, by finding that a re-marriage had taken place, such as is ordained by Mahomedan Law, the Principal Sudder Ameen substantially found that the second marriage was a lawful one according to the Mahomedan Law, which it would not have been, unless the defendant, after her divorce, had married another man who had also divorced her.

We think that this is not the meaning of the Principal Sudder Ameen; that all he meant was that a re-marriage had, in fact, taken place in the mode required by Mahomedan Law; but that he did not consider whether the impediment to the re-marriage had been lawfully removed, and whether the defendant at the time of the re-marriage was lawful to the plaintiff, her former husband. At any rate, the finding is ambiguous.

If it were necessary, we should remand the case for re-trial and for a distinct finding upon that issue. But no evidence has been pointed out to us which would warrant a finding in favor of the plaintiff upon that issue, and it is, therefore, unnecessary to remand the case. The only evidence, in addition to the presumption to be derived from the re-marriage, is a mortgage-deed alleged to have been executed by the defendant and another person on the 6th Assar 1270, in which she was described as the wife of the plaintiff. This alleged deed is dated after decisions in the defendant's favor in two former suits: one brought against her by the plaintiff for a restitution of conjugal rights; and the other by her against the plaintiff for dower. The defendant denies that she executed the

mortgage-deed; but the Principal Sudder Ameen has in effect found that she did execute it, for he says the veracity of the witnesses as to the fact of the re-marriage is borne out by it.

We are of opinion that a mere declaration by the defendant that she was the wife of the plaintiff contained in the mortgage-deed (assuming that she executed the deed with a full knowledge of the mode in which she was described in it) would not be evidence of the removal of the legal impediment to the re-marriage which was proved to have been created by the divorce. Neither could a presumption be drawn from the fact of the re-marriage that the impediment had been removed, and that defendant had again become lawful to the plaintiff for re-marriage.

No allegation was contained in the plaint that, after the plaintiff had divorced the defendant, she was married to another man, who had divorced her or died; nor was any direct evidence given to that effect.

Suppose it had been alleged and proved that the defendant had married another man, and it had been alleged that he had died, would the statement in the bond and the proof of the re-marriage have been sufficient evidence that the second husband had died before the re-marriage? If not, would it be evidence that he had divorced the defendant before her re-marriage? We are of opinion that no presumption of either of those two facts could be drawn from the mere statement in the bond or from the fact of the re-marriage. If such a presumption could be drawn from the fact of the re-marriage for the purpose of removing an impediment to a re-marriage once proved to exist, it might also be drawn for the purpose of removing an impediment of the same nature to an original marriage; and thus, if it should be proved that a woman was once married to *A*, and afterwards within a year married to *B*, it might be presumed from the fact of the marriage with *B* that *A* had died or divorced his wife.

We think that there is no evidence in this case from which it can lawfully be presumed that the defendant, before her re-marriage, had married another man who had divorced her or died, and that she had accomplished her edit. We think that the defendant ought not, upon such evidence, to be compelled to rejoin the plaintiff, and continue to live with him in intercourse which, according to the Mahomedan Law and the religion of the defendant, would be illicit and criminal.

The decrees of the Lower Courts in the suit brought by the respondent, plaintiff, against the appellant, defendant, must be reversed, and a decree entered for the defendant, and the plaintiff must be ordered to pay the costs of the defendant in both the Lower Courts, and her costs in this appeal with interest from the date of the decree in this Court to the date of realization.

The 14th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Arbitration.

Case No. 2742 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 9th July 1866, reversing a decision passed by the Moonsiff of Sewan, dated the 5th July 1865.

Baboo Surubjeet Narain Singh (Defendant), *Appellant,*

versus

Baboo Gouree Pershad Narain Singh and another (Plaintiffs), and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Debendur Narain Bose* for Appellant.

Mr. R. E. Twidale and *Baboo Kishen Succa Mookerjee* for Respondents.

An award made by private submission may be valid and binding, though no proceedings under Section 327, Act VIII. of 1859, have been taken to enforce it.

It is almost a universal rule that a submission to arbitration is revocable before award made.

Where several arbitrators are appointed, and the parties do not agree to be bound by the act of the majority, the award, in order to be valid and binding, must be concurred in and executed by all the arbitrators.

Arbitrators have no power to delegate their authority to others. Thus, if some of the arbitrators are absent, those present cannot appoint others in their stead.

Norman, J.—This is a suit for the possession of one beegah six biswas of land.

While proceedings were pending in the Criminal Court between these parties, on the 3rd March 1865, it was agreed that the dispute between the parties should be referred to the award of Bindessury Pershad and others, the agreement being that the parties should abide by the award, and raise no objections to it.

On the 14th of April, the plaint in the present suit was filed. On the 8th of June the Moonsiff disposed of certain issues in bar,

and directed the case to stand over till the award should have been made.

On the 10th of June, the plaintiffs put in a petition objecting that they had not consented to the reference which had been made without their authority.

The arbitrators made their award on the 22nd of June, and it was put into Court on the 24th of the same month. On the 5th of July, the Moonsiff decided the case in accordance with the award of the arbitrators, and dismissed the suit.

The Principal Sudder Ameen reverses the decision of the Moonsiff. He says that, in his opinion, the Moonsiff acted very irregularly in relying on the decision of Baboo Bindessury Pershad and others. These persons had been appointed arbitrators neither at the application of the parties through the intervention of the Court as required under Section 312 of Act VIII. of 1859, nor has their award been passed as the award of private arbitrators and confirmed by the Court in the mode prescribed by Section 327 of that Act.

The Principal Sudder Ameen accordingly treats the award as a nullity, and decides the case quite independently of it.

But there is no reason why an award made by private submission should not be perfectly valid and binding on the parties, though the parties may not have sought to enforce it by summary proceedings under Section 327. If the decision is in favor of the defendant, he may be able to treat it as final and conclusive. *See* English cases decided on this principle, Gascoyne *versus* Edwards, 1 Younge and Jervis, p. 19; Thomlinson *versus* Arriskin, 1 Comyn's Reports 328; Russell on Awards, pp. 517, 519.

It is true that several questions arise as to the award in the present case:—

First, whether the plaintiffs did agree to refer the matters in dispute, or whether, by subsequent acts, they ratified the act of their agent or mooktear who agreed to the reference.

Secondly, whether, if so, they subsequently revoked the authority of the arbitrator before any award was made.

If it is found that the plaintiffs revoked the submission before award made, it will be necessary to see whether there is anything in the submission to take the case out of the almost universal rule that such a submission to arbitration is revocable. These were matters which should have been enquired into by the Moonsiff before he took upon himself to stay the proceedings until after the award of the arbitrators had been made.

There are, however, two objections to the award in this case which appear to be fatal to it. Strange to say, these objections are not noticed by either the first Court or the Lower Appellate Court, nor were they adverted by the vakeels on the argument, and it was only by going through a translation of the papers that we discovered them.

The reference is to four arbitrators, Bindessury Pershad, Roodeb Narain, Jaunobi Deo Narain, and Bhagbut Pershad Narain.

The first point is that there is no agreement by the parties to be bound by the authority of the majority, and, that being so, in order to make a valid award binding on the parties, it was necessary that all should concur. In fact, however, the award appears to have been executed only by one of these parties, Bindessury Pershad, and one Surdeo Narain Singh.

The second objection is still more serious. Baboos Jaunobi Deo Narain and Bhagbut Pershad Narain being absent, Baboo Mohendro Pershad Narain, the above-mentioned Surdeo Narain, and Gudadhur Dyal Narain, were made arbitrators, apparently by Bindessury Pershad and the other. It is not even suggested that the plaintiffs or defendants agreed to the nomination of these parties. Arbitrators have no power to delegate their authority to others. The award as made does not in any sense pursue the submission, and is simply null and void.

The parties seem each to have been under a misapprehension as to the effect of the award. It is probable that, if the case had been tried by the first Court on a principle different from that on which it was dealt with by the Moonsiff, much evidence would have been forthcoming on the part of the defendant which was not before the Lower Appellate Court. The Principal Sudder Ameen would do well to give the defendants an opportunity of adducing fresh evidence before him. We are not satisfied that the merits of the case have been fully determined.

The case must be remanded for a fresh decision.

The 14th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Right of way—User—Prescription—Evidence.

Case No. 2434 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 25th June 1866, affirming a decision passed by the Moonsiff of Madareepore, dated the 25th November 1865.

Bhugwan Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Shaikh Khosal and others (Defendants), *Respondents.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A right of way in this country need not be proved by user for a definite period of 20 years in order to give a right by prescription or presumption of a grant. Proof of well-established and fixed user will be sufficient.

Bayley, J.—THE grounds taken in this special appeal are :—

1. That right of way can only be decreed on proof of its acquisition by grant or legal prescription, and there is no proof of either the one or the other in this case.

2. That, as to the pathway now claimed, No. 2, the Lower Appellate Court finds that it has only been so used for fourteen years, and that the only pathway which existed from time immemorial was one distinct from that now in dispute.

The plaintiff sued for the closing of the pathway No. 2 of the map, and for the value of the paddy and jute lost to plaintiff by the use of this pathway.

Defendant pleaded a right by user, and that plaintiff was barred by the Law of Limitation.

The first Court held as follows :—

"It clearly appears from copy of the "report submitted by the Naib Darogah of "Karee Bazar, who held a local investiga- "tion under the order of the Fouzdaree "Court in the said Fouzdaree case, that "there was before a pathway in existence "there. Besides, by the evidence of "Mudun Mohun Roy Chowdhry and "Oomesh Chunder Roy Chowdhry, *witnesses named by both the parties*, and by "the evidence of the witnesses of the "defendants, the existence of the pathway "for limitation period has been clearly "proved. Further, that plaintiff has admitted that in the said road there is land "belonging to Mudun Mohun Roy Chowdhry, Teeluck Chunder Roy, Chunder "Coomar Roy, and Chundee Churn Roy, "besides the plaintiff's land. These persons not appearing to have sued for the "closing up of the pathway, the existence "of the way from before is manifest."

Further, the first Court discredited defendant's witnesses, who deposed to the pathway No. 2 having been used only since 1269 B. S., and it found as a fact that a pathway in No. 2 had been used as such for a period sufficient to bar plaintiff's suit under the Law of Limitation.

The Lower Appellate Court thus states its judgment :—

"In appeal this Court has carefully "gone over the records, and has grounds for "concluding from the evidences of Chundee "Churn Roy, Mudun, Oomesh, and others, "who appear to be respectable people, over "whose grounds the pathway also exists, "that figure No. 1 was the original pathway "from Amugram to the Beel, but it became "impassable in consequence of being cut "away and under water; and figure No. 2 "was some 14 years ago at first made use "of through necessity when plaintiff raised "objections which were brought to the "notice of the Fouzdaree Court, since which "figure No. 2 had become the pathway, and "made use of by the people of the locality, "amongst them Chundee Churn Roy and "the others over whose lands it passed along; "but as the cattle in passing over it have "been destroying some of plaintiff's crops, "which are on both sides of the pathway "passing over his lands, he has brought "this suit to close the pathway altogether. "As, however, this subsequent pathway is "at present the only convenient way to the "Beel, and has been in existence for the "past 12 or 14 years owing to the previous "one being impassable, I do not see how "it can be closed; proper precautions only "have to be taken by plaintiff and the "others over whose lands the pathway lies, "to secure their crops by fencing them in "on the two sides; and as I consider the "evidences of the individuals whom I have "mentioned more truthful and trustworthy "than the four who have given evidence "before the Ameen, I see no reason for "interfering with the Moonsiff's judgment,

"and dismiss the appeal with costs against "appellant."

After considering these judgments and the grounds of special appeal before stated, we are of opinion that the case must be remanded.

We do not find that it has ever been decided by this Court that the right of way *must* be shown by user for exactly and fully 20 years in order to give a right by prescription or presumption of a grant. No such definite period has been taken in this country. Proof of well established and fixed user has been generally regarded as sufficient.

It certainly is a question whether, by analogy, proof of a user of 20 or nearly 20 years might not be required. Then, again, the question arises now whether 20 years, which is the usual term of prescription in England, would not be more properly represented in this country by 12 years, a period probably adopted in the earlier Regulation as the custom of the country.

In this case the plaintiff does sue within 12 years of the award of the Fouzdaree Court; but, on the other hand, both Courts below find as a fact on the evidence that the pathway in suit has been used as such from 12 to 14 years. But this is not as final or clear a decision as is required.

Under all the circumstances, the Lower Appellate Court should, we think, re-try the case on two points:—

I. Whether user *of or approaching to* (which, we think, will suffice in this country) 20 years has been proved in regard to the pathway in suit, and, if so, whether this will not be a sufficient title by prescription in analogy to the English Law?

II. If that period of user be not necessary to be proved, whether a user of 12 years or what period is sufficient either to give a right by prescription according to the custom of the country?

III. Whether plaintiff's suit is barred by the Law of Limitation?

Remand accordingly.

The 14th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Joint lease—Joint liability to rent.

Case No. 2942 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 27th July 1866, modifying a decision passed by the Deputy Collector of that District, dated the 14th May 1866.

Jogendur Deb Roy Kut (Plaintiff), *Appellant,*

versus

Kishen Bundhoo Roy and others (Defendants), *Respondents.*

Baboo Sreenath Doss and *Kishen Dyal Roy* for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondents.

When a lease is granted jointly to two tenants, both are jointly liable for the rent due under the lease, and one of them cannot divide this joint liability.

Pundit, J.—THE mooktear defendant having admitted that he is even now receiving rents for the Raja, and that, for the property leased out to him and to Bholanath the defendant (exempted by the Lower Appellate Court), the defendant mooktear had always, before the lease, received the collections, and granted receipts to the putwarees. We think that the Lower Appellate Court has rightly held that the money received by the mooktear was not received by him as a shareholder of the farm, but only as an agent of the Raja, plaintiff. The decision of this issue, however, does not affect the case, as this money alleged to have been so paid to the agent of the Raja is admitted to have been received by the Raja, and the suit is for arrears after deducting this sum. Now, Bholanath can be released only on his succeeding in showing that, by the terms of the deed, he was liable to pay only half of the rents. The lease was joint, and so whatever may be due to the Raja on the lease is due to him from both the tenants *jointly*. Bholanath has no right to divide this joint liability. We, therefore, do not think that the decree of the Lower Appellate Court can stand as it is. We, therefore, reverse with costs the decision of the Lower Appellate Court, and uphold the decree of the Court of first instance, decreeing the special appeal with costs.

The 14th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Onus probandi—Allegation of title under deed of sale in lieu of Dower.

Case No. 2973 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 1st August 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 13th March 1866.

Mussamut Sobratun (Plaintiff), *Appellant,*

versus

Mussamut Toova and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Mr. R. E. Tweidale for Respondents.

The plaintiff, having alleged a distinct title under a deed of sale in lieu of dower, was held bound to prove her title, and not entitled to claim the benefit of a decision to which she was not a party, nor of an admission by her husband as binding on the defendants.

Seton-Karr, J.—THE pleader in the first case attempts to argue that the respondent, who was the judgment-creditor, purchased in execution under a decree which has since been set aside by a decision of the High Court; and that, consequently, she is dispensed from proving her own title, which the Courts have now found to be unproved.

But we cannot assent to this doctrine. The plaintiff alleged a distinct title under a deed of *baimokasa*, or sale instead of dower, which deed she never produced, and the Courts find in addition that she was never in possession. She was bound to prove her title as alleged, and she has failed to do so; and she cannot claim the benefit of a decision to which she was not a party, nor of an admission by her own husband which cannot bind the defendants who are in possession till ousted by a better title.

The 15th March 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Section 26, Regulation V., 1812—Disposal of surplus profits—High Court's power of superintendence.

The Collector of Rungpore, *Petitioner.*

Baboo Kishen Kishore Ghose for Petitioner.

When a joint undivided estate has been attached under Section 26, Regulation V., 1812, and made over to the management of a Collector under Regulation V., 1827, the Zillah Judge has jurisdiction to direct the Collector to divide the surplus profits of the estate among the several shareholders according to their respective shares, and the High Court cannot, under its general powers of superintendence over the subordinate Courts, interfere with the order of the Judge.

The petition was as follows:—

"THAT an estate by the name of Mouzah Lithake having been attached under the order of the Judge of Rungpore, dated 29th August 1835, under the provisions of Section 26 of Regulation V. of 1812, was made over to the management of your petitioner under Regulation V. of 1827.

"That your petitioner was directed by the Judge of Rungpore to pay the profits of the estate to the several shareholders according to their respective shares, notwithstanding your petitioner's objection to the contrary.

"That your petitioner as well as the superior Revenue Authorities believe that, under Section 26 of Regulation V. of 1812, your petitioner is bound only to collect the rents and discharge the public revenue, and provide for the cultivation and future improvement of the estate; that it forms no part of his duty to distribute the surplus proceeds to the several shareholders according to their respective shares, and that, therefore, the order of the Judge is not at all warranted by the law.

"Your petitioner therefore prays that your Lordships would be pleased to pass whatever orders your Lordships think just and proper under the circumstances of the case."

The matter was referred to a Full Bench by Loch and Norman, JJ., with the following orders:—

Norman, J.—Let the shareholders, to whom the Judge of Rungpore has directed that the profits of the estate should be paid according to their respective shares, show cause on the 3rd day of December next why

his order directing the Collector of Rungpore to pay the profits of the estate, which is under the management of the Collector, under Section 26 of Regulation V. of 1812, shall not be quashed, being an order which, under that Regulation, he had no jurisdiction to make.

Let this rule be sent to the Zillah Judge, who will cause it to be duly served on all the parties interested in the matter, and see that such service is properly made.

Loch, J.—As I entertain some doubts as to whether this Court has power under Section 15 of the Charter Act to make the above order, we think it advisable that, on its return, the rule should be argued before a Full Bench.

The shareholders did not appear, and the rule was argued ex parte before the Full Bench, whose judgment was delivered as follows by—

Peacock, C. J.—We think that in this case the Judge, Mr. Fowle, had jurisdiction.

Section 26, Regulation V. of 1812, is in the following words: "Inconvenience to the "public and injury to private rights having "been experienced in certain cases from "disputes subsisting among the proprietors "of joint undivided estates, it is hereby "enacted that, whenever sufficient cause "shall be shown by the Revenue Authorities, "or by any of the individuals holding an "interest in such estates, for the inter-"position of the Courts of Judicature, it "shall be competent to the Zillah and City "Judges to appoint a person duly qualified, "and under proper security to manage the "estate, that is, to collect the rents and "discharge the public revenue, and provide "for the cultivation and future improve-"ment of the estate."

At that time the person put in to manage the estate was in the nature of an ordinary Receiver, and it appears to us that, without any express authority being given to the Judge, he would have power to control the Receiver by directing him to pay over any surplus which might remain in his hands after paying the Government revenue and providing for the cultivation and improvement of the estate.

This Section could never have intended that the Receiver should retain in his hands any surplus profits of the estate without being subject to the orders or control of the Judge by whom he was appointed.

We think, therefore, that, under the Regulation to which we have referred, even without the interpretation which in practice has been put upon it, the Judge had jurisdiction over the Receiver with regard to the disposal of the surplus profits.

By Regulation V. of 1827 it was enacted that, whenever the Zillah or City Courts should deem it proper, under the provisions of the Regulations therein mentioned, to provide for the administration and management of landed property, the Court should issue a precept to the Collector of Land Revenue, directing him to hold the estate in attachment. It could not have been intended that the Collector should hold all the surplus profits of the estate without being subject to the orders of the Court. In point of fact we find in this very case that, as far back as 1860, Mr. Tucker, who was then the Judge, made an order for the payment of the surplus proceeds, and that order appears to have been complied with until very recently, when the Board of Revenue passed a collection of rules, by Section 7 of which it was stated that "a Collector cannot, "unless under the special orders of the "Civil Court" (thereby recognizing the jurisdiction of the Civil Courts to make such orders), "disburse to any one any "part of the surplus proceeds from lands "thus managed under his superintendence; "and inasmuch as the disbursement of any "portion of such surplus proceeds is oppos-"ed to one object of the law, and is pro-"bably illegal, the receipt of any order for "the disbursement of such surplus from the "Civil Courts, though it must be obeyed, "should be immediately reported for the "information of the Commissioner and the "Board of Revenue."

The Government Pleader, who has appeared before us to-day on behalf of the Collector, has argued that the object of the law, to which the disbursement of any part of the surplus proceeds is alleged to be opposed, was to compel the parties disputing to come to terms, or, in other words, to drive them into a settlement of their disputes by withholding from them the profits of their estates.

We think it very clear that the object of the law was not to force the disputants into an arrangement; but to avoid inconvenience to the public, or injury to the parties, which might arise from their neglecting, pending their disputes, to pay the Government revenue, or to manage their estate properly.

The order of the Board of Revenue goes on to say that, "surplus proceeds may, "with the sanction of the Commissioners, be

"expended upon the improvement of the es-"tate," and that "any money not required for "that purpose should be held simply in depo-"sit, and not invested so as to produce inter-"est or profit." If the Judge has no power to make an order with regard to the surplus proceeds, the owners will not only be deprived of the present use of the surplus prodeeds, but will also be deprived of all benefit which might accrue to them from having them profitably invested. In short, if the Judge has no jurisdiction, proprietors of the estates may, as long as their disputes continue, be left to starve or be compelled to borrow money at a high rate of interest, whilst the surplus proceeds of their estates is lying without any advantage to them in the Collector's treasury.

We think that the Judge had power to make the order.

It is not necessary to determine whether the Judge was right in making an order that the Collector should pay the parties according to their respective shares. The propriety of making such an order might depend upon the facts of the particular case. In this case it appears that a petition was presented to the Judge by the Collector, representing that the order of the Judge's predecessor ordering the Collector to pay the profits of the estate to the zemindars according to their respective shares had been regarded by the Board of Revenue as contravening the Board's rule, and praying that the said order might be set aside; and that the Judge thereupon requested the Collector to ascertain and report the number of shareholders and the extent of the share of each, if there was any such specification. The Collector reported that the profits had been paid according to the share of each shareholder duly specified; whereupon the Judge ordered that payment should be made to each separate shareholder; meaning, as we understand, that payments should be made in the shares in which the shareholders had been in the habit of receiving them.

But whether this was the meaning of the order or not, it appears to the Court that the Judge had jurisdiction to make an order with regard to the surplus proceeds. The High Court cannot therefore, under its general power of superintendence over the Subordinate Courts, quash the order of the Judge.

It is not necessary to send the case back to the Bench which referred it, but the application will be refused.

The 15th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Onus probandi—Sale for arrears of rent—Bona fide purchase.

Case No. 3331 of 1866.

Special Appeal from a decision passed by Mr. R. J. Richardson, Judge of Gya, dated the 31st August 1866, reversing a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of that District, dated the 11th August 1864.

Hur Suhaye Misser (Plaintiff), *Appellant,*

versus

Deen Dyal Singh (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Nil Monee Sein* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Where a son purchased property sold for arrears of rent on account of the default of his father, and both father and son were living together at the time of the purchase—HELD that the *onus* was on the son to prove that his purchase was *bonâ fide*.

Pundit, J.—THE Judge below has not decided for the plaintiff, because he finds that there is no proof of the collusion of the landlord. It is quite sufficient to justify a decree for the plaintiff for the restoration of the property from the purchaser, if the father of the purchaser, who was the farmer, cannot show that the default was on his part wilful and fraudulent with a view to make the purchase.

The farmer pleaded that he offered the arrears of rent due to the landlord, but the latter would not take it from him. The Lower Appellate Court does not believe the statement, nor was it attempted to be shown that, after this alleged refusal by the landlord, the farmer took proper steps to protect the property from being sold for arrears.

In fact, the Lower Appellate Court has in a manner found that the farmer was acting fraudulently: but, notwithstanding, it has not decided for the plaintiff, because it found that there was no proof of the landlord's collusion. The Lower Appellate Court has not noticed that the first purchaser is alleged to have been another near relative of the defaulter, and that fact strongly smells of a family combination.

The Judge below admits that the subsequent purchaser, the son of the defaulter, was living in the same house with his father at the time of the purchase. In such a case the Lower Appellate Court should require the most clear, positive, and unmistakeable proof from this purchaser as to his purchase being *bond fide*, independent of his father's interest, and for himself; and that, even if it be found that he, the son, had independent property and dealings, that he did not purchase the property in dispute as the premeditated result of the fraudulent act of his father. The son might still be required to restore the property, if he cannot show that the father did not fraudulently cause the default, in order to enable the son to purchase the same in an equally fraudulent manner.

The whole *onus* should be thrown upon the son.

A doubt may arise that, in order to set aside the sale, the collusion must be traced to the landlord. The view, however, taken above is rather of considering this case as if it were not a case so much to set aside the sale as to get back from the farmer and his son property which they, with respect to their previous relation with it, should not be allowed to retain after acquiring it in a fraudulent purchase. Had it not been for the infancy of the plaintiff and of his infant brother, before deciding all that has been noticed above, it would have been necessary to see whether, when the suit was brought for the arrear for which the property was sold, the plaintiff had not notice, and so an opportunity to pay the same and to protect the property from being sold.

The 15th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Right of way—User—Prescription—Limitation—Presumption of consent.

Case No. 3282 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 24th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 30th June 1865.

Huro Soonduree Debia and others (Defendants), *Appellants,*

versus

Ram Dhun Bhuttacharjee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

A user for 4 or 5 years is not sufficient to show a right by prescription.

If *A* constructs a road across *B*'s land, *B* can sue within the ordinary period of limitation, and no consent can be inferred from the fact that *B* did not sue immediately after the commencement or completion of the road.

Pundit, J.—In this case no sufficient user is proved. The Lower Appellate Court holds that a user for only 4 or 5 years has been shown, and that is not sufficient to show a right by prescription.

Looking further into the fact that the defendant, special appellant, prepared this road across the plaintiff's lands, we hold that it is quite open to the plaintiff to sue within the ordinary period of limitation, and that no consent can be inferred from the fact that the plaintiff did not sue immediately after the commencement of the preparation or the completion of the road.

As to the point of completion, a case is cited to us from page 288, Volume I., Weekly Reporter; but we do not see in the judgment sufficient record of the facts upon which the judgment in that case was based.

We, accordingly, see no reason to interfere, and reject the special appeal with costs.

The 16th March 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

High Court—Section 36, new Letters Patent—Powers of superintendence—Section 15, High Courts Act.

Petition praying that an order of the Sudder Ameen of Nuddea dismissing the suit of the petitioners be set aside.

Chunder Kant Bhuttacharjee and others, *Petitioners,*

versus

Bindabun Chunder Mookerjee, *Opposite Party.*

Mr. R. E. Twidale for Petitioners.

Baboos Dwarkanath Mitter, Chunder Madhub Ghose, Sreenath Doss, and *Mohinee Mohun Roy* for Opposite Party.

A judgment of the Senior Judge of a Division Bench of the High Court is final within the meaning of Section 36 of the new Letters Patent, even when the Junior Judge entertains doubts, and expresses no final opinion.

The Junior Judge cannot refer a question for the decision of the Full Bench, without the concurrence of the Senior Judge.

Per Norman, J.—Where a Court added a third party as a plaintiff, and, in the absence of the original plaintiff, improperly dismissed the suit, it was held that the suit was still pending and undisposed of by the Lower Court as regards the original plaintiff, and the Lower Court was ordered, under the High Court's powers of superintendence vested in it by the 24 and 25 Vic., c. 204, s. 15, to take up and try the case accordingly.

THE petition was originally presented to Norman and Seton-Karr, JJ., on the 26th July 1866, when a rule was granted, calling upon the defendants to show cause why the order of the Sudder Ameen should not be set aside, and why the plaintiffs should not be at liberty to proceed with the suit.

On the 29th January 1867, the opposite party having appeared, the following orders were recorded by the two learned Judges :—

Norman, J.—Mr. Twidale, on the 26th of July 1866, obtained a rule calling on the defendants, Bindabun Chunder Mookerjee and others, to show cause (*inter alia*) why the order of the Sudder Ameen of the 23rd April last should not be set aside, and why the plaintiffs should not be at liberty to proceed with the suit.

The applicants by their petition stated that the suit was one for the possession of certain land which they claimed as heirs of their grand-uncle against Bindabun Chunder Mookerjee and others; that the defendant Bindabun, having obtained an *ex-parte* decree under Act X. for the rent of other property, caused the right, title, and interest of the plaintiffs in the *suit now in question* to be put up for sale, and bought the same in the name of his nephew Juddoo Puttee Chatterjee.

After the sale on the 3rd of April, the matter was brought to the notice of the Sudder Ameen, in the presence of all the parties by the purchaser applying to have his name substituted as plaintiff. The sale-certificate not being produced, no order was then made. But, on the 23rd of the same month, in the presence of the plaintiffs, the defendants, and Juddoo Puttee, the purchaser, an order was passed by the Sudder Ameen to the effect that, "the case having been called on, upon inspection of the record, it appeared that the rights and interests of the plaintiffs in the suit had been sold in execution of a decree, and that the auction-purchaser, having put in a certificate of his purchase, had applied to have his name substituted; whereas the rights of the plaintiffs, whatever they may be, are now seen to lie in the auction-purchaser, therefore the order is that he be put in possession, and his name put in the register."

Later in the course of the same day a proceeding was recorded by the Sudder Ameen, entitled "Chunder Kant Bhuttacharjee and others named, former plaintiffs, "and on allegation of purchasing their "rights, Juddoo Puttee," in which, after reciting that Juddoo Puttee had applied for a postponement which the Court refused to allow, he ordered that, for the present, the suit should be dismissed, but that the party should be at liberty to re-institute the suit within the legal time, Juddoo Puttee to pay half the costs of the defendants.

The plaintiffs were not in any way before the Court when this second order was passed.

Baboos Chunder Madhub Ghose and Mohinee Mohun Roy showed cause. They objected, *first*, that this Court had no jurisdiction to interfere, inasmuch as the plaintiffs had their remedy by appeal in the ordinary way; and, *secondly*, that the application being more than three months after the date of the order of the 23rd of April, being

beyond the period allowed for an appeal to the Principal Sudder Ameen, was not made within a reasonable time. I think that neither of these objections ought to prevail.

Mr. Twidale had argued that the right of the plaintiff in a suit is not liable to attachment and sale in execution. It certainly appears not to be moveable property; nor does it fall within any of the definitions of property liable to attachment and sale under Section 205 of Act VIII. of 1859. Mr. Twidale referred to a case reported amongst the Miscellaneous Appeals, Weekly Reporter, 7th June 1865; *see* case *also ib*, 31st May 1865. It is apparently not property either moveable or immoveable within the meaning of the term as used in Section 86 of Act X. of 1859. But we do not decide the case on that ground.

The 73rd Section of Act VIII. of 1859 empowers the Court, at any hearing of the suit, to direct that any person who may claim any interest in the subject-matter of the suit, or who may be likely to be affected by the result, may be made plaintiff or defendant, as the case may be.

And, no doubt, when the Sudder Ameen found that a sale of the plaintiff's rights had taken place in the Collector's Court, it may have been competent to him to permit the purchaser to appear as plaintiff to defend his supposed interest in the suit. But there is nothing in Act VIII., or in any other law that we ever heard of, which empowers a Judge, at the instance of a third party, to strike out the name of a plaintiff, or, in other words, to deprive a plaintiff of his right of being heard out in the suit; and, in fact, the plaintiff's name was never by any formal order actually removed from the record. He was not dismissed from the suit by the order which was passed in his presence on the 23rd of April. Whatever the Sudder Ameen's intentions may have been, I think we cannot construe his order as one which he had no power whatever to make, unless he has expressed such to be his intention. That being so, I think we must treat the plaintiff as still being a plaintiff on the record at the date of the recent order. And, as that order was passed in the absence of the plaintiff, does not purport to be a decree against him, does not order him to pay costs, does not declare that he shall be dismissed from the suit, I think we can only treat it as an order which does not affect him or bind him in any way. The order that the suit should be dismissed must be construed as an order affecting only the parties in whose presence and by whose consent it was made.

The striking the case off the file was simply an act which the Sudder Ameen had no right to do, until the plaintiff's case was disposed of by a decree for or against him.

As there was no decree, there is nothing for which the plaintiff was bound to appeal. In our opinion the case is in point of law, as regards the plaintiffs, still pending undisposed of in the Court of the Sudder Ameen; and, therefore, by virtue of the powers and in exercise of the duty cast upon the Court by the 15th Section of the 24 and 25 Vict. CCIV. of superintending all Courts which are subject to our appellate jurisdiction, I think we should order the Sudder Ameen to take up and try this case as one which we find to be still pending and undisposed of in his Court, and that the defendant should pay the costs of this rule.

Seton-Karr, J.—In all that my learned colleague has written as to the sale of the plaintiff's rights, as to the supposed dismissal of his suit, as to still being properly before the Lower Court, and as to the propriety of his having his case tried, I entirely concur.

What I doubt about is the power of our Court to interfere under the Section of the Charter quoted.

It is said that this power has been exercised by Divisional Benches on other occasions. This may be the case; but the reasons for such action are not before us; and that fact alone is no answer to my doubts as to whether the Charter was intended to sanction such a proceeding as that now contemplated.

My doubts are somewhat strengthened by the Full Bench decision in a case from Bhaugulpore noted in the margin, in which it is ruled that our Court cannot do by way of motion what it cannot do by way of appeal, and that there was nothing in the Charter which induced the Court to think that it had power to give relief to the parties.

W. R., Vol. V., page 25, Miscellaneous Rulings.

The case is not exactly on all fours with the case before us, but the reasons for non-interference would seem equally to apply.

It is thrown out that this Full Bench decision is open to question. That may or may not be so; but, while it stands unrescinded, I do not think we can get over it by expressing mere doubts as to its soundness.

At any rate, the case before us is, in principle, so important that I think the matter should be referred to a Full Bench.

I want a full answer to my doubts as to whether, under the Charter, and not under any local law, we can give the relief and exercise the interference necessary to what, I must admit, would be in this instance an act of justice.

The case accordingly came before the Full Bench on the 15th March 1867.

Mr. Twidale (for the Petitioner) urged that Mr. Justice Norman's judgment was final under Section 36 of the new Letters Patent, dated the 28th December 1865, and that there was no reference to the Full Bench.

Baboos Dwarkanath Mitter and *Chunder Madhub Ghose (contra)* contended that Mr. Justice Norman's judgment was not final under the Section cited. It was not the opinion of the Senior Judge in a case where the Judges composing the Division Court were *divided* in opinion, inasmuch as Mr. Justice Seton-Karr, while agreeing with Mr. Justice Norman as to the *facts*, had, instead of giving any opinion on the *point of law* involved in the case, expressly referred it for the decision of the Full Bench. The Senior Judge of a Division Court (they proceeded) was not competent to pass judgment in a case when the Junior Judge neither concurred in, nor differed from, the opinion of the Senior Judge.

The case was postponed for a reference to Mr. Justice Norman as to whether he intended his order as the judgment of the Court, and on the following morning—

Peacock, C. J., intimated that Mr. Justice Norman had written to say that he had passed his judgment in the case. As therefore that learned Judge had not made the reference, and as Mr. Justice Seton-Karr could not of his own authority make the reference alone, the Full Bench had no power to entertain it.

Mr. Justice Norman's order accordingly prevailed.

The 16th March 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Pre-emption—Limitation—Minority.

Case No. 3016 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 28th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th December 1865.

Jungoo Lal (Plaintiff), *Appellant,*

versus

Lalla Alum Chund and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellant.

Mr. C. Gregory and *Moulvie Syud Murhumut Hossein* for Respondents.

The terms of Section 11, Act XIV. of 1859, are general, and include cases of pre-emption under Clause 1, Section 1, so that a plaintiff may sue to enforce a right of pre-emption within a year after his attaining majority.

Norman, J.—THIS is a suit to enforce the right of pre-emption. The plaintiff alleges that he attained his majority on the 23rd of August 1865, and that, having then heard for the first time that the land claimed had been sold to the defendant, he, on the 29th of August 1865, performed the ceremonies required by Mahomedan Law to entitle him to claim pre-emption, and brought the present suit on the 18th of September following, within three weeks afterwards.

The Judge holds that the plaintiff is not entitled to any deduction, though he assumes that he was a minor at the time when his right to claim pre-emption arose.

We think this an erroneous view; it is perfectly clear that the words of Section 11 of Act XIV. of 1859 are perfectly general, and include cases under Clause 1, Section 1. That being so, the 11th Section empowered the plaintiff to bring his action within the same time after his disability ceased, that is, after he came of age, as would otherwise have been allowed when his cause of action accrued, that is to say, within one year of plaintiff's attaining his majority. This decision of course only relates to the period with-

in which the plaintiff can pursue his *remedy*. With regard to his right under Mahomedan law or custom, the question may be very different.

The case must go back to the Judge for trial.

Seton-Karr, J.—I concur in the order of remand, and in overruling the Judge's decision as to limitation. I cannot hold the Judge to be correct in declaring, for the purposes of this case, that the right to sue accrued to the plaintiff from the date of the performance of the ceremonies. That performance was a mere preliminary, and a necessary condition of the suit, but it did not create a right of action. Nor is the Judge correct in saying that, because the ceremonies were performed, on the plaintiff's own statement, after he had attained his majority, therefore his right to sue could not have accrued during his minority. His right to sue, and his performance of certain formulas, are two very different things.

The plaintiff was bound to sue within one year of the purchaser's obtaining possession under Clause 1, Section 1 of Act XIV. of 1859. The meaning of that Clause of the Section, I take it, was to give security to purchasers, and not to permit them to be disturbed after the expiration of one year; and I do not see that, when a purchaser had been in possession for one year, the plaintiff could claim to oust him on the mere ground that the plaintiff had subsequently, and for the first time, heard of the purchase.

What the plaintiff, however, can claim, and what he does claim, is, that the period of legal disability be deducted as provided for by Section 11; and, if he has sued within one year after the legal disability has ceased, he is in time. The Judge should find when the plaintiff arrived at majority; and, if he has sued within one year from that event, he would be in time, and the Judge should then go into the merits.

This is what I would venture to think is the correct rule to be laid down for the Judge's guidance.

The 16th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges*.

Compulsory Registration—Amuldustuks—Damages—Breach of Contract.

Case No. 397 of 1866.

Regular Appeal from a decision passed by the Judge of Gya, dated the 10th August 1866.

Bunwaree Lal and others (Plaintiffs), *Appellants*,

versus

Sungum Lal and others (Defendants), *Respondents*.

Baboo Opender Chunder Bose for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

Suit laid at Rupees 1,100.

It was not intended that compulsory registration under Section 13, Act XVI. of 1864, should apply to deeds, like amuldustuks, which are merely preliminary to the main contract or engagement, or that deeds, which are steps in, or mere parts of, a transaction, should be registered before they can be used as evidence.

Where *A*, in a suit against five defendants *B* to *F*, claimed, under an alleged contract by *B* to *E*, to grant him a lease, and sought to disturb *F*'s possession under a subsequent registered lease from *B* to *E*—HELD that, in the absence of any suggestion to the contrary, *F*, who had gained his separate suit, must be assumed to have taken *bond fide* and without notice of the alleged contract with *A*, and that *A*'s remedy for any wrong sustained by him must be by a suit against *B* to *E* only for damages for breach of contract.

Seton-Karr, J.—THE plaintiffs sued to establish their mokurruree right, to confirm their possession, and to compel the defendants, Nos. 1 to 4, to execute a perpetual mokurruree lease for a six-annas share in a village. Their plaint stated that the defendants, proprietors of the village, had agreed to give them such a mokurruree title on consideration of a nuzurana of 450 rupees, of which 150 rupees had been paid, and that the defendants had given them an amulnamah by which possession of the village had been actually conferred, as well as a receipt; but that the said defendants then acted wrongly, did not complete the engagement, and executed another mokur-

ruree lease in favor of Mitturjeet Singh, defendant No. 5. The suit was consequently brought to cancel this latter deed, as well as for the objects already stated.

The proprietors repudiated the whole of the plaintiffs' claim and statement, and the Judge dismissed the case. simply on the ground that, as the plaintiffs had neglected to register the amuldustuk, which was an instrument coming strictly within the category of those, the registration of which was imperative under Section 13, Act XVI. of 1864, they were out of Court altogether. The Judge further held that the precedent cited from the Weekly Reporter, Volume III., page 64, Civil Rulings, case of Ram Tunoo Sircar, was not in point.

We are clearly of opinion that the decision of the Judge cannot be supported on the grounds taken by him, and that his ruling is wholly wrong in law. The Act quoted by him says that "no lease of immoveable property exceeding one year, and no "instrument which purports or operates to "create, declare, transfer, or extinguish any "right, title, or interest of the value of 100 "rupees or upwards in any immoveable "property, &c., &c., shall be received in evi-"dence, unless the same shall have been "registered in the manner prescribed by "this Act."

It is impossible that the Legislature could have intended this provision to apply to deeds which are merely preliminary to the main contract or engagement, as the amuldustuk undoubtedly is, or that deeds which are steps in, or mere parts of, a transaction, were intended to be registered before they could be used as evidence. Unquestionably the mokurruree pottah, had it ever been completed, would have been one of those instruments to which compulsory registration applied. The amuldustuk, like many similar documents, was merely bestowed, in the plaintiffs' own view of the case, to give them possession pending the execution of the formal instrument, which was to create and declare a right and interest in their favor in immoveable property of more than 100 rupees in value, and which, when completed, would have formed their title-deed.

The case referred to by the Judge, and held by him not to be in point, appears to us really to apply to the case before us. The Judges then held that a deed which was simply "a contract to sell land at some future time on receipt of a certain sum not then paid" did not require registration.

The deed in that case was a *bainanamah*, showing that 124 rupees had been paid in advance, and stipulating that, on payment of a further sum of 800 rupees, the plaintiff should receive defendant's share of the talook. The Judges held that compulsory registration did not apply, and we endorse that opinion, and hold it with regard to the deed before us, which is one to be placed in the same category. We, therefore, set aside the ruling of the Judge as erroneous in law.

It appears, however, that Mitturjeet, defendant No. 5, brought a suit against the plaintiff, appellant before us, and against the four defendants, proprietors of the mouzah, for registration of his pottah. The claim was preferred under Section 15 of Act XVI. of 1864, and it was regularly numbered and registered as a suit. The Principal Sudder Ameen decreed the claim of Mitturjeet, and the Judge, in appeal, confirmed that decision, when the defendant, now plaintiff before us, preferred a special appeal to the High Court, in regard to which the appellant is only able to show us that the said appeal was dismissed for default of appearance.

The result of this suit is thus to leave Mitturjeet with a complete and perfect title to the mouzah in question, while the appellant before us has nothing to show but an imperfect contract, an incomplete title, and an unsuccessful appeal.

I am of opinion that, though the plaintiff had undoubtedly a cause of action against the defendants 1 to 4, and might have had some remedy against them, there was no charge of fraud or collusion against Mitturjeet. The effect of the litigation in the separate suit is to give Mitturjeet a complete and good title against the plaintiff, appellant. The law of equity, as construed and laid down by the highest Courts in England, would certainly favor a person in the position of Mitturjeet. He was a purchaser *bond fide*, and had no notice of any claim on the estate, as far as appears. The favor of a Court of Equity ought to be extended to such a purchaser, not only where he has a prior legal estate, but where he has a better right to call for the legal estate than any other person. *See* Sugden on the Law of Vendors and Purchasers, edition of 1834, Chapter XVI., Section 10, page 258. In this view, then, though I think that the plaintiff was not wrong in including Mitturjeet in the list of defendants in his suit, he did not charge him with fraud, and he has now no cause further to harass him or to dispute his title, seeing

that the case, as affects Mitturjeet, has been separately put an end to, and his interests have been guarded and preserved by the separate appeal. And the better course for the plaintiff would have been from the first to have sued defendants Nos. 1 to 4 only, and not for specific performance, but for damages as for breach of contract. The plaintiff may still avail himself of this form of action if he thinks fit. But I am clearly of opinion that we ought not to accede to his request to be permitted to substitute this form of action in the present suit for the one preferred by him, and to have his case remanded for trial on the merits. By his own laches, the appellant has allowed Mitturjeet to become the possessor of a complete title in the property, and the appellant cannot be permitted to vex and harass him any further in the present action, seeing that the real point at issue between them has been separately decided. The altered state of things will leave the plaintiff at liberty to sue the four defendants for breach of contract should he be so advised, but for the reasons given, though I hold the Judge to be wrong in law, I am of opinion that his order dismissing the suit should stand good.

I would dismiss the appeal with costs.

Norman, J.—I concur in thinking it clear that the Judge is wrong in supposing that the amulnamah required registration under Section 13 of Act XVI. of 1864, and for the reasons given in the above judgment.

But, although the judgment of the Lower Court is erroneous on this point, it appears to me clearly unnecessary to remand the suit for trial.

The plaintiff sues to establish his alleged mokurruree right, and for confirmation of his possession. He claims under an alleged contract by the four first-named defendants to grant him a lease. His plaint shows that these defendants subsequently executed a lease to the fifth defendant, Mitturjeet Singh. The four first-named defendants deny the alleged contract. Mitturjeet relies on his title under the lease to him. The plaint does not suggest that this lease is not *bond fide* as far as Mitturjeet Singh is concerned, or that Mitturjeet Singh had any notice of the alleged prior contract by the other defendants to grant a lease to the plaintiff. This is not merely a defective statement in the plaint; it is the whole case made by the plaintiff as appears clearly from the issues. Under these circumstances the plaintiff's remedy for any wrong that he has sustained must be by a suit for damages for breach of contract against the four first-named defendants.

The plaint does not show any right or title whatever in the plaintiff to disturb the possession of Mitturjeet Singh, who has a perfect and valid legal title under a duly-registered lease, and who, in the absence of any suggestion to the contrary, must be assumed to have taken *bond fide*, and without notice of the alleged contract with the plaintiff. The suit is dismissed with costs and interest.

The 19th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Section 4, Act X. of 1859—Uniform payment of rent — Kubooleut — Tender of pottah.

Cases Nos. 3084, 3093, and 3097 of 1866 under Act X. of 1859.

Special Appeals from a decision passed by the Additional Judge of Chittagong, dated the 8th September 1866, affirming a decision passed by the Deputy Collector of that District, dated the 16th January 1866.

Munsoor Ali and others (Defendants), *Appellants,*

versus

Bunoo Singh and another (Plaintiffs), *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

A variation of one anna is not sufficient to destroy the uniformity required by Section 4, Act X. of 1859.

The previous tender of a pottah is not absolutely necessary to entitle a landlord to a decree for a kubooleut. The decree may make the obtaining of the kubooleut contingent on the offering of a corresponding pottah.

Pundit, J.—In these three special appeals, the special appellants are right in pleading that the Lower Appellate Court wrongly holds that a variation of one anna is sufficient to destroy the uniformity required by Section 4 of Act X. of 1859. But the Lower Appellate Court says that plaintiff has not explained the reason of this variation, and adds that it is not proved

that the person in whose name the dakhilas which show the variation are granted had anything to do with the lands now in dispute. Besides, this remark applies only to the dakhilas of one year, and plaintiff has to prove uniform payment for eight years, besides the twelve years preceding the suit, for which period plaintiff admits that special appellants had paid uniformly.

The special appellants then plead that the Lower Appellate Court has not tried that the increase in the productive powers of the land found to exist has not arisen from any *other cause* besides the expense and the labor of the special appellants. We find that the special appellants never urged any such plea before the Lower Appellate Court, and so that Court had no occasion to try it.

Special appellants also argue that plaintiff has not proved that he had offered pottahs, and so he is not entitled to obtain a decree for kubooleuts. It is quite sufficient if plaintiff is ordered to obtain the kubooleuts on his offering the pottahs to the ryots from whom he is now demanding the kubooleuts.

In all these cases it is always understood that the plaintiff will obtain a kubooleut as decreed, only on offering a corresponding pottah.

Seeing no reason to interfere, we reject these three special appeals with costs.

The 22nd March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Jurisdiction (of Civil Court)—Suit to recover possession with mesne-profits (against zemindar and others)—Right of occupancy (by ryots holding under terminable leases).

Case No. 2934 of 1866.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Dinagepore, dated the 8th September 1866, affirming a decision passed by Moulvie Abdool Mujeed, Sudder Ameen of that District, dated the 13th July 1866.

Puddo Monee Dossia (Defendant), *Appellant,*

versus

Jholla Pally and others (Plaintiffs), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A suit to recover possession with mesne-profits, against a zemindar and others, is cognizable by a Civil Court.

Where a tenant holding under a terminable lease, which does not provide for re-entry, makes no allegation of previous possession, and there is no admission of it on the other side, the tenant is bound to go out at the expiration of his term; and, if he claims a right of further occupancy, it is for him to prove that right.

Loch, J.—THE plaintiff sued to recover possession of his jote lands, from which he had been ousted by the defendant, zemindar, and others, and to recover the price of paddy which the defendants had wrongfully appropriated.

The Lower Courts gave a decree for the plaintiff; and a special appeal is preferred on three grounds: *1st*, want of jurisdiction in the Civil Court to entertain the suit; *2nd*, that the plaintiff is not entitled to re-entry as he held only for a term; *3rd*, that the question as to plaintiff's right of occupancy has already been decided in another suit.

We reject the *first* objection, as we find a current of decisions of this Court, which rule that such a suit can be instituted in and tried by a Civil Court (*see* Wyman's Journal, 8th June 1864; 1 Weekly Reporter, pages 138 and 160; 2 Weekly Reporter, page 52, Civil; 6 Weekly Reporter, page 19, Act X. Rulings).

We dispose of the *third* objection before taking up the *second*. It appears that plaintiff brought a suit against the present defendant, claiming an abatement of his rent under the provisions of Section 18, Act X. of 1859. In appeal the Judge held that the plaintiff was not entitled to abatement, as he had not proved his right of occupancy. The judgment in that case has been read to us; but we do not find that this point was fairly put in issue, and the plaintiff required to prove his right of occupancy. The Judge, incidentally, as it were, says that plaintiff has not proved his right of occupancy. We agree with the Lower Courts in thinking that this judgment cannot be considered such a trial on the merits as to preclude further investigation on this point in the present case.

On the *second* objection taken in special appeal, we find that the defendant, zemindar, has filed a kubooleut admittedly executed by the plaintiff for a term, which term has expired, and plaintiff has held over. It is evident from the recital in that kubooleut that plaintiff did not get possession under that instrument, but held the lands as far

back as 1247, when a settlement was made with him after measurement of the lands of the estate. The kubooleut recites that the plaintiff has held the land under leases for a term, and that the lease then given him was for nine years from 1255 to 1263; and it is contended for the special appellant that, as plaintiff has held under terminable leases, they do not give him a right of occupancy, nor will the period for which he has held over give him such a right, even if his possession under the lease and the period subsequent to it together exceeded 12 years. Our attention has been called to two decisions of a Division Bench of this Court reported at 2 Weekly Reporter, page 54, Shib Dyal Paleet; and 4 Weekly Reporter, page 1, which declare "that a pottah for a "term of years is not necessarily inconsist-"ent with a right of occupancy, since tem-"porary settlements of the rents of tenures "held at variable rates are often made for "a term of years—that where, on the face "of a contract between landlord and tenant, "it appears that the tenant came into pos-"session under that contract only, or that a "right of re-entry was reserved to the land-"lord, no right of occupancy under Section "6 accrues. Where, however, there are no "such terms, but merely a pottah for a cer-"tain number of years, the *onus* is on the "landlord to show that the tenure was "such that the express limit of years may "be fairly applied to the possession, and con-"strued to give the right of re-entry."

In the present case it is evident that the tenant did not come into possession under his present pottah filed in the suit, and the pottah contains no words providing for re-entry after the expiry of the term. The rule, however, as laid down in the decisions above quoted, is perhaps stated too broadly, and is not applicable to all cases, for it may so happen that on the one side there is no allegation of previous possession, nor admission of it on the other, while the terms of the lease may not provide for re-entry. Under such circumstances the inference would be that the tenant is bound to go out at the expiry of his term; and, if he claim a right of further occupancy, it would be for him to prove that right. We see no sufficient grounds in this case for interfering with the judgment passed below, and we reject the appeal with costs.

This order is applicable to No. 2933, the only difference in the two cases being that the plaintiff in No. 2933 denies having executed the kubooleut filed by the defendant.

The 22nd March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Evidence—Uniform payment of rent.

Cases Nos. 3186 to 3189 of 1866 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Dinagepore, dated the 18th September 1866, affirming a decision passed by the Deputy Collector of that District, dated the 11th August 1866.

Elahee Buksh Chowdhry (Defendant), *Appellant,*

versus

Roopun Telee and others (Plaintiffs), *Respondents.*

Baboo Tara Prosunno Mookerjee for Appellant.

Baboo Tarucknath Sein for Respondents.

A trifling difference in the jumma will not necessarily affect the fact of uniform payment of rent.

Although receipts for rent are ordinarily the best evidence of uniform payment, yet uniform payment may be proved by satisfactory means other than receipts for rent.

Pundit, J.—In these four cases the plaintiffs, respondents, sued the special appellant their landlord, with a view to disprove special appellant's right to enhance plaintiffs' rents in respect to which he, defendant, special appellant, had served plaintiffs with notices.

It appears that, previous to the present litigation, the property of the special appellant was farmed for several years to a third party, and the landlord alleged that the plaintiffs had with other ryots agreed to pay, and had paid, enhanced rents to the said farmer under an ikrar. The landlord filed a document to that effect, alleged to have been granted by the plaintiffs and other ryots, but failed to prove it against the plaintiffs.

In two cases, 3186 and 3189, there is, however, strong *primâ facie* case in favor

of the fact that plaintiffs paid an enhanced rent to the farmer, as they have failed to produce dakhilas (except for the last year 1270) for this entire period, while they produce receipts of a period some time beyond the 12 years preceding this suit.

In the two other cases, Nos. 3187 and 3188, the receipts for the period of the farmer's lease are generally produced, but they cannot be accepted until they are proved to be receipts applicable to the lands held by the plaintiffs in those two cases; and they alone will not suffice the plaintiffs in those cases to get a decree for exemption, unless they show the rents have actually been uniform for 20 years. As the dakhilas are now shown in these two cases to us, they do not prove a uniform payment, and require much explanation before they can be accepted as proof of that fact. In order to take the benefit of the presumption which the law allows to be raised from proof of the fact that rents have not varied for 20 years previous to the suit, ryots can give what is the best proof of non-variation, *viz.*, that they have paid uniformly for the 20 years preceding the suit. Then the best evidence of payment being receipts, these are ordinarily filed to support the plea. When receipts are filed, not for the entire period of 20 years preceding suit, but some are wanting here, and some there in that interval, still uniform payment may be proved otherwise for the wanting years by other proof, and from surrounding circumstances.

A trifling difference in the jumma will not necessarily affect the fact of a uniform payment. Nor do we deny that uniform payment may also be proved by satisfactory means other than dakhilas; but the receipts for rents are undoubtedly ordinarily the best evidence in this matter.

In the first two cases, no explanation is given why the receipts during the period of the farmer's possession, which is recent, are wanting; and in the two cases the dakhilas filed are not proved to refer to the lands in dispute; and if they are not shown to prove a uniform payment, the receipts thus produced would not establish the non-variation for 20 years required by the law.

We think that these four cases should be taken up again below separately each on their merits, and not on a general view as if they had but one feature common to all.

We accordingly remand the cases to the Lower Appellate Court to re-try them separately, with reference to the above remarks.

The 22nd March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale of under-tenures for arrears of rent (Effect of)—Enhancement (of under-tenures).

Case No. 2639 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 5th July 1866, modifying a decision passed by the Deputy Collector of that District, dated the 17th June 1864.

Mohima Chunder Dey (Defendant), *Appellant,*

versus

Gooroo Doss Sein (Plaintiff) and others (Objectors), *Respondents.*

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Appellant.

Baboos Greeja Sunkur Muzoomdar and *Sreenath Banerjee* for Respondents.

A sale of an under-tenure for arrears of rent (not affected by Act VIII. of 1865 B. C.) does not extinguish incumbrances created by the defaulter before the sale, unless there is a written stipulation providing for the sale of the tenure for its arrears.

A talookdar is liable to enhancement only to the extent of what other similar talookdars in the neighbourhood pay for similar under-tenures with similar lands.

Pundit, J.—THE Lower Appellate Court considered that the special appellant is a mere ryot having a right of occupancy, because it held that, by the sale for arrears of the parent tenure within which the under-tenure of the special appellant was situated, the *under-tenure* became extinct.

It has been decided by the Full Bench in the case No. 992 of 1866, dated 13th instant, that, unless there is a written stipulation that the tenure will be sold for its arrears in all sales for decrees of arrears, which are not affected by Act VIII. of 1865 of the Bengal Council, the sale does not extinguish incumbrances created by the defaulter before the sale. It is not shown that the terms under which the parent tenure was held had any such stipulation, and it is not denied that this sale is not affected by the afore-cited Act of the Bengal Council.

The Lower Appellate Court has not noticed that the agent of the landlord has, after the

remand by the Lower Appellate Court, admitted before the Court of first instance that the holding of the special appellant was *not* that of a ryot, but that of a talookdar.

We, therefore, think that it is already a matter beyond dispute, that the special appellant is a talookdar, and not merely a ryot. Such being the case, special appellant is entitled to urge that he is liable to be enhanced only to the extent of what other similar talookdars in the neighbourhood pay for similar under-tenures with similar lands.

In this view special appellant cannot be assessed so as to leave him no reasonable profits for his under-tenure, which would be the case if he be treated as a mere ryot.

The case is, accordingly, remanded for determining this rate.

The 22nd March 1867.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Judgment (Addenda to)—Onus probandi—Wrongful possession and detention of Timber.

Case No. 298 of 1866.

Regular Appeal from a decision passed by Dr. W. H. Clark, Recorder of Moulmein, dated the 24th of August 1866.

R. Snadden (Defendant), *Appellant,*

versus

Todd, Findlay, & Co. (Plaintiffs), *Respondents.*

Messrs. R. V. Doyne and *I. T. Woodroffe, instructed by Mr. J. W. Mirfield,* for Appellant.

Messrs. A. T. T. Peterson and *J. P. Kennedy, instructed by Mr. F. J. Fergusson,* for Respondents.

It is irregular to add to a judgment once delivered when the effect of the addition is to alter the grounds on which the judgment proceeded.

Semble.—A Judge may append to his judgment additional reasons merely to show more fully the correctness of the decision at which he has arrived, though such a course is not strictly warranted by the Civil Procedure Code.

In a suit under that Code in which the plaintiffs allege that the defendants wrongfully and forcibly took away and were detaining timber which had been in the plaintiffs' constructive possession and to which they are entitled, and the relief asked for is the restitution of the timber with costs of suit, if it be proved that the defendants had forcibly or wrongfully taken property in the plaintiffs' actual or constructive possession, it would then be for the defendants to show that they were entitled to the timber. In the present case, the plaintiffs having failed to show their possession of the timber or the forcible or wrongful dispossession or conversion of the goods, and the defendants having made good their title to the timber—HELD that the judgment should have been for the defendants.

Jackson, J.—THIS is an appeal from a decree made in the Court of the Recorder of Moulmein, in a suit No. 153 brought by the plaintiffs to recover possession of 52 logs of teak timber, being a portion of 609 logs which it was alleged the plaintiffs had cut under a license in the Mhineloongyee forests, and had dragged to the river, where the defendants, it was alleged, had wrongfully seized the logs in question, and detained them from the plaintiffs.

The Recorder gave judgment in this case for the plaintiffs, and made a decree in their favor, and he also declared the same judgment to be applicable to eleven other similar cases, in which the defendants were the same as in this case, but the plaintiffs were not the same, and in which, as we understand, no evidence was given. Decrees were consequently made in all those cases in like manner.

The suits were originally against three persons: 1, R. C. Burn, a merchant of Moulmein; 2, Moung Shoay Gan, a timber trader of the same place; 3, R. Snadden, a merchant also of Moulmein. But Snadden, who appears to have purchased the other defendants' rights in the timber, was afterwards made sole defendant (Burn having died while the suit was pending), and he therefore appeals in all the cases.

Our present judgment, however, relates only to the suit No. 153, in which the Recorder's decision was actually given; and there is a peculiar feature in that decision, upon which we think it as well to remark before going further.

After the defendant's evidence had closed, and the advocates on both sides had been heard, the Recorder, in the evening of the same day, pronounced his judgment, in which he observed that the real questions which his Court had to decide had been reduced to two. Upon these issues he found in favor of the plaintiffs, and thereupon made his decree dated 24th August.

After the judgment thus delivered, comes a paper called an *addendum*, bearing date the 25th August, in which detailed findings are recorded upon all the remaining issues in the cause, as originally fixed by the Recorder who first heard the case (certain issues being struck out which were thought not to affect the defendant Snadden).

We find on the record, however, a petition of this defendant, dated 10th September following, in which it is stated that this *addendum* had been made *several days* after judgment declared and signed in open Court, and had been appended to the record with the finding *five days after copies of the judgment and decree had been granted to defendant for appeal purposes.* The defendant therefore protested against such *addendum* being placed or retained on the record.

On this petition we do not find that any order or observation was made by the Recorder.

The Procedure Code does not authorize the recording of any further grounds for a decision or of an addition to the judgment once delivered under Sections 183, 184, and 185 of the Code. But neither is such a course expressly forbidden, and we are not disposed to say that a Judge may not lawfully append to his judgment such additional reasons as may tend more fully to show the correctness of the decision at which he has arrived. In saying this, we assume that the further reasons do not alter the ground on which the decision proceeded.

In this instance we notice the proceeding, because we think it indicates the haste and consequent imperfection of the first judgment, and because the superficial mode in which the case has been dealt with below has contributed much to our difficulty in disposing of the appeal.

For the Recorder observes in this *addendum* that he finds "he has casually omitted "to dispose *seriatim* of the issues declared "by Mr. Kennedy" (the late Recorder).

He says: "It is true that by the 186th Section a separate finding on each of the issues is not required when the decision on any one or more suffices;" and that he has already declared his opinion that the finding on the last of the issues was sufficient for the determination of the suit; but "to prevent mistakes," and to show what his opinion was on all the facts, he proceeds to state a concise finding on each issue.

We are compelled to say that some of these findings—those on the issues 5, 6, and 10—are of an unsatisfactory character; and that others, on 7, 9, 11, are such as it is extremely difficult to reconcile with any reasonable view of the evidence, although they are, it must be admitted, "in conformity with the views enunciated by" the Recorder in his judgment.

But while in the judgment it is laid down that the plaintiffs are entitled to a decree by reason of *prior acquest* and by reason of *forcible removal from his possession* by the defendant; on the other hand, the *addendum* declares that "plaintiffs' possession by "*acquest*, by *pursuit*, by *payment of duty*, by "*working*, and by *sufferance*, is superior to "that set forth by defendant on inconclusive "documents accompanied by indications of "violence and force:" that those are the principles on which the judgment rested, and that these findings are in concurrence with those principles.

That the judgment, however, was not originally based upon those principles is, we think, apparent, not only from the nature of the questions which, in the outset, the Recorder sets before himself for trial, but from the succeeding passage in the judgment, where, after premising that the precise authority or jurisdiction of the Chief of Zimmay (plaintiffs' licensor) is immaterial in the present suit, he declares that the Court's "duty is almost limited to saying "which of the bargains was prior in point "of time, and which of the bargains stood "and stands ratified by subsequent transac-"tions;" and this is further apparent from the curious parallel case which he puts immediately afterwards.

It is clear enough to us that the Recorder has shown a striking example of the inconvenience which must arise from arriving at a short cut at a general conclusion upon a case which involves many distinct questions, and from being compelled afterwards to bring the findings on those several questions into harmony, with the general conclusion to which he stood committed.

And the result of this is that the Appellate Court, instead of taking the simple course of adjudicating on the objections to the decision, is obliged to deal with the case as it were originally, and to come to independent conclusions on all the questions of law and fact for itself.

We proceed then to state, *1st*, the case set up by plaintiffs; *2nd*, that of the defendant; *3rd*, the facts as they appear to us actually established by proof; and finally, connecting the facts proved with the allegations, to consider whether the plaintiffs were entitled to a verdict.

It may be stated by way of introduction that the timber to which the suit relates appears to have been cut from what are called the Mhineloongyee forests, situated in the territory, or at least within the juris-

diction of Zimmay, which is one of the Shan States of Laos, bordering the British Province of Tenasserim on the north-east and tributary to Siam.

The forests lie along the Mhineloongyee and other rivers or creeks falling into the Thomegyeen and Salween rivers, the latter of which streams runs past places called Kyodan and Kadoe towards Moulmein. The former of these names we understand to mean a rope station, or place where ropes are stretched across the river for the purpose of checking and controlling the progress of timber which is floated down in separate logs. Kadoe appears to be a place not far from Moulmein where the timber is finally stopped and placed in store for exportation.

The ordinary mode in which timber comes to the Moulmein market from the forests may be stated as follows:—

Foresters, having a license for that purpose, go into the forest and girdle the trees. They are left in that state for about three years, apparently with some forest mark upon them before they are cut down. At the end of that time, the licensees cut them down, and, after clearing them of their branches, drag them to the river. There a fixed duty is paid on each log, and thereupon the licensee puts his hammer mark as it is called on each log, and commits it separately to the stream. The hammer marks are registered in a Government office, and the proprietors at the proper locality get possession of the logs bearing their own marks, and bring them into the yards at Kadoe.

That is the usual course as represented to us; and it seems to follow that, in order to a legitimate and profitable dealing in the trade, there must be a license extending over several years.

The plaintiffs' case was this: That Moung Khine had obtained from the Zimmay Chief a license for one year, the Burmese and Siamese year 1226, corresponding with the English year 1864, to *work out** timber in the Mhineloongyee forest; that in pursuance of that license he cut 609 logs; that he then paid the duty, *worked*† the logs, and dragged them to the river, where, but for a wrongful interference with them, they would have floated down to Kadoe and come again into plaintiffs' hands; that defendants, however, without any title whatever, went to the forest and using force, wrongfully impressed their own marks on those of the plaintiffs, and so took the timber out of the plaintiffs' possession, and afterwards received it in the defendants' own yard in Kadoe, and retained it, notwithstanding the plaintiffs' letter of demand.

On this it was and is contended that the plaintiffs had both property and possession in the timber; but that, at any rate, there was a possession, constructive if not actual, forcibly disturbed, which gave the plaintiffs a valid *primâ facie* title against the defendants who are wrong-doers, unless the defendants could make out a complete title superior to that of the plaintiffs.

The defendant's case was this: That the defendant Shoay Gan *had*, and the plaintiffs *had not*, a valid license from the owner of the forest to cut and take timber therefrom; that their license was for ten years and excluded other parties; that Shoay Gan had under his license cut the logs in question, and the defendants had worked, dragged, marked, and floated them; that the plaintiffs' so-called license from the Zimmay Chief was, in fact, a permission to steal the defendants' timber; and that plaintiffs had, accordingly, in fraud of Shoay Gan, removed many logs, and marked others, including the logs in question; that such marking gave the plaintiffs no right of property in the logs; that the defendants had done no more than peaceably remove their own property; and that their rights had been solemnly recognized by the plaintiffs' alleged licensor, the Chief of Zimmay, who had undertaken to abstain from interference with them, in consideration of their desisting from the prosecution of their complaint against him before the Royal Court of Siam at Bangkok.

Other formal and technical pleas are raised which it is not necessary to notice, as they are no part of the case in appeal.

The plaintiffs' contention on the defendants' case was in effect that Shoay Gan had cut no timber; that his license had been revoked by the chief (Chow Rajapoot) who gave it; that the license from the Rajah of Zimmay, who was the ruler of the country, would override inferior grants; that the proceedings of the Siamese authorities had been improperly influenced through the British Consul at Bangkok; and that the decision of the Court there had been really in favor of the Zimmay Chief.

Other and more difficult questions have been raised by the learned Counsel who

* That is the expression used in the license which he produced.

† *Qy.*, marked.

argued the case before us, to some of which we shall presently advert.

The facts, as they appear to us to have been proved, or as they have been in one shape or another admitted, are as follows :—

We think it sufficiently proved that Chow Rajapoot, who is himself a Chief and a relative of the principal Chief of Zimmay, gave to Moung Shoay Gan the license marked X. or S. A., which gave him the exclusive right of cutting and taking timber within the forests belonging to the grantor from 1220 to 1230 Burmese; and that, although it appears that the grantor at one time contemplated a recall of the license and appointment, in consequence of Shoay Gan's absence and non-user—for he actually wrote to the British authorities, requesting that it might be returned to him—yet it never was in fact revoked, but, on the contrary, has always been acknowledged and maintained by Chow Rajapoot, and is, as far as this record discloses, in force to the present day; that, by reason of infractions of this privilege by the Chief or Prince of Zimmay selling or affecting to sell to Mr. Lenaine a right to carry away timber from those forests, Moung Shoay Gan complained to H. B. M.'s Consul at Bangkok and to the Siamese Court there, and that, after certain proceedings in that Court, in the course of which both Chiefs attended and were examined, something in the nature of a judgment was drawn up and possibly recorded, of which the exhibit marked A 8 is a translation; but that, owing to the interference of the Consul, this judgment never become operative, but the Zimmay Chief subsequently executed a document, bearing date 16th April 1864, by which he bound himself to abstain from acts depriving Shoay Gan of the forest superintendence conferred upon him by Chow Rajapoot, and this was declared to be in consideration of Shoay Gan and Captain Burn (who was acting for him) having desisted from the prosecution of their suit against the Chief. This document is in a certain sense authenticated by the declaration of the Regent of the Northern Provinces of Siam marked W, which further expressly declares all grants made by the Chief of Zimmay, after the date of such compromise, in derogation of the rights of Shoay Gan, to be "illegal and of no effect." This latter document is, we think, fully authenticated, and its authoritative character shown by the certificate, under the seal and signature of H. B. M.'s Consul at Bangkok, and further by the evidence of Mr. Fowle, the resident Siamese Consul in British Burmah.

The exhibit was rejected as inadmissible by the Court below for reasons which appear to us insufficient, though it was allowed to remain upon the record, and the rejection of it is one of the points raised in appeal.

On the other hand, an exhibit marked N. N. was referred to as showing that a valid adjudication in favor of the Chief of Zimmay had been come to. To the admission of this document, Mr. Doyne objected, making it the sole exception to the arrangement agreed to on both sides, to let in the whole of the documents on the record *quantum valeat*.

Having looked at this document, we found that it purported to be an authenticated copy of an original said to be in the possession of the witness Johnstone, the non-production of which original being unaccounted for, we thought that, under the circumstances, it would be unsafe to depart from the strict rule in respect of copies; and we refused to take the contents into consideration, more especially as it was not very clear how the paper had got upon the record.

We also think the evidence sufficiently establishes that, notwithstanding and after this agreement, the Chief of Zimmay at some time in the Burmese year 1226 granted to the plaintiff Moung Khine the license marked A to work out timber for that year. We do not believe that the plaintiff cut the timber, for which he subsequently obtained the order B, the evidence as to his cutting being scanty, conflicting, and not trustworthy. But we believe that he came into the forest, and placed his mark upon a great number of logs, including the logs which are the subject of this suit.

We do not find that he had possession of the logs otherwise than by, and at the time of, placing such mark upon them.

We find that the witness Frederick Burn went up in the end of 1864 or beginning of 1865, to work these forests in which his brother (the defendant now dead) had an interest; that he was in the forests during a great part of 1865, and then marked and floated a quantity of timber including the logs in dispute. He proves (p. 32 of the small printed book) that he found this timber in the forest granted by Chow Rajapoot to Shoay Gan.

We find that he was accompanied by armed men, and we believe that he was prepared to assert his brother's rights by

force, and that he behaved in an overbearing manner towards the native authorities; but we do not find that any force was used in respect of the timber to which the suit relates.

It has not been shown to us that the Chief of Zimmay had any authority to grant a license for the removal of timber cut by other persons in the forest belonging to Chow Rajapoot, or to override grants made by the latter.

The result of all the evidence upon the point is, we think, undoubtedly that this Chief is the principal member of a ruling family, and is the Governor of the country; that he is not an independent or sovereign prince, but subordinate to the Government of Siam, and liable to be impleaded in the Courts of that kingdom.

From what we have found as to cutting by the plaintiffs and defendant respectively—that is, *A*, that the defendant had license to cut and did cut logs; *B*, that his license excluded others, and there is nothing to show that any third party cut those logs; *C*, that the plaintiff did not cut the logs in question—the inference appears to follow that these particular logs must have been cut by the defendant Shoay Gan or by persons working under his license; and that, consequently, the plaintiffs, in marking such logs, committed a trespass.

It will be apparent from what has gone before that we take a very different view of the facts of this case from that which was taken by the learned Recorder of Moulmein.

We think that the character of the evidence recorded, and the minute examination which it has undergone in the course of five days' argument before us, amply justify us in acting upon our own opinion.

We proceed shortly to state our view of the law applicable to the case.

In the Courts of the Recorders in British Burmah, except in certain cases, all questions of fact and of law or equity are to "be "dealt with and determined according to "the law administered by the High "Court of Judica-" ture at Fort William in Bengal in the exer-" cise of its Ordinary Original Civil Jurisdiction," and the proceedings in civil suits are to be regulated by Act VIII.

Section 21, Act XXI. of 1863.

Section 20, *ib.*

We have consequently before us, not an action of trespass, of trover, or of detinue, but a *suit* under the Procedure Code in which the plaintiffs' allegation amounts to this, that the defendants, having no right, with an exhibition of force, took away and were detaining timber which had been in the plaintiffs' constructive possession, and to which they are entitled. The relief asked for is the restitution of the timber with costs of suit; and all questions arising thereupon, whether of fact, or of law, or equity, are to be dealt with as if we had been sitting in the exercise of Ordinary Original Jurisdiction.

Now, we can have no doubt that, in such a case, if it were proved that the defendants had forcibly or wrongfully taken property in the plaintiffs' actual or constructive possession, it would then be for the defendants to show that they are entitled to the goods.

In the present case we think that the plaintiffs have failed to show their possession of the timber, and that they have also not shown the fact of forcible or wrongful dispossession or conversion of the goods. It was said that the Recorder had erroneously excluded some evidence as to force; but no appeal or objection was preferred by the respondent on this point, and Mr. Peterson observed that the allegation was amply proved.

But we also think that the defendants have made good their title, and clearly shown that they, and not the plaintiffs, had a right to the timber.

It follows that, in our opinion, the judgment should have been for the defendants.

There are certain matters arising out of the record upon which there has been a good deal of comment in the course of the argument, and upon which we shall not say more than justice absolutely requires.

These are, *first*, the intervention of the British Consul at Bangkok; *second*, the proceedings of the brothers Burn in the Zimmay territory: and, *thirdly*, the evidence given by C. O. Johnstone in reference to which the Recorder has used the very strong expressions which will be found in that part of his judgment which deals with the defendants' case.

Her Majesty's Consul at Bangkok is entrusted with the regulation* and control of the interests of all British subjects coming to Siam. Disputes† arising between British and Siamese subjects are to be heard and determined by the Consul in conjunction with the proper Siamese officers; and this appears to point to a regular judicial func-

* Treaty Act II.

† *Ib.*

tion to be exercised in such matters by the Consul.

But we find that a definite and somewhat different principle is laid down by the 2nd article of the agreement prepared by the Royal Commissioners for carrying out the provisions of the Treaty; for it is there provided that "all civil cases in which both "parties are Siamese, or in which the de- "fendant is a Siamese, shall be heard and "determined by the Siamese authorities "alone."

If we were not otherwise well satisfied of the validity of the defendant's right, it might be question of some doubt how far we ought to take into consideration proceedings of those authorities, upon which the influence of the British Consul, exercised on behalf of the complainant, had been so very strongly brought to bear.

As to the conduct of the Messrs. Burn, although we have not found any indication of the use of force in respect of the subject-matter of this suit, yet it must be subject of regret that British merchants in foreign territory should resort to such high-handed methods of assisting their rights, however clear those rights may be.

As to the witness Johnstone, he has certainly by his admissions and by the letter in his handwriting (marked W. W. W.) made himself obnoxious to severe animadversion; yet, on the one hand, we doubt whether his evidence ought to be wholly denied credit, and, on the other, we think that the Recorder's judgment conveys an imputation of complicity, on the defendant's part, in the witness's veracity which is by no means warranted. It was fully admitted before us, and we are entirely of that opinion, that there was no ground whatever for the remark that Johnstone "admitted "that he had offered to sell his venal tongue "to the highest bidder, and that his offer "having been scouted by one party, had "been transferred to the other," that is, if those words imply, as they seem to imply, that any offer of Johnstone's to sell his evidence to the defendants had been made to and entertained by them.

The learned Counsel for the plaintiffs, respondents, raised, as we have already mentioned, certain questions which are not, according to our finding, material, and which, if they were material, would have reference rather to the law governing real property in England than to the principles on which we are to suppose that such transactions are dealt with in the petty States tributary to Siam.

It was contended, for instance, that the license or grant to Shoay Gan gave him no right in the freehold; that he gained no property in any trees, except such as he might cut down; that any trees cut by a trespasser could not be taken out of his hands by the licensee, but belonged to the lord of the forest.

Certainly, if it had been shown that the plaintiff had gone to the forest, and with or without a license had cut down trees, marked and removed them, and the defendant had taken them out of his actual possession, it might have been that, in a case framed to meet that state of facts, the Court would be obliged to decree restitution of the timber, leaving the defendant to his remedy by action for damages against the party who had infringed his rights to cut exclusively.

But, as already remarked, these questions, we think, do not arise here; and it only remains for us to reverse, as we do, the judgment of the Court below, and to order that the decree be given for the defendant, appellant, with all costs of these proceedings.

The 22nd March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeals to Privy Council—Language of Razeenamahs, Safeenamahs, and Security-bonds.

Privy Council Case No. 83 of 1864.

Meer Mahomed Tukee Chowdhry (Plaintiff), *Appellant to England,*

versus

Luchmeeput Singh Doogur and others (Defendants), *Respondents to England.*

Moonshee Ameer Ali for Appellant.

Baboo Bungsee Buddun Mitter for Respondents.

Razeenamahs and Safeenamahs, as well as security-bonds, connected with appeals to England, need not be in English.

Deputy Registrar.—THESE are petitions for the withdrawal of the above appeal.

They are not drawn up in the English language, and are not among the documents excepted in the rule which came into operation on the 1st instant, and which enjoins that "all petitions and applications "connected with appeals to Her Majesty in "Council, except *mooktearnamahs*, or *va-* "*kalutnamahs*, should be drawn up and "submitted in the English language."

The razeenamah and safeenamah are only required to be translated when presented *after* the transmission of an appeal to England. It may not, therefore, be the intention of the Court to compel the presentation of these papers *always* in the English language, but to relax the rule in regard to them when they are presented *before* the transmission of the appeal to England.

I take the present opportunity of laying the matter before the Judge presiding in the Miscellaneous Department, and of requesting instruction as to whether the razeenamah and safeenamah should *always*, whether presented *before* or *after* transmission of an appeal to England, be required to be drawn up in the English language.

I would also beg instruction as to whether the security-bond should also be required to be drawn up in the English language.

Jackson, J.—The wording of the rule is certainly wide enough to include the petitions before me; but looking to the object of the rule, which was chiefly to save time and expense in translating petitions connected with appeals which would have to be transmitted to England, it appears to me that these petitions do not really come within its scope. These are petitions, the effect of which would be to remove the appeal to England from the file. The reason, therefore, which dictated that rule does not apply to this petition; and, as long as the practice of this Court permits any petitions to be presented in the native language, there appears to be no reason why a petition of this kind should not be so presented.

In regard to the question put by the Deputy Registrar in the concluding part of his reference, it appears to me that security-bonds, as part of the proceedings to be transmitted to England, should be in the English language.

Deputy Registrar.—Security-bonds are not, I beg to report, made a part of the proceedings transmitted to England.

Jackson, J.—If not, they need not be in English.

The 22nd March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Hindoo Law (Mitakshara)—Joint Hindoo Family—Succession—Widow—Brother.

Case No. 3182 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 15th September 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 5th January 1865.

Benee Pershad (Defendant), *Appellant,*

versus

Mussamut Mohaboodhy and others (Plaintiffs), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Debendur Narain Bose* for Appellant.

Mr. C. Gregory for Respondents.

Where the Mitakshara Law prevails, the widow of a member of a joint Hindoo family cannot succeed to her husband in preference to the husband's brother, and is no heir to her brother-in-law or to his widow after their death.

Pundit, J.—PLAINTIFF claims as heir to Reut Lal, the deceased brother of Jumeeut Lal, plaintiff's late husband, who had before died. Her allegation is that she was in possession jointly with Lal Daee, the deceased widow of Reut, from the time of Reut's death.

Plaintiff never alleged in this case that she was in possession from the time of her husband who died before her brother-in-law. Further, the previous unsuccessful proceedings commenced first by Lal Daee (and to which plaintiff also was afterwards made a party) to get their names recorded in the place of Reut Lal after his death, show that plaintiff could never make such an allegation.

In this view we cannot understand upon what data the Lower Courts made an issue (if they really made any in the case) regarding plaintiff's possession from the time of her husband's death.

The decisions of both the Courts were chiefly based on the fact that special appellant, defendant, had failed to prove that his father was *joint* with the husband and the brother-in-law of the plaintiff, and rather show that these Courts had but a vague notion regarding the real rights of the plaintiff.

These Courts appear to say that plaintiff held *jointly* with her brother-in-law from the death of her husband, and thereafter jointly with the widow of the said brother-in-law; if so, they either found this without attaching much importance to the fact of such previous possession of the plaintiff before the death of her brother-in-law, or they found it directly against the allegation of the plaintiff *herself*, and without any proof of such previous possession being any part of her present case. If these Courts really intended to decide for the plaintiff, on the ground that they were satisfied that she held independently as heir from the death of her husband, they should have noticed and explained how, in the district of Tirhoot under the Mitakshara Law, a widow of a deceased Hindoo joint brother could hold or acquire any right as heir to her husband in preference to her husband's brother in a joint undivided Hindoo family living under that law. These Courts could not but have observed that, even if plaintiff were allowed to hold in some way jointly with the male member of the family, that could not be as *of right*, and, even if she had alleged and proved to have really held, we do not see how, as regards the half share of her husband, the Courts could give a decree for possession to the plaintiff.

This half share, after the death of Lal Daee, must go to the special appellant, even if his father and other predecessors were living *separate* from the husband and the brother-in-law of the plaintiff. We, however, see that the very plaint of the plaintiff shows that she has no case on the grounds taken below, and there was no occasion to try such a claim.

We accordingly decree the special appeal with costs, and, reversing the decisions of both the Lower Courts with costs, dismiss the plaint of the plaintiff.

The 23rd March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Attachment of under-tenures for arrears of rent.

Case No. 3199 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 20th August 1866, modifying a decision passed by the Assistant Collector of that District, dated the 20th March 1866.

Mussamut Bibee Coolsoom and others (Defendants), *Appellants,*

versus

Dhunput Singh (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Since the passing of Act X. of 1859, there is no law authorizing the attachment of an under-tenure for arrears of rent, except express power to do so be reserved in the lease. When a zemindar has collected all that is due to him up to hand, if he still continue to hold possession after that, he cannot claim anything on account of the rents of such subsequent period.

Pundit, J.—In this case arrears of rents due for the years 1270, 1271, and 1272 Moolkee were claimed by the special respondent.

It appears that the special appellant had taken a farm from 1268 to 1272 Moolkee, and executed a kubooleut by which he bound himself to pay annually certain rents to the plaintiff, with this condition that the advance made by the special appellant in 1268 was to be credited towards the payment of the rents of the (last) year 1272 Moolkee. It was also provided in the deed that, on an arrear falling due, plaintiff was entitled to attach the property in order to realize those arrears.

By the terms of the deed, special appellant is liable for the difference which may remain due to the plaintiff after such a collection by him.

Defendant, special appellant, having fallen in arrears for the year 1269 Moolkee, plaintiff brought an action against the special appellant for those arrears, deducting the aforesaid advance as a credit to 1269. The remainder was decreed. Plaintiff then attached the tenure and remained in possession.

The present suit is brought for what is alleged by the plaintiff to be still due from the special appellant on account of the rents up to 1272 Moolkee, after deducting all that has been collected up to that year.

The Lower Appellate Court having held that, under a precedent of the late Sudder Court, dated 24th April 1862, the attachment could be made only for the rents of the then current year (1270 Moolkee), and not for the future rents of the two subsequent years, dismissed the suit of the plaintiff for the years 1271 and 1272 Moolkee, and decreed the claim as far as it related to the year 1270 Moolkee.

Against this order special appellant appealed on the ground that, as he was not in possession during the year 1270 Moolkee, he is not liable for the rents of that year. He further pleads *before us* that, when the advance was deducted by the plaintiff towards the payment of the rents for the year 1269 Moolkee, and he took possession of the leased property, and remained in possession all along up to the termination of the special appellants' lease, the legal construction to be given to these acts is that plaintiff has, by mutual consent, extinguished the previous contract, and has thereby absolved the special appellant from all claims for the rents now in dispute.

The respondent appeals under Section 348 of Act VIII. of 1859 for the rents of the years 1271 and 1272 Moolkee.

We find that the precedent quoted by the Lower Appellate Court applies to the provisions for attachment referred to in Section 18 of Regulation VIII. of 1819, but the lease now before us was executed *after* Act X. of 1859 had come into operation.

It is accordingly evident that the latter law supersedes the former provisions for attaching tenures of defaulters.

At present there is no law authorizing an attachment for arrears, except express power to do so be reserved in the lease. There is such a provision in the lease of the special appellant.

Now, it is clear that the power to attach must cease the moment plaintiff is found to have held possession *after* he has collected all that was due to him, *viz.*, that due on account of *past* arrears for which the attachment was originally made, as well as those sums which subsequently became due, and further any interest upon these arrears if such be claimable under the terms of the deed.

Rents becoming due after the right of the plaintiff to continue in possession legally ceased, cannot be recovered by a landlord who thus wrongfully kept his tenant out of possession.

We do not, however, see that plaintiff is anywise precluded from demanding the arrears for these three years 1270 to 1272 Moolkee, on the ground of the provisions of a law now rescinded, but only so far as his claim may be inconsistent with his wrongful dispossession of his tenant.

We do not attach weight to the plea taken by the special appellant regarding the legal construction to be given to the deduction of the advance three years before it was agreed to be credited. If both parties had, by mutual consent in the beginning of the year 1270 Moolkee, annulled the contract, special appellant would not have failed to plead that fact in his written statement. Even *here* the special appellant does not urge this, but asks us to give what he calls a legal construction to the acts of the plaintiff as to the deduction of the advance.

We do not find that plaintiff has, under the facts of this case, injured the special appellant in any way by deducting in the accounts of the arrears for 1269 money which was originally stipulated to be credited towards the payment of the rents of 1272 Moolkee.

It is also to be kept in mind that special appellant is entitled to have it decided in this case whether, for each of these three years, plaintiff should deduct only the sums which had been collected by the special appellant for that one year, *in* the subsequent year, or *all* the rents for that one year collected by plaintiff up to the date of suit or up to hand.

We, accordingly, think it proper to remand the whole case to the Lower Appellate Court that it may re-try it with reference to the above remarks.

Remand accordingly.

The 23rd March 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale Law—Section 54, Act XI. of 1859—Lease of share.

Case No. 3286 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 6th September 1866, affirming a decision passed by the Moonsiff of Serampore, dated the 20th February 1866.

Kalee Puddo Ghose (Plaintiff), *Appellant,*

versus

Monohur Mookerjee (Defendant), *Respondent.*

Baboo Mohendro Lal Shome for Appellant.

Baboo Bama Churn Banerjee for Respondent.

A lease of a share is protected under Section 54, Act XI. of 1859.

Pundit, J.—In this case we cannot agree with the Lower Appellate Court that the lease of a *share* is not protected under Section 54 of Act XI. of 1859, which Section the Lower Appellate Court thinks applies only to incumbrances affecting the *whole* estate.

We further observe that the Lower Appellate Court has not found at what period Puddo Monee died. If she died before the sale in which Monohur Mookerjee, respondent, purchased (even assuming that she had no right to grant a farm beyond her lifetime), the special appellant may plead that the Lower Appellate Court has not tried whether the daughter of Puddo Monee, previous to the sale, ratified the lease for the rest of the period by receiving rents for the plaintiff ijaradar.

If Monohur purchased what really were the rights and interests of the daughter of Puddo Monee, and the daughter had no right to question the validity of the lease, Monohur can have no right to do so.

In such a case, when there was an ijaradar, and the daughter received rent for one year from her without protest, this would be a sufficient ratification, unless want of knowledge could be successfully pleaded.

The respondent objects under Section 348 of Act VIII. of 1859 that the Lower Appellate Court is wrong in saying that it need not try the genuineness of the ijarah deed, because the daughter of Puddo Monee admits it.

On this plea we agree to a certain extent with the respondent. But we think we have no power to remand, when the Lower Appellate Court credits the statements of witness Joy Kishen Mookerjee, that he had no individual interest in the ijarah; that there was a *bond fide* lease to the plaintiff from Puddo Monee, and that he (the witness Joy Kishen) had acted in trust for the *plaintiff* ijaradar.

The special respondent refers us to the reasons given by the Court of first instance for believing the pottah to be a forgery, but we see that they only raise a suspicion that here was a lease benamee for plaintiff, but really beneficially for Joy Kishen Mookerjee.

The Lower Appellate Court has, however, believed the statement of the plaintiff and the evidence of Joy Kishen supporting it. The Lower Appellate Court finding this fact, upon its belief of that evidence, we have no power in law to interfere with such a finding of fact, and cannot therefore say that the cross-appeal can be allowed on this ground.

We accordingly remand this case for the trial of the issue of *ratification* for the remaining period, which is an important point untried below.

The 23rd March 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Appeal—Ex parte decision—Written Statement.

Case No. 3293 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 24th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 14th June 1866.

Jankee Ram Doss (Defendant), *Appellant,*

versus

Chundrabully Debia (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Nil Madhub Sein for Respondent.

A decision cannot legally be called an *ex-parte* one precluding an appeal, when the defendant appeared by pleader who was present at the trial, merely by reason of the defendant not having filed a written statement or made a verbal one.

Pundit, J.—The Lower Appellate Court has refused to admit the appeal of the

special appellant against the decision of the Court of first instance, on the ground that, the defendant not having filed any written statement or made any verbal statement, the decision of the first Court, as against this defendant, is so far *ex parte* as to preclude the special appellant from preferring any appeal.

We find it is admitted that the special appellant had appeared through a pleader, and it is not shown that his pleader was absent when the case was tried. A decision pronounced in such a case cannot be legally called an *ex-parte* decree precluding an appeal, merely because the defendant had not filed any written statement or made any verbal one.

We reverse the order of the Lower Appellate Court, and direct the Lower Appellate Court to receive the appeal of the special appellant which he prefers against the decision of the first Court.

Remand accordingly.

The 23rd March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Special Appeal—Ex-parte judgment of Deputy Collector.

Petition of Special Appeal from a decision passed by the Judge of Gya, dated the 10th December 1866, affirming a decision passed by the Deputy Collector of that District, dated the 10th September 1866.

Roghoonath Singh and another (Defendants), *Appellants,*

versus

Roy Mohun Lal Mitter and others (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

No one for Respondents.

A special appeal does not lie from the order of a Judge declaring that sufficient cause has not been shown to his satisfaction for presenting after time an appeal from an *ex-parte* judgment of a Deputy Collector.

Deputy Registrar.—THE original suit for arrears of rent amounting to Rupees 39-13 (*see* the judgment of the Collector in the file, in which the claim is stated to be "Rupees 39-13, arrears of rent, with interest and damages, &c.") was instituted in the Court of the Collector of Ameenabad (Zillah Gya): and, having been decreed *in the absence* of the defendant, the defendant applied, under Section 58, Act X. of 1859, for the revival, &c., of the suit.

That application was rejected. The defendant then appealed first to the Collector, and then to the Judge, with the same result in both Courts.

This special appeal is from the order of the Judge.

Section 58, Act X. of 1859, sets out with the declaration that no appeal shall lie from an *ex-parte* judgment of the Collector; and Section 13, Act VI. of 1862 B. C., which modifies the latter Clause of Section 58 of Act X. of 1859, provides for an appeal *in all appealable* cases from an order of a Collector rejecting an application for setting aside an *ex-parte* judgment "*to the tribunal to which the final decision would be appealable.*"

This case was for an amount below Rupees 100, and appears to me, therefore, not to be an appealable case (*vide* Section 153, Act X. of 1859); and, if it were even an appealable case, there is reason to question whether the appeal would lie to this Court, which is not, I presume, "the tribunal to which the final decision would be appealable."

I beg, therefore, to refer this special appeal to the Judge presiding in the Miscellaneous Department for orders as to its admission or otherwise.

On the 22nd March 1867 the following judgment was delivered by—

Jackson, J.—In this case the petitioner was defendant in a rent-suit. It does not appear from the papers here what the amount was for which the plaintiff sued. The Deputy Registrar states that it was a suit for 38 rupees. The petitioner, on the contrary, states that the plaintiff claimed 438 rupees, and the defendant, paying 400 rupees into Court, disputed only the odd 38 rupees. This statement receives a certain confirmation from the fact that the Collector, to whom the appeal was first taken, observes that the appeal against the final decision in this case would have lain to the Judge. The suit was at first disposed of by the Deputy Collector *ex parte*, the defendant being absent. Application was afterwards made under Section 58, Act X. of 1859, for a new trial. That application was refused, and the defendant appealed against the order of refusal, first to the Collector, and afterwards to the Zillah Judge. The Zillah Judge, although it was represented to him that time had been taken up in an ineffectual appeal to the Collector,

was of opinion that satisfactory cause for the delay in preferring the appeal to his Court had not been shown. He, therefore, refused to entertain the appeal. The petitioner now seeks to appeal specially to this Court against the order of the Judge. It appears to me that, upon such an order, no special appeal will lie. Baboo Debendronarain Bose, who appears for the petitioner, states that, on various occasions, special appeals have been admitted by this Court under the same circumstances; but he is not at present able to show a case in point. My present opinion is that this appeal is not admissible, and I order that the appeal be disallowed. But this order will not become final until to-morrow, when the vakeel will be at liberty to show any decision on the other side.

On the following morning, the vakeel cited a decision passed by Bayley and E. Jackson, JJ., on the 1st September 1865, in special appeal No. 1519 of 1865, which was as follows:—

"The Judicial Commissioner (of Haza-"reebaugh) rejected the petition of the "karpardauz of the appellant, on the "ground that, as the delay had been "one of 18 days, and the sickness "alleged by the karpardauz of 10 or 12 "days, the latter had sufficient interval "within which to attend. But it appears "that the 10 or 12 days of illness was at "Hazareebaugh, and the Appellate Court "is at Ranchee, some 50 or 60 miles off. "In such a case we think that, if, on enquiry, "the plea of illness at that distance is "shown by evidence to be a true plea, the "Lower Appellate Court would have exer-"cised a proper judicial discretion in con-"sidering that circumstance with reference "to the petition for the admission of the ap-"peal. But these facts are not referred to "in the reasons given by the Judicial Com-"missioner for the rejection of the appeal. "We, accordingly, decree this special appeal, "and remand this case for re-consideration, "with reference to the above remarks."

The following judgment was then given by—

Jackson, J.—It appears to me that there is no special appeal in this case.

The order against which the petitioner seeks to appeal specially is not a decision in appeal. It is simply a declaration by the Judge that sufficient cause has not been shown to his satisfaction for presenting the appeal after time. The petitioner's vakeel shows a decision of a Division Bench of this Court in which a special appeal was entertained under circumstances somewhat like the present case. But there is this distinction between that case and the present. In that case the Judge had simply stated that, as the appeal was presented after time, it must be rejected, and had not taken into consideration the cause shown for presenting it after time. In this case the Judge has considered that cause, and has held that the cause is not sufficient or satisfactory.

In this matter, I am of opinion, and it has been so held by the First Bench of this Court, that a special appeal will not lie.

The appeal is, therefore, refused, the order recorded yesterday being allowed to stand.

The 25th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Sale of under-tenures for arrears of rent—Act VIII. of 1835.

Case No. 2498 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 29th June 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 20th September 1864.

Mussamut Monoshee (Plaintiff), *Appellant,*

versus

Abdool Hossein and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kalee Prosunno Dutt* for Appellant.

Mr. R. E. Twidale for Respondents.

Sales of under-tenures under Act VIII. of 1835 for arrears of rent are not required to be according to the procedure laid down in Regulation VII., 1799, but according to the procedure prescribed by Section 2 of Act VIII. of 1835.

Glover, J.—THE plaintiff in this suit, an eight-annas owner of two shikmee talooks Nos. 16 and 53 within the Government khas mehal Muneeram, sues to have the sale of talook No. 16, made at the instance of the surburakar for arrears of rent, reversed on the ground that no rent was in arrear on that talook for the year 1224 B. S.

There were several defendants in the case. Two claimed to have purchased parts of the mehal from Romaprya, the mother of the

plaintiff, before the auction-sale; and Punchanund, the purchaser at that sale, also pleaded that he had made over his rights in the property to Doorga Churn and Shib Churn, who are the real defendants in this suit.

The case was originally decided in favor of the defendants; but, on special appeal to this Court, there was a remand to find under what law the sale of the talook was effected, and whether the proceedings were carried out according to law. The Lower Court was likewise directed to summon the surburakar, and examine him touching the dakhilas which the plaintiff relied on as proving her case.

The Principal Sudder Ameen has now decided that the sale was held under the provisions of Act VIII. of 1835, and that there was no proof that the balance of rent due on No. 16 had been paid. He declared the sale to be legal, and dismissed the plaintiff's case.

There are two special appeals from this decision. As regards No. 2498, which refers to the legality of the sale of Talook No. 16, it is urged: (1.) That sales under Act VIII. of 1835 are required to be in conformity with the procedure laid down in Regulation VII. of 1799, and that the sale not having been so conducted was illegal; and (2.) That the Principal Sudder Ameen has misconstrued the rent-papers filed by the plaintiff, and made them refer to the two mehals, whereas they referred only to talook No. 16.

Neither of these grounds appear to us tenable.

When the sale took place (in 1863 that is), the only law applicable to the sale of under-tenures in estates under the immediate management of a Collector was Act VIII. of 1835, which, so far as procedure was concerned, superseded the substantive law, *viz.*, Regulation VII. of 1799.

Section 2 of Act VIII. of 1835 lays down in express terms how such sales are to be carried out, and necessitates no further procedure than that they are to be public, conducted by the Collector or his Deputy, and to be notified for ten days previous by an advertisement stuck up at the cutcherry of the local Adawlut and of the Collector.

Sales were still made under the power given by Regulation VII. of 1799; but the method of selling was altered by the new law, which remained in force until the passing of the Bengal Act VIII. of 1865.

Now, it is admitted in this case that the notice required by Section 2, Act VIII. of 1835, was duly issued, and that all other things required by that Act were done. It follows, therefore, that the sale of the talook was legal, and cannot be reversed on the first ground of special appeal.

And, with regard to the second, the Principal Sudder Ameen has found on the evidence that the receipt for Rupees 6 did not refer solely to talook No. 16, but to talook No. 53 also, and that only Rupees 4 were paid as rent of the former holding.

This opinion of the Lower Appellate Court was formed on the evidence of the surburakar, and on the chalan and receipt signed by the Collector, which showed that the chalan filed by the plaintiff was a forgery.

With the correctness or otherwise of this opinion, we have nothing to do in special appeal. The finding of the Principal Sudder Ameen is distinctly one of fact on evidence, and we must, therefore, dismiss this application with costs.

The 25th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale (by eldest brother).

Case No. 3297 of 1866.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of 24-Pergunnahs, dated the 24th September 1866, reversing a decision passed by the Moonsiff of that District, dated the 16th January 1866.

Cazee Oahud Buksh (Plaintiff), *Appellant,*

versus

Bindoo Bashinee Dossee, mother and guardian of Haran Chunder Fowtadar, minor (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

In the absence of authority in the eldest brother from his brothers to sell their rights, the sale by the eldest brother is not the act of all the brothers.

Pundit, J.—A PURCHASER of a share in resumed lakheraj lands held by the father of the vendor cannot ordinarily be allowed to plead that he had *no means of knowing* that the three brothers of the plaintiff living in the same house had concern or

right in the lakheraj lands before they were resumed. We cannot also allow such a purchaser to argue that, because the name only of the eldest of the four brothers, *viz.*, that of *his* vendor, is entered with those of other parties in the settlement-proceedings, the purchaser had no means of knowing that the other brothers had any rights.

Had the Lower Appellate Court found that the vendor of the defendant, respondent, had sold with the consent of *the other brothers* and for their benefit, we would not allow the special appellant to plead his rights against the purchaser.

But if the purchaser knew that the vendor had no right to sell the *whole*, then such a purchaser is not entitled to plead any act of the co-sharers of his vendor, as giving *him* any right, because those acts could not have misled the purchaser to believe that his vendor was the *sole* proprietor.

If the purchaser could show that by any act the special appellant misled and deceived the purchaser under circumstances which made it difficult for the purchaser to learn the correctness of the statements of his vendor, the case would be different; but plaintiff's omission to go to Court immediately after obtaining notice of an act of his brother likely to affect ultimately plaintiff's right is no ground for holding that such a silence is a fraud for which plaintiff is liable to forfeit his rights of property.

The consent of a co-parcener to an act of his co-parcener affecting the other co-parcener's interests may be of such a character as it may be difficult to prove direct, and can be proved only by inference from conduct.

A co-sharer might also act, so that, even without his stating direct falsehood regarding the co-sharer's own rights in the property, he may deceive the said purchaser regarding the real rights of the vendor.

The facts, then, we think, must be more clearly ascertained in this case before the question of consent and benefit can be tried.

Moreover, in the absence of authority in the eldest brother from the plaintiff to sell plaintiff's rights, it was not right for the Lower Appellate Court to remark that the sale by the eldest brother was the act of all the brothers who had rights in the property.

The Lower Appellate Court must find whether any direct or indirect authority was in the eldest brother to sell away the rights of the plaintiff.

The Court may, if the defendant likes to press the point, re-try the question whether plaintiff had any rights at all, but that plea must be taken on a separate issue.

The silence of the other two brothers in those matters, and even any delay on the part of the plaintiff to sue and to interfere, may be considered as a question of evidence to be circumstances in favor of the purchaser, defendant.

We, therefore, remand the case to the Lower Appellate Court, to try the question of limitation, and also to try whether the *consent* is proved; further, whether plaintiff has been benefited by the sale, and the elder brother was authorized to sell plaintiff's rights, of course on the assumption that it is first shown, or is admitted that plaintiff had some rights at all.

The 26th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Suit—Restoration to caste—Damages—Compensation.

Case No. 3339 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 4th October 1866, affirming a decision passed by the Moonsiff of that District, dated the 20th July 1866.

Gopal Gurain (Defendant), *Appellant,*

versus

Gurain (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Upendur Chunder Bose for Respondent.

A suit will lie for restoration to caste, and for damages and compensation for cost of restoration to caste.

When the defendant denies that he did not make any accusation, and it is proved that he did make one, and that it alone led to the excommunication of the plaintiff, the defendant should be allowed an opportunity of proving that the accusation was *not* false, before a decree for damages is passed against him.

Bayley, J.—The pleas taken on this special appeal are:—

I. That a suit for restoration to caste and for damages and compensation for cost of restoration of caste cannot lie.

II. That the Lower Appellate Court has come to no definite finding on the case, nor considered special appellant's pleas against the first Court's judgment in respect to

plaintiff's failing to prove his allegations, or special appellant's denial of being the cause of plaintiff's excommunication.

III. That there is no proof that the cost of restoration to caste would be that which plaintiff claims.

The plaintiff, we observe, sues substantially for a declaration of plaintiff's right to be restored to the society of his equals without that loss of character and of position which the accusation of the defendant involved, and compensation for such loss as might be involved in consequence of the defendant's acts.

Defendant's answer is that he did not make the accusation or excommunication, and that, therefore, no injury accrued to plaintiff, and no compensation was, therefore, due.

The first Court found that plaintiff proved his case, and gave him a decree.

The whole judgment of the Lower Appellate Court is in these words, *viz.:* "Referring "to the records, it appears that defendant "accused plaintiff of adultery: and the "latter in consequence has been shut out "from the society of their relations and "fraternity. The defendant *in his answer* "does not take any exception to the amount "estimated by plaintiff as necessary to "restore him to his caste."

We are of opinion that the suit being substantially of the character above designated will lie. We are further of opinion that, as it is clearly found as a fact on evidence by the Lower Courts that the defendant did accuse the plaintiff of adultery and did excommunicate plaintiff, and consequently the relations and friends would not eat with him, except after due fine and penance, so far being found on facts, we cannot interfere in special appeal. But we think that an alternate plea arises in the case which the Court below has omitted to consider, and to give the defendant an opportunity to show, *viz.*, that the accusation found to have been made was *not* false, and the excommunication ensuing therefrom *not* wrong.

We also think that it was not necessary for defendant to state *in his answer* that the damages sued for were too much or too little, for *his* whole defence was that there was no injury, so no compensation or damages required.

In this view we remand this case to be re-tried, with reference to the above remarks.

The 27th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contribution—Costs.

Case No. 3212 of 1866.

Special Appeal from a decision passed by Baboo Luckhee Narain Mitter, Additional Principal Sudder Ameen of Mymensingh, dated the 26th July 1866, modifying a decision passed by Moulvie Ali Newaz Khan, Sudder Ameen of that District dated the 14th September 1865.

Kisto Coomar Chowdhry (Defendant), *Appellant.*

versus

Anund Moyee Chowdhrain (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

A sued *B*, *C*, and *D*, for possession and obtained a joint decree, and, in satisfaction of his costs, attached *B's* property. *B*, in order to save her estate, paid the demand in full, and now sues *C* and *D* for contribution. HELD that, though the decree was jointly and equally against all three, yet *C* and *D* were liable to *B* for a rateable amount of costs in proportion to what was their interest in the property decreed to *A*.

Glover, J.—THE plaintiff in this case, Anund Moyee Chowdhrain, sued Muneekurnika Chowdhrain and Kisto Coomar for contribution under the following circumstances:—

It appears that one Gobind Coomar sued the three above-mentioned persons for possession of land. He failed in the Court of first instance, but, on appeal, recovered possession.

Muneekurnika and Kisto Coomar appealed specially against this decision, as likewise did Anund Moyee, the latter under a separate number.

Both special appeals were dismissed, and Gobind took out execution of his original decree, and, in satisfaction of his costs, attached the property of the judgment-debtor Anund Moyee.

Anund Moyee to save her estate from sale, paid the demand in full, *viz.*, Rupees 803-3-6. Of this sum, after deducting the amount due on account of her own special appeal and her share of costs in the original appeal, there remained a balance of 407 rupees due by Muneekurnika and Kisto Coomar, for which the present suit was brought.

The defendants replied that the plaintiff's interest was very much larger than theirs, and that their property in the land decreed to Gobind only extended to 3 beegahs odd cottahs. They objected, therefore, to pay an equal proportion of the costs.

The Court of first instance found that the defendants were only interested to the extent of 3 beegahs odd cottahs of land, and assessed their proportion of the costs accordingly.

But the Principal Sudder Ameen on appeal held that, as the decree was joint against all the three, they were all jointly and equally responsible for the costs, and that no question of particular interest could be gone into.

Against this order the defendants now appeal specially, and we think that their objection must be allowed. It was held to be proved, and we do not see that it has ever been denied, that they were only interested in the land recovered by Gobind to the extent of 3 beegahs, whilst the special respondent claimed the remaining 1,058 beegahs, and there can be no reason why the special appellants should be kept within the four corners of the decretal order, if it were proved that they had comparatively a very small interest in the property contested in the suit.

The same principle is laid down in a Divisional Bench Ruling of this Court of the 1st August 1865, Bama Soonduree Debia, Appellant, 3 Weekly Reporter 170. At the same time the special appellants are, of course, liable to the special respondent for a rateable amount of costs in proportion to what was their interest in the property decreed to Gobind.

The case must, therefore, go back to the Principal Sudder Ameen to find what was the interest of the special appellants in the land, the subject of Gobind's suit, and in accordance therewith, to assess on each of them the proportion of costs due to the special respondent.

The costs in these cases will follow the result.

The 27th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Section 32, Act X. of 1859.

Case No. 3159 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Behar, dated the 14th September 1866, modifying a decision passed by the Deputy Collector of that District, dated the 11th May 1866.

Gossain Umur Narain Pooree (Defendant), *Appellant.*

versus

Arurut Lal *alias* Baboo Jan (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Respondent.

Section 32, Act X. of 1859, does not authorize the recovery of only 3 years' rent, but requires suits for the recovery of rents to be instituted within three years from the end of the Bengal or Fuslee year, as the case may be.

Kemp, J.—THIS was a suit for rent from 1270 to Falgoon 1273. The amount of jumma is not in dispute.

The first Court gave the plaintiff a decree for the whole of his claim *minus* 150 rupees claimed on account of unauthorized abwabs.

In appeal the Judge held that that portion of the claim, which was for the rent of the first six months of 1273, was barred under Section 32, Act X. of 1859, as under that Section more than three years of back rent cannot be recovered. To this extent the decision of the first Court was amended.

In special appeal it is contended by the defendant—

1st.—That the rents from the kist of Assin 1270 to kist Falgoon of the same year are altogether barred.

2nd.—That the plaintiff ought to have been called upon to submit his accounts to show whether the amounts admitted to have been paid by the defendant, and which the plaintiff has credited to *bukeya* or old balances, did not more than cover what was due under that head, leaving a surplus to the credit of the current rent.

3rd.—That the Judge has not deducted certain items aggregating Rupees 387, which

the defendant paid to the superior landlord, and which were admitted by the plaintiff in his examination before the Deputy Collector.

The plaintiff prefers a cross-appeal against that portion of the Judge's decision which disallows the claim for the rent of 1273.

On the *first* point we are clearly of opinion that the claim for the rent of 1270 is not barred. Act X. of 1859 does not authorize the recovery of only three years' rent. Suits for the recovery of rents may be instituted within three years from the end of the Bengal year, or, as in this case, the Fuslee year.

This suit having been instituted within three years from the last day of the month of Jeyt 1270, the claim for the rent due up to that month was clearly not beyond time.

The *second* objection is untenable. The receipts accepted by the defendant were for the back rent, and the chalans of payment did not specify to what head of account eaah sum was to be credited. The plaintiff was, therefore, clearly, entitled to credit the sums paid to the old balances. The plaintiff was examined in Court, and the defendant had, therefore, ample opportunity to cross-examine as to the amount credited to old balances, and as to the existence of any overpayment in that account which was available to the credit of the current rent.

With reference to the *third* ground taken by the defendant, special appellant, we find that credit was given by the Deputy Collector for the items aggregating 387 rupees. The account drawn up by the Deputy Collector was accepted by the Judge after scrutiny, and the grounds of appeal to the Court below do not raise this point very clearly.

In the matter of the cross-appeal of the plaintiff, it is clear that his claim for the rents of 1271, 1272, and 1273, cannot be held to be beyond time. The plaintiff's suit being instituted within three years from the last day of Jeyt 1270, he is entitled to recover what was due on account of 1270 and also the rent for 1271, 1272, and 1273, which cannot fall within the provisions of the period of limitation laid down in Section 32, Act X. of 1859.

The appeal of the defendant, special appellant, is dismissed with costs and interest, and the cross-appeal of plaintiff decreed, and the decision of the Judge amended with costs and interest.

The 27th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Withdrawal of suit—Fresh suit.

Case No. 3275 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 16th September 1866, reversing a decision passed by the Deputy Collector of that District, dated the 26th February 1866.

Modhoo Soodun Mulick and others (Plaintiffs), *Appellants.*

versus

Panch Cowree Mulick and others (Defendants). *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellants.

Baboo Romanath Bose for Respondents.

A plaintiff withdrawing a former suit without obtaining any express power from the Court to institute a fresh action is not precluded from bringing such fresh action under Act X. of 1859.

Pundit, J.—Act X. of 1859 does not contain any Section corresponding to Section 97 of Act VIII. of 1859, and therefore we cannot concur with the Lower Appellate Court that, because the former suit of the special appellant was withdrawn by him without obtaining any express power from the Court to institute the present action, the special appellant cannot institute this suit.

We do not deny that, if the former suit of the special appellant had been tried, adjudicated, and decided against the special appellant, he could not institute the present action, as both of them relate to the same subject-matter against the same defendant, and it would really be then *res adjudicata.*

The very precedent quoted by the Lower Appellate Court against the special appellant, pages 148, 150, Marshall, Volume I., in its conclusions entirely supports our view.

We, accordingly, remand the case to the Lower Appellate Court to re-try the merits.

The 27th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale by Hindoo Widow—Suit by Reversioner.

Case No. 3344 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 2nd October 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 29th December 1865.

Shurut Chunder Sein (Plaintiff), *Appellant,*

versus

Mothooranath Pudatick (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Shushee Bhoosun Bose* for Appellant.

Mr. R. E. Twidale for Respondent.

Though a reversioner cannot obtain possession during the lifetime of a Hindoo widow, yet he may be entitled to a declaration whether the alienations made by the widow are or are not valid and binding on the absolute heir. If the reversioner can prove that wilful default is about to take place, he will be entitled to such relief from the Court as will prevent the apprehended occurrence of a sale for arrears.

Pundit, J.—It is admitted by the special appellant that he is not entitled to obtain possession during the life of his maternal grand-mother; but we do not see why the Lower Appellate Court should not try whether, as reversioner, plaintiff is not entitled to a decision, whether the alienations made by the widow are or are not legal under the Hindoo Law, and why special appellant should not obtain a declaration, that, if these alienations are invalid, they are not binding upon him or any other who may hereafter succeed as *absolute* heir. The Lower Appellate Court might have been considered to have already decided this question, had it first decided whether plaintiff *is* the reversioner to the property in dispute, or whether the whole of it is the estate of the maternal grand-father of the special appellant, and whether the maternal grand-mother, as alleged, has sold for legal purposes. All these questions had to be decided before the one as to the reversioner's right to the declaration he asked for could be determined.

The respondent refers to the Full Bench Decision of this Court of three Judges (the Ticaree case, page 1, Volume VI., Weekly Reporter). The facts of that case, however, were different from those of the present one.

Special appellant further pleads that the Lower Appellate Court has not tried the plea that the defendant was about to cause the sale of the property for arrears of revenue by a wilful default.

After hearing Counsel and referring to the record, we do not think it is a judicial reason answering to this last plea to say that the plaintiff can otherwise than by this suit prevent the sale if he choose.

If plaintiff establishes the charge of a wilful default being about to take place, that will entitle him to such relief from the Court below as will prevent the apprehended occurrence of a sale for arrears. A reversioner has a right to sue to prevent waste, and such a sale would be wilful, and thus a fraudulent real waste of property.

We, accordingly, remand this case to the Lower Appellate Court to re-try this case, with reference to the above remarks.

The 28th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Breach of Contract—Liquidated damages—Specific performance—Pleading.

Case No. 278 of 1866.

Regular Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 28th May 1866.

Mussamut Ashrufoonissa Begum (Plaintiff), *Appellant,*

versus

Mr. Stewart and others (Defendants), *Respondents.*

Mr. A. T. T. Peterson, Baboo Bama Churn Banerjee, and *Moonshee Ameer Ali* for Appellant.

Mr. R. V. Doyne for Respondents.

Suit laid at Rupees 20,000.

Where the parties to a contract stipulate for the payment of a specified sum for any breach of it; and the damages resulting from any such breach are uncertain and incapable of accurate valuation, the sum agreed to be paid will be treated as liquidated damages and not as penalty.

A plaintiff, who sues for damages and is entitled to them, cannot likewise be entitled to specific performance or to an injunction against the further breach of the agreement.

In a suit for breach of contract, it is open to the defendant to plead in that suit (without being obliged to bring a fresh suit) that the plaintiff, being the first to break the agreement, cannot now sue for damages for something subsequently done by the defendant in contravention of it.

Loch, J.—It appears that, in the year 1858, a boundary-line was laid down by the plaintiff as proprietor of Hurpore Rewaree Factory and Mr Wilson, the then Manager and one of the partners in the Jitwarpore Indigo Concern, with the view to prevent disputes and interference with one another's cultivation. An agreement bearing date the 24th October 1858 was drawn up in terms to the following effect, and each party declared himself liable to a penalty of Rupees 20,000 should he infringe any of the conditions of the agreement executed between them:—

"Whereas, since a short period, a dispute "with regard to the fixing of a limit arose "between the Kotee at Hurpore Rewaree "and the Kotee of Jitwarpore, Pergunnah "Suresa, therefore now a settlement between "me (Wilson) and the said Mussamut (Ashruf-"oonissa Begum) through the intervention "of Mr. John Martins, Manager and Agent "of Kotee Kurmole, in the presence of "Syud Mahomed Tukee Khan, &c., with re-"gard to fixing a *surhud* or boundary "between the said two kotees, was thus con-"cluded: that Mouzahs Ruhimpore Arbi-"kar, Russoolpore Palama, Lukmeepore, "Moheshputee, Sugownia, Sookool, Soopool, "Bumawan, Hurpore Rewaree, Ameersing-"pore, Deolee, and Sohumtola Malikana, Per-"gunnah Suresa, Asulee Mai Dakhelee, are, "from 1266 F. S., included within the bound-"ary of the Kotee at Hurpore Rewaree, and "that Mouzah Bikabat *alias* Lohagurrh will "also be included in the boundary of the "Kotee at Hurpore Rewaree from 1272 "F. S. after the expiry of the lease of the "Kotee at Jitwarpore which ends in 1271 "F. S. And after the expiration of the "term in question, I or my representatives, "or other maliks or mooktears of Kotee "Jitwarpore, shall in no way interfere with "the said mouzahs or with the cultivation "of indigo, and taking a ticca or giving a "kutkina or any other matter during the "existence of the Kotee at Hurpore Re-"waree." The instrument then makes over certain lands in the said villages held by the Jitwarpore factory from the ryots by a kutkina lease to the said Mussamut as falling within the boundary of Hurpore Rewaree, and then goes on to say: "If the said Mussamut or her mooktears "or karpurdauzes, or the purchasers of the "Kotee at Hurpore Rewaree, or myself or "my representatives, or my mooktears or "karpurdauzes of the said kotee at Jitwar-"pore, *i. e.*, any body on either part connect-"ed with the Kotees at Hurpore Rewaree "and Jitwarpore, transgress the Surhud-"bundee limit, or shall in any way interfere "by planting indigo and taking ticca and "kutkina pottahs and other writings, &c., "or at any other time, then the party trans-"gressing or interfering shall be liable to "pay a sum of Rupees 20,000, of which a "half is Rupees 10,000 as compensation or "damage caused by him, that is, when any "one from amongst the servants of either "of two kotees, shall, contrary to the Sur-"hud-bundee, in any way interfere with the "planting of indigo and the taking of ticca "or kutkina, &c., or infringe the conditions "entered in this deed, then the Court, on "institution of a suit and the claim being "proved, will cause the infringing party "to pay the said damage-money to the com-"plainant, and the Court shall not in any "way take into consideration any objections "set forth by either party."

The plaintiff comes into Court to recover the penalty mentioned in the agreement, on the allegation that defendant has violated the terms of the agreement in the following instances: That on the 16th October 1862, he took a lease of Mouzah Buldhurpore Relout *alias* Lugawniah within the plaintiff's boundary for seven years; that in like manner, he has taken leases for Mouzah Ruhimpore, Arbikar, Russalpore, Bhuteah, Luckmonypore, on 26th January 1865, notwithstanding that these villages were held in lease by plaintiff, and her lease has not expired, and, in contravention of the terms of their agreement, he has had inserted a clause in his lease by which the defendant is debarred from underletting the same. Further, that he has induced some of the ryots of Ruhimpore Arbikar to cultivate indigo for him, and has misappropriated the crops on 250 beegahs of land cultivated by the ryots in Mouzah Buldhurpore, and caused obstruction to the cultivation of indigo in Mouzah Ruhimpore Arbikar, and the plaintiff prays that she may recover the amount of penalty entered in the deed of October 1858; and that, as the villages named above are within the boundaries of plaintiff's factory, she may obtain a kutkina lease and possession thereof, and that the leases obtained by the defendants may be set aside.

The defendants, Wilson and Stewart, have filed separate statements denying their liability, pleading limitation, and urging that plaintiff was the first to break through the terms of the engagement; that plaintiff can only sue for damages, but cannot deprive them of the lands, and that she is entitled only to actual damages.

Stewart, in addition to the pleas urged by his co-defendant, pleads that the contract was entered into by Wilson without the consent of his co-partners, that the penalty is personal to Wilson, that the contract is not binding on the present proprietors of the factory.

The Judge dismissed the case, holding that plaintiff was, under any circumstances, entitled only to actual damages, and, having failed to prove any such damage, she could recover nothing.

An appeal has been preferred from the judgment of the Lower Court, and the points proposed for our determination are as follows: Whether the sum of Rupees 20,000 mentioned in the agreement of 24th October 1858 is to be considered as penalty or liquidated damages; whether plaintiff is not entitled to specific performance, as well as to recover the amount of damages. If it be held that plaintiff is not entitled to recover damages, whether she is not entitled to specific performance. Whether the act of Wilson is not binding on Stewart, who purchased into the factory some years after the agreement was made, so as to render him liable for damages. Whether the fact that plaintiff had herself first acted in contravention of the agreement, should not have been determined in this suit.

Looking at the terms of the agreement, we think that the intention of the parties is expressed in language as to the meaning of which there can be no mistake. The intention is this: "Whoever fails to keep the agreement as to the boundary-line, shall pay to the other Rupees 20,000." The words are clear, and the intention reasonable, considering the nature of the property with which the parties were dealing, and that the object was to put an end to boundary-disputes between the two indigo factories. The rule applicable to such cases is to be found stated in Addison on Contracts (pp. 1072-3, *5th Edit.*); "If the damages arising "from a breach of contract are of an uncer-"tain nature, and the parties have chosen "to assess and fix them beforehand by con-"sent and agreement among themselves, and "the amount agreed upon is no more than "what may be a fair and reasonable measure "of damages, equity will grant no relief "from it. If the indenture or memorandum "of agreement contains covenants or "promises for the performance of various "acts and duties, and then provides for the "payment of one large sum by way of com-"pensation in case of the non-performance "of all or of any one of the things stipulat-"ed to be done, and the damages in every "case of non-performance are altogether "uncertain and incapable of accurate valu-"ation, the sum agreed to be paid will be "treated as liquidated damages, and not as "a penalty. But, if a contract contains "stipulations for the performance of divers "things, and the damages resulting from "the non-performance of some of them "are capable of being measured by a pre-"cise sum, and one sum is stipulated to "be paid in respect of the non-performance "of the contract generally, that sum is a "penalty, although the parties may choose "to call it liquidated damages, and even "expressly declare that it is not penalty."

The present case seems to us to fall directly within the principle of the decision of the Court of Queen's Bench in Reynolds *versus* Bridge, 26 L. J., Q B. 12, and Mercer *versus* Seving, 27 L. J., Q B. 291. The plaintiff, in fact, stipulated that, within certain limits, she alone should carry on and enjoy the business of indigo planting, and she provided against interruptions in that business by the neighbouring factory then managed by the respondent Wilson. It was difficult to ascertain the damage which might be sustained by such interruptions, and indeed it is impossible to say what damage might not accrue in a business such as indigo planting from the neighbouring factory extending its operations across the limits occupied even in only one instance. The parties accordingly thought it better to say that any breach should be valued with a liability to pay Rupees 20,000; and the arrangement seems to us perfectly fair and reasonable. We think that the Lower Court was wrong in treating the case as one of penalty, and not of liquidated damages.

The plaintiff having sued for damages, and being entitled to them, cannot be likewise entitled to specific performance, or to an injunction against the further breach of the agreement. It appears to us that she has agreed that Rupees 20,000 shall represent the full damage sustained by her by any amount of breaches of the agreement. Decrees for specific performance are usually

made only in cases in which it is supposed to be impossible to give satisfactory compensation by way of money-damages. Here a money-value is put by the plaintiff herself on any injury which might arise from a breach of the contract, and we know of no principle on which she can be entitled to specific performance also.

As regards the respondent Stewart, we think that the plaintiff's suit must be dismissed with costs, he being in no way bound by the agreement entered into by Wilson. Stewart is the purchaser of the 8-annas share of Beckwith, for whom, among others, Wilson professed to be acting when he signed the agreement. But, even supposing Wilson to have had full authority from Beckwith to make the agreement on his behalf, still that agreement will not necessarily affect Stewart personally, he not being shown to have been aware of its existence, when he purchased Beckwith's share, and not being proved ever to have accepted any liability, or even to have acted under the agreement. There is no authority whatever for saying that such a contract runs with the land into whose hands soever the land may come. It is a mere personal contract binding personally Wilson and those who executed the contract through Wilson. It is said that Stewart has ratified the agreement by taking rent from the plaintiff under its terms. Stewart has taken rent under the leases granted by Wilson to the plaintiff at the time when the contract was made, but his doing so does not show either that he was aware of the existence of that contract, or that he consented to it.

There remains only one other point which it is necessary to notice. It is pleaded that the plaintiff had been the first to infringe the terms of the contract by taking a lease of the Pitpara village, which lies within the boundary of the Jitwarpore factory; and it is urged that she, being the first to break the agreement, cannot now ask the Court to give her damages for something subsequently done by defendant in contravention of it. On the other side it is contended that this plea, whether true or not, cannot be heard in the present suit, but should form the subject of a separate suit; that it would be inconvenient and irregular to try such a plea in the present suit. We find that the Judge has refused to enquire into it; but we think that it was a material issue, and that we are not prevented from receiving proof of it from the respondent, and that it may be disposed of without causing any confusion in the case. As, however, there is no evidence on the record to enable the Court to dispose of this issue in a satisfactory manner, we remand the case to the Judge under Section 354, Act VIII. of 1859, with instructions to allow the parties to produce evidence in support of and against the allegation, and the Judge, after trying the issue and determining whether plaintiff did or did not break the contract in the manner stated by the defendant, respondent, will remit his finding, and the evidence so taken for the final orders of this Court.

The 28th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Alternative plea.

Case No. 3176 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 26th September 1866, reversing a decision passed by the Moonsiff of Serampore, dated the 31st January 1866.

Shuhochuree Dossee and another (Defendants), *Appellants,*

versus

Showdaminee Dossee (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Appellants.

Baboo Kalee Prosunno Dutt for Respondent.

Where, from the way in which the issues were framed and the pleadings worded, it was clear that there was no contention on the part of the defendant as to whether the terms of the deed on which the suit was based had been strictly complied with or not, but the factum of the deed itself was only put in issue by the defendant—HELD that this was not a case in which the defendant was entitled to fall back upon an alternative plea and raise the question of compliance.

Kemp, J.—THIS was a suit under the following circumstances:—

The plaintiff alleges that the defendant contracted to sell to him the property in dispute, and that he received from the plaintiff Rupees 100 as earnest-money. The balance was to be paid in one month and a half when a deed of conveyance was to be executed.

The plaint recites the payment of the earnest-money (the number of the Bank Note even is given) and proceeds to state

that the plaintiff repeatedly tendered the balance of the purchase-money to the defendant within the stipulated period, and that the defendant refused to receive it or to execute a conveyance. The suit was for specific performance, and the balance of the purchase-money was tendered in Court.

The defendant's case was, after taking some technical objections to the value of the stamp and non-registry of the deed, that he never executed the deed, that he never received the earnest-money, and that his joining his mother in such a transaction was wholly improbable.

The Court of first instance raised issues not as to a compliance or non-compliance with the terms of the deed, but simply as to the execution and *bona fides* of the deed, and found that the deed was not executed at all.

In appeal the Principal Sudder Ameen found that the deed was executed, and decreed that the plaintiff was entitled to possession of the land in dispute, and that the defendant was to execute a deed of conveyance on the plaintiff paying the balance of purchase-money.

In appeal it is contended that the Principal Sudder Ameen was wrong in decreeing the plaintiff's suit on the bare finding that the deed was executed, without entering into the question whether the plaintiff performed his part of the contract and paid or tendered the balance of the purchase-money within the term stipulated upon.

The form of the decretal order is also objected to as vague, inasmuch as it does not provide when or within what time the plaintiff was to pay the balance of the purchase-money.

We think that this is not a case in which the defendant is entitled to fall back upon an alternative plea. The plaint clearly sets out the plaintiff's whole case. The defendant altogether denied the execution of the deed; he allowed issues to be raised and went to trial upon the question of the execution of the deed, and upon that question alone he was successful in the first Court; in the Appellate Court he permitted the same issues to be tried, and did not attempt to contend that the plaintiff had (assuming the deed to be proved) failed to comply with any of the terms thereof. In short, from the way in which the issues were framed and the pleadings worded, it is clear that there was no contention as to whether the terms of the deed had been strictly complied with or not, but the factum of the deed itself was put in issue.

The decretal order of the Court below is, we think, a proper one. The plaintiff prays in his plaint to be permitted to lodge the balance of the purchase-money, and, as a matter of course, he must pay it into Court before the defendant can be called upon to execute a conveyance. If the defendant, after payment of the balance of the purchase-money, neglect or refuse to execute the conveyance, the plaintiff is at liberty to proceed under the provisions of Section 202 of Act VIII. of 1859.

The appeal is dismissed with costs and interest.

The 28th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 104, Act X. of 1859—Sale—Irregularity—Damages.

Case No. 3210 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 24th September 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 11th June 1866.

Ram Chunder Surmah Chuckerbutty (Plaintiff), *Appellant,*

versus

Rajah Kalee Chunder Singh and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Nuleet Chunder Sein* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Section 104, Act X. of 1859, does not enact that the decree-holder is to pay damages whenever it may be found that there has been an irregularity in publishing the sale-processes, wholly irrespective of the question whether such irregularity was caused by his acts or omissions.

Kemp, J.—This was a suit for damages by reason of an alleged irregularity in publishing the processes of sale under Section 104, Act X. of 1859.

The Principal Sudder Ameen held that the decree-holder had not endamaged the plaintiff, and dismissed the plaintiff's suit, though he at the same time found that the non-service of the proclamation of the sale at the house of the judgment-debtor may have endamaged the plaintiff.

In special appeal it is contended that, under Section 104, Act X. of 1859, the fact of an irregularity in publishing a sale of moveable property existing, is alone sufficient to entitle the plaintiff, special appellant, to recover damages.

The property sold was clearly moveable property, and this much is admitted that, under Section 98 of Act X., all that the judgment-creditor had to do was to point out the property which was to be sold, and this duty he performed, for we find a description of the property given in the perwannah of the Collector to the Nazir which could only have been prepared from information supplied by the judgment-creditor.

The proclamation of sale was affixed to the door of the Collector's cutcherry as certified by the Nazir. The proclamation was not published at the residence of the judgment-debtor; but, as the Principal Sudder Ameen has found that this omission was not owing to the neglect of the decree-holder, and that his acts have been *bond fide* and have not caused damage to the plaintiff, we cannot interfere in special appeal.

The irregularity, if any, did not vitiate the sale. The plaintiff, under Section 104, Act X. of 1859, if he has sustained damage, must sue the party who has caused that damage. The Principal Sudder Ameen has found as a fact that the defendant did not cause that damage. The suit, therefore, as against him has been properly dismissed.

Section 104 does not enact that the decree-holder is to pay damages whenever it may be found that there has been an irregularity in publishing the sale-processes, wholly irrespective of the question whether such irregularity was caused by his acts or omissions.

The appeal is dismissed with costs and interest.

The 28th March 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution—Representative—Mesne-profits.

Case No. 14 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 6th October 1866.

Muzhur Ali *alias* Sat Cowree Meah (Decree-holder), *Appellant,*

versus

The Nawab Nazim of Bengal (Judgment-debtor), *Respondent.*

Baboos Sreenath Doss and *Umbika Churn Banerjee* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

Where execution is ordered to be taken out against the estate of a deceased judgment-debtor and the property is sold, the representative of the debtor cannot be called to account in execution for the mesne-profits of the property while in his hands.

Loch, J.—The decree was against one Jamrood Ali, whose estate on his death went to Ameeroolnissa Begum, and on her death devolved with her other property on the Nawab Nazim of Bengal. It has been held by this Court that the Nawab Nazim was liable to the extent of any property of the judgment-debtor which had come into his hands; and a putnee talook called Koocheamara belonging to the judgment-debtor being found in the possession of the Nawab Nazim was sold in execution of the decree; but, as the amount of it has not thereby been satisfied, the decree-holder, under the provisions of Sections 211 and 203, requires the Nawab Nazim to account for the collections made from the property while it was in his possession.

Section 210, Act VIII. of 1859, provides for the execution of a decree against a person who dies before it is fully satisfied, and it directs that, in such cases, application for execution shall be made either against the legal representative or the estate of the deceased; and Section 211 provides that, if the decree be ordered to be executed against the representative, it shall be executed in the manner provided in Section 203 of the

Code. In the present case, however, execution was ordered to be taken out against the estate, and not against the Nawab as representative of the debtor, and this has been done, and the property sold. Under these circumstances, we do not think that the respondent can be called to account in execution for the mesne-profits of the property while in his hands. The appeal is dismissed with costs.

The 28th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Instalment-bond—Section 7, Act VIII. of 1859—Relinquishment of claim—Mortgage—Money-decree.

Case No. 352 of 1866.

Regular Appeal from a decision passed by Baboo Nurottun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 12th July 1866.

Bolakee Lal and others (Plaintiffs), *Appellants,*

versus

Chowdhry Bungsee Singh and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellants.

Messrs. R. V. Doyne and *R. E. Twidale*, and *Baboos Mohesh Chunder Chowdhry*, *Lukkhee Churn Bose*, and *Chunder Madhub Ghose* for Respondents.

Suit laid at Rupees 14,071.

Plaintiff sued upon an instalment-bond as each successive instalment fell due, and the whole of his claim on each instalment was included in his suit. He recovered the full amount of the first instalment under the first decree, and a portion of the second instalment in execution of his second decree. He now sues for the unpaid portion of the second instalment and for the whole of the third instalment including interest. HELD that such suit was not affected by Section 7, Act VIII. of 1859.

Plaintiff, having asked for and obtained the residue of the sale-proceeds after all the judgment-creditors had been fully satisfied, was held not to have abandoned his right as mortgagee.

Kemp, J.—THIS was a suit to recover Rupees 14,071, being the balance, principal, and interest of the amount due under two decrees, dated the 22nd December 1863 and the 9th of July 1864, by the sale of three mouzahs with dependencies, Aslee and Dakhelee, noted in the margin.

1 Goura Sukhee.
2 Sabulpore.
3 Rasuck Mandar.

The plaint sets forth that Raj Coomar and Muddun Mohun, the father of Rughoonath, borrowed 9,000 rupees from the plaintiff, and executed an instalment-bond on the 29th Falgoon 1268 Fuslee, corresponding with the 20th March 1861.

The amount covered by the bond was payable in three equal instalments, and the properties mentioned in the margin *supra* were pledged.

The plaintiff sued as each successive instalment fell due. It appears that he recovered the full amount of the first instalment under the first decree, and a portion of the second instalment in execution of his second decree. The present suit is for that portion of the second instalment which remained unpaid and for the whole of the third instalment including interest, and the object of the suit is to follow the properties hypothecated, and which have passed, one by private sale and the remaining two by sale in execution of decrees, into the hands of third parties, the defendants in this suit.

There are three sets of defendants answering to the number of the estates claimed. Their answers are substantially the same, and may be briefly stated to be to this effect—

That the suit of the plaintiff cannot be maintained, as the plaintiff relinquished or omitted in his former suits a portion of the claim arising out of the same cause of action. Section 7, Act VIII. of 1859, is quoted.

That the plaintiff, by sharing rateably with other judgment-creditors in the sale-proceeds of one of the estates claimed, has virtually abandoned his position and claim as mortgagee. Section 271, Act VIII. of 1859, is quoted.

That the decrees obtained by the plaintiff were personal and simple money-decrees, and do not in any way bind the properties which have passed into the hands of third parties.

That the defendants are *bond fide* purchasers for a valuable consideration and without notice, express or implied, of the plaintiff's lien, and, as such, are entitled to the protection of the Court.

The Principal Sudder Ameen of Bhaugulpore laid down the following issues:—

1st.—Whether the properties of the judgment-debtors were mortgaged or not?

2nd.—Whether the plaintiff's lien is extinguished and waived or not?

3rd.—Can plaintiff's lien be revived or not; and, if revived, whether such revival

will affect the purchasers for valuable consideration with or without notice.

On the *first* issue the Principal Sudder Ameen found that the properties were mortgaged.

On the *second* issue he observed that there was no evidence that the plaintiff had shared rateably in the sale-proceeds of the estate Rasuck Mandar, No. 3, and that, therefore, plaintiff's rights were not affected by Section 271 of the Code of Civil Procedure, but that, having obtained money-decrees against his judgment-debtors, which decrees declared that there was no lien upon the mortgaged properties, the bond became, as the Principal Sudder Ameen remarks, "merged in the decree;" that the frame of the plaintiff's plaint in the former suits and the scope of the decrees obtained by him were calculated to mislead the world; and that, consequently, the plaintiff must be held to have waived his original right of lien on the properties.

On the *third* issue the Principal Sudder Ameen states that there can be no doubt that the plaintiff's lien can be revived; but the question is whether to the prejudice or not of innocent purchasers without notice. In this case, observes the Principal Sudder Ameen, it may be conceded that the defendants purchased without notice, for the plaintiff's bond had merged in the decrees obtained by him, and in the decrees there was no order for keeping alive plaintiff's lien; that, in spite of all diligent search, the defendants could not have made out that there were any charges on the properties purchased by them, for the decrees of the plaintiffs were mere money-decrees in which no mention of any mortgage is made.

The suit of the plaintiff was, therefore, dismissed with costs.

The plaintiff appeals; the three sets of defendants also appear, and are represented by Mr. Doyne and Baboo Mohesh Chunder. A cross-appeal is taken by one of the defendants, represented by Baboo Mohesh Chunder, who contends that the suit of the plaintiff was wholly inadmissible under the provisions of Section 7, Act VIII. of 1859.

We shall dispose of the cross-appeal first, for, if the suit be not maintainable, it is obviously useless to go into the other points raised in the argument before us.

Section 7 of Act VIII. of 1859 enacts that "every suit shall include the whole of the "claim arising out of the cause of action, "but a plaintiff may relinquish any portion "of his claim in order to bring the suit "within the jurisdiction of any Court. If "a plaintiff relinquish or omit to sue for "any portion of his claim, a suit for the "portion so relinquished or omitted shall "not afterwards be entertained."

For instance, if *A* be indebted to *B* on a sum of Rupees 420 on a bond, *B*, if he relinquish 120 rupees to bring the suit within the jurisdiction of the Moonsiff's Court, cannot, after such relinquishment, bring a fresh suit for the sum so relinquished.

In the present case the plaintiff sued as each successive instalment fell due, and the whole of his claim on each instalment was included in his suit; nothing was omitted or relinquished. The cause of action was the non-payment of the instalment according to the terms of the bond, and the whole of the claim arising out of that cause of action was included in each successive suit. We are, therefore, clearly of opinion that this suit is in no ways affected by the provisions of Section 7, and can be entertained.

It is clear that the lien obtained by the plaintiff upon the three properties, the subject of this suit, amounts to a simple mortgage, and that such is the case has not been seriously disputed. The agreement was that, until the amount of the debt covered by the bond shall be paid in full, the debtor could not alienate by sale, mortgage, or gift, the three properties mentioned above. This amounts, in our opinion, to a simple mortgage. *Vide* page 27, Macpherson on Mortgages.

It is also clear that the plaintiff, having contented himself with a money-decree for each instalment as it fell due, though his lien is set forth in the plaint in each suit, would not be entitled to execute his money-decrees summarily against the properties pledged, but that he must bring a regular suit to follow the properties and to obtain a declaration that they are liable in satisfaction of his decrees. The present suit is brought with that object, that is to say, to enforce the plaintiff's lien against the parties in possession of the properties pledged to him, and is clearly maintainable. *Vide* Full Bench Decision, Volume I., Weekly Reporter, pages 315-316.

The suit, therefore, being maintainable, it is necessary to decide whether the plaintiff has waived his right as a mortgagee. It is contended for the respondents that the plaintiff having permitted his claim to be postponed to that of judgment-creditors whose claims date subsequent to his, and having shared rateably in the sale-proceeds

of one of the villages mortgaged, must be held to have abandoned his right as mortgagee, and to have fallen to the lower position with all its incidental rights of a simple judgment-creditor seeking to enforce a simple money-decree. Section 271 of the Code of Procedure is relied upon.

Now, the Principal Sudder Ameen has clearly found that it has not been proved that the plaintiff did share rateably in the sale-proceeds of the mortgaged village. The learned Counsel and pleaders for the respondents have not pointed to any evidence to show that the plaintiff did share rateably, and we must, therefore, accept the finding of the Principal Sudder Ameen as correct and uncontroverted. The fact is that the plaintiff did not share rateably at all; he asked for and obtained the residue of the sale-proceeds after all the judgment-creditors had been fully satisfied, and his lien being so far reduced is for the benefit of the defendants who hold the mortgaged estates. Therefore Section 271 does not apply.

The next question is whether the defendants purchased without notice.

One of the villages passed into the hands of one set of defendants by private sale. In the deed of conveyance it is recited that the village was sold to raise money to pay off the decree obtained by the plaintiff in this suit against the vendors. That decree is based upon a mortgage-bond which is registered, and the plaint recites the mortgage. The vendees, therefore, clearly had notice, and it is their fault if they did not examine the decree and the bond upon which it is based. The bond being registered, it is idle to say that they exercised due diligence in ascertaining whether the property they purchased was burthened with any charge or not. In the case of the other defendants who purchased in execution, they bought the rights and interests of the judgment-debtor in the properties sold which had been previously mortgaged to the plaintiff. The registry of the bond, and the institution of the suits in which the plaints disclose the nature of the plaintiff's lien, were acts which must be held as giving due notice to the world of the charge on the properties.

We, therefore, reverse the decision of the Principal Sudder Ameen. The plaintiff is entitled to follow the properties pledged into the hands of the parties in possession, and to satisfy his decrees by the sale of his judgment-debtor's rights and interests in those properties as they stood at the time the properties were mortgaged to him, and the defendants, if they wish to retain those properties, must relieve the estates purchased by them of the liens upon them by satisfying the plaintiff's claim. The appeal is decreed, and the decision of the Lower Court reversed with costs and interest payable by the respondents.

The 28th March 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Sale in Execution—Maintenance.

Case No. 639 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 25th June 1866, reversing an order passed by the Sudder Ameen of that District, dated the 7th May 1866.

Mussamut Duloon Koonwur (Judgment-debtor), *Appellant,*

versus

Sungum Singh and others (Decree-holders), *Respondents.*

Baboos Tarucknath Dutt and *Nil Madhub Sein* for Appellant.

Baboo Doorga Doss Dutt for Respondents.

A right to future maintenance cannot be sold in execution of a decree.

Seton-Karr, J.—In this case the decree-holder applies to the Court to sell a certain right of maintenance under a decree passed in favor of the judgment debtor. The Judge has ordered the whole amount of maintenance to be put up for sale.

Two precedents in similar cases have been placed before us, *viz.*, Weekly Reporter, Volume V., page 111 of Civil Rulings, and Volume III., page 16 of Miscellaneous Rulings. We agree with the principle in those decisions that the right to maintenance is a personal right, and that a decree-holder cannot ask the Courts to attach a right to future maintenance. But, in this case, the decree-holder seeks only to put up to sale the maintenance alleged to be due to the debtor from February 1860 to March 1866. This may be done, the purchaser, of course, taking the risk of finding that the arrears have been already paid up or enjoyed, and that nothing remains to be sold. The Judge is entirely wrong if he intended the right to maintenance, present and future, to be sold.

We set aside the Judge's order, or rather we amend it, so that the decree-holder may only put up to sale the right of the debtor, if it still exists, to receive the arrears of maintenance for the period above mentioned, *i. e.*, between February 1860 and the 13th of March 1866.

The appeal is consequently decreed with costs.

The 29th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale in Execution—Rights of purchaser.

Case No. 3046 of 1866.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Mymensingh, dated the 25th August 1866, affirming a decision passed by the Moonsiff of Nicklee, dated the 25th November 1865.

Chunder Kant Surmah Talookdar and another (Defendants), *Appellants,*

versus

Bissessur Surmah Chuckerbutty (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Sreenath Doss for Respondent.

If a sale takes place in execution of a decree in force and valid at the time of sale, the property in the thing sold passes to the purchaser.

Per Norman, J.—If the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser.

Seton-Karr, J.—THE Principal Sudder Ameen has found in this case that a certain decree was obtained at a time when Goureenath was a minor; that Ramprya, the mother of Goureenath, fraudulently and collusively admitted a debt, which was a personal debt of her own, and that, consequently, the plaintiff, who now sues as reversioner, has a right to recover the property from the purchasers thereof, the special appellants before us.

Now, we observe that the purchase took place as far back as February 1838. It took place in pursuance of a decree of Court making Ramprya liable for a debt *as heiress of Goureenath.* The defendant, special appellant, takes his title from that sale and purchase made in open Court. The decree under which the sale was effected has never been reversed. Nor is collusion imputed to the special appellants, purchasers. Collusion is, indeed, imputed to the decree-holders in a general way, but they are not made parties to the suit.

This being the case, we hold that it was not competent to the Court, in this case, to raise the question of fraud as against the defendants, purchasers, or to impugn the title which they derived from their sale and purchase effected in open Court and in pursuance of a decree. We might even go further and say that, had the decree been set aside on the ground of collusion between the decree-holder and Ramprya, the defendants, as *bonâ fide* purchasers, would still have been entitled to retain their purchase.

In this view of the case, holding that the Courts had no right to raise the question which they did raise, and that no case is made out, even *primâ facie,* against the defendants, we reverse the decisions of both the Lower Courts, and decree the appeal with costs. This order will, of course, only apply to the share of Goureenath, which alone passed by the sale to the purchasers. As regards the share of Mothooranath, the order of the Lower Courts will stand good. Each party may pay their own costs in this appeal.

Norman, J.—I entirely concur in this judgment. It is important to observe that, if a sale takes place in execution of a decree in force and valid at the time of the sale, the property in the thing sold passes to the purchaser; and, if the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser. The question will be found to be discussed in Dow *versus* Thom., 1 Maule and Selwyn 425; Goodyere *versus* Ince, Croke and James 246; Manning's Case, 8 Reports, 94 B.

The 29th March 1867.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Remand — Evidence (Reception of additional— on appeal).

Cases Nos. 312 to 318 of 1866.

Regular Appeals from a decision passed by Dr. W. H. Clark, Recorder of Moulmein, dated the 24th August 1866.

R. Snadden (Defendant), *Appellant,*

versus

Todd, Finlay, and Co. and others (Plaintiffs), *Respondents.*

Mr. R. V. Doyne, instructed by Mr. J. W. Mirfield, for Appellant.

Mr. A. T. T. Peterson, instructed by Mr. Sanderson, for Respondents.

Quœre.—Whether, under Sections 351 and 352, Act VIII. of 1859, when several cases are tried together, a remand can be allowed for a new trial on the ground that the plaintiff's evidence had not been completely heard, and that it was an error in the Court below to determine all the cases at once.

Even additional evidence cannot be admitted in appeal without any substantial reason to be recorded in the proceedings.

Jackson, J.—THESE are all appeals from the Recorder's Court at Moulmein.

That Court heard and determined with the regular suit No. 153 of 1865 eleven other cases, in all of which it gave judgment for the plaintiffs; and seven of those eleven cases, being within the limits of value appealable to this Court, were appealed with the first-named suit 153, which was the subject of the appeal No. 298 disposed of by our judgment of the 22nd March.

On the appeal in these cases being opened by Mr. Doyne, the learned Counsel (Mr. Peterson) for the respondents interposed, and, admitting that, after our judgment in 298, he could not hope to support the decision in these cases as it stood, urged that they ought to be remanded for a new trial, on the ground that the plaintiff's evidence had not been completely heard, and that it was an error in the Court below to determine all these cases at once. He contended that the evidence as to possession in the several suits would have been distinct, and that, without having such evidence, no decree could be passed which an Appellate Court would be likely to affirm.

We cannot accede to this prayer. It is quite clear, on reference to the proceedings in the Recorder's Court in several places, and more especially from what took place on the 15th August 1866, at which time the case for the plaintiffs in No. 153 had concluded (*see* p. 52 of the printed book), that the plaintiffs deliberately elected to be bound by the decision of the Court in the 1st case, and *see* the order of 3rd October 1865, p. 12 of the same book, by which it is declared to be agreed between the parties that the evidence to be given in the one case should be evidence in all the cases, and the Court below, at the plaintiff's express request, proceeded to adjudicate upon all the cases simultaneously.

It is not contended that the evidence in the other cases, if they had been separately tried, would have been of a different kind or better than the evidence adduced in No. 153; and we cannot shut our eyes to the certainty that, if we sent these cases back to be re-tried (if, indeed, we are competent to do so) after our judgment in the appeal in No. 153, we should be simply affording the plaintiffs an opportunity of making a new case framed so as to meet the exigencies of our decision.

But, in fact, it is extremely doubtful whether, in accordance with the Code of Civil Procedure, Sections 351 and 352, we should be competent to remand these cases, if even we thought that justice required us to do so.

We might, indeed, permit the reception of additional evidence. But, assuredly, the facts of the case would afford no justification for our doing so, and we are bound by a recent decision of the Judicial Committee (in the case of Sreemun Chunder Day *vs.* Gopal Chunder Chuckerbutty) to abstain from admitting further evidence in appeal without any substantial cause for so doing, to be recorded in the proceedings.

We have therefore no choice but to reverse the several decrees of the Court below, and we reverse them accordingly with all costs of these proceedings.

The 29th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgage — Redemption by co-mortgagor.

Case No. 3228 of 1866.

Special Appeal from a decision passed by Baboo Mohendronath Bose, Officiating Principal Sudder Ameen of Hooghly, dated the 10th September 1866, reversing a decision passed by Baboo Kishen Mohun Mookerjee, Moonsiff of Pandooa, dated the 12th December 1865.

Ram Kristo Manjhee and another (Defendants), *Appellants,*

versus

Mussamut Ameeroonissa Bibee (Plaintiff), *Respondent.*

Baboos Otool Chunder Mookerjee and *Mohendur Lal Seal* for Appellants.

Baboo Roopnath Banerjee for Respondent.

Mortgage-debts are indivisible except where there is a distinct notice on the face of the mortgage-deed of the separate shares of the mortgagors.

One co-mortgagor or his representative may redeem the entire estate, if joint and undivided, by payment of the whole of the mortgage-money.

Glover, J.—This was a suit on the part of two co-sharers in a small property consisting of 6 beegahs of land, to redeem the same by paying off the amount advanced by the mortgagees in 1224 B. S. to their ancestor Abbas Ali.

The defendants pleaded an absolute sale in 1245 B. S.

The Court of first instance originally dismissed the suit on the issue of limitation, but, on remand, gave a decree in favor of Ameeroonissa, one of the plaintiffs, for her 4-annas share of the property, throwing out the claim of Tonoo, the other co-sharer, on the ground that he had admitted the sale of 1245, and had so waived his claim.

The Moonsiff, however, found the kubala of 1245 not proved.

The Principal Sudder Ameen upheld this order as regarded the genuineness of the kubala of 1245, and decreed the whole claim in favor of Ameeroonissa, observing on the cross-appeal of Tonoo, who pleaded ignorance of the so-called admission made in his name, that it was immaterial to the issue, inasmuch as, under any circumstances, a co-mortgagor or his representative had the power to redeem the entire property mortgaged.

The only point taken in special appeal is that, as Tonoo had admitted the sale of 1245, and had, by so doing, waived his claim to redeem so much of the property as represented Tonoo's share, *viz.*, 12 annas, must remain with the defendant, and that Ameeroonissa could have no claim to it.

We consider this objection untenable.

Had Tonoo been the sole plaintiff in this suit, proof of his admission of the sale of 1245 would have amounted to a waivor of his individual rights in the property as holder of an equity of redemption. But, as Ameeroonissa was a co-plaintiff, and as the Principal Sudder Ameen has found as a fact on evidence that the mortgage of 1224 was valid, and that there was no sale in 1245, it is immaterial to consider whether Tonoo did or did not make the admission referred to, inasmuch as Ameeroonissa would, by law, as one of the representatives of Abbas Ali, have the equity of redemption as regards the entire property mortgaged.

It is contended by the special appellant that Ameeroonissa would be only entitled, under the Lower Courts' finding, to redeem her 4-annas share of the property, and one case has been cited (Mukhun Lal *versus* Wuzeer Ali, 4 Select Reports 32) in support of the argument that the heir of an original mortgagor can redeem such share of the estate as comes to him by inheritance, and therefore by analogy can claim no other. But this view of the law has been contravened by later decisions, and is in itself wholly inconsistent with the principle that all mortgage-debts are indivisible. For, if this were not so, and if the right of a mortgagor became split up and vested in twenty different persons, each of them would be entitled to come forward and sue to redeem the twentieth part of the property on paying the twentieth part of the debt due—a system which would expose mortgagees to endless annoyance and litigation, and is quite opposed to the principles on which mortgage-agreements are founded. *Vide* Macpherson on Mortgages, 3rd Ed., page 136.

This rule would not apply where there is a distinct notice on the face of the mortgage-deed of the separate shares of the mortgagors,

but there is no such contention in the present case.

The principle that one out of two co-mortgagors or their representatives can redeem the entire estate, where such estate is joint and undivided, by payment of the whole of the mortgage-money, is laid down in the Full Bench Ruling of this Court in the case of Maharanee Wuzeerunissa *versus* Bibee Saedun and others (6 Weekly Reporter, page 240).

And, following this precedent, we think that the Principal Sudder Ameen's order, giving to Ameeroonissa the power of redeeming the entire property mortgaged by Abbas Ali, should be maintained, and this special appeal be dismissed with costs.

The 29th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 73, Act VIII. of 1859—Intervenors being made parties to a suit—Mortgage.

Case No. 3245 of 1866.

Special Appeal from a decision passed by Baboo Kylash Chunder Deb Roy, Principal Sudder Ameen of the 24-Pergunnahs, dated the 26th September 1866, reversing a decision passed by Baboo Brojendro Coomar Seal, Moonsiff of Bussirhaut, dated the 23rd February 1866.

Saroda Pershad Mitter (Plaintiff). *Appellant,*

versus

Kylash Chunder Banerjee (Defendant),

Respondent.

Baboos Kalee Prosunno Dutt, Kheltur Mohun Mookerjee, and *Tarucknath Sein* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

An intervenor claiming under a title adverse to that set up both by the plaintiff and the defendant may be made a defendant under Section 73, Act VIII. of 1859, if his interest in the subject-matter of dispute is likely to be affected by the decision between them—as in a suit for possession by foreclosure of a mortgage, in which the defendant admitted the fact of the mortgage, but the intervenor came in declaring the mortgage to be false and collusive between the alleged mortgagor and mortgagee for the purpose of depriving him of a mokurruree tenure which he held in the alleged mortgagor's estate.

Glover, J.—This was a suit for possession of certain land by foreclosure of a mortgage. The first defendant admitted the fact of the mortgage, but raised an objection as to notice of foreclosure.

The second defendant (who appears as special respondent in this case) came in as an intervenor under Section 73, Act VIII. of 1859, and declared the mortgage to be a collusive transaction between the plaintiff and the first defendant, the object of which was to oust him from a mourosee tenure held within the defendant's estate.

The first Court found that notice of foreclosure was duly served, that the plaintiff was entitled to a decree on the admission of the mortgagor-defendant, and that the mortgage was not collusive.

The Principal Sudder Ameen, on appeal, held that the mortgage was collusive, and that, supposing the mortgagor-defendant to have admitted the factum of the mortgage, it could not affect the right of the intervenor-defendant when fraud was proved.

It is urged in special appeal that the intervenor was improperly made a defendant under Section 73 of Act VIII. of 1859, and that, as he had no interest in the subject-matter of dispute, he could not impugn the plaintiff's title, or throw doubt on the transaction between him and the mortgagor-defendant.

In support of this contention, we have been referred to a decision of this Court of the 26th February 1867, Joy Gobind Doss, Appellant (Weekly Reporter, page 201), wherein it is laid down that, where an intervenor comes in, whose title is adverse to that set up both by plaintiff and defendant, and whose interest would not be affected by the decision between them, he should not be made a defendant. No doubt, this would be so; and if it were shown that the special respondent, the holder of a mokurruree tenure within the defendant's estate, had no interest in the decision of the present suit, the objection would be tenable. But, so far from this being the case, we find, on turning to the plaint, that the alleged mortgagee demanded to be put into khas possession of the land, with all upon it; and, had he got a decree in the terms of his plaint, the intervenor-defendant would have been ousted from his holding. Clearly, therefore, he had a very distinct interest in the result of the case, and was properly made a defendant under Section 73, and the precedent quoted does not apply.

We observe, further, that the special appellant never raised any objection to the intervenor's being made a defendant by the

Court of first instance, although the ground of his intervention was clearly set forth in his pleading, and an issue drawn up, in accordance with it. The case went to trial on that issue amongst others, *viz.*, that the mortgage propounded by the plaintiff was false and collusive between him and the alleged mortgagor, for the sole end of depriving the intervenor of his mokurruree holding.

The Principal Sudder Ameen has held on the evidence that the mortgage was collusive and fraudulent in the terms of the special respondent's objection. We think that, under the circumstances, he was fully justified in considering the point, the mortgagor's admission notwithstanding; and as his decision on it is one of fact, we cannot interfere with it in special appeal.

We, therefore, reject this application with costs.

The 29th March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Pleaders and Mooktears (Charge of misconduct against).

Miscellaneous Appeal from an order passed by Mr. H. C. Richardson, Sessions Judge of Tipperah, dated the 4th December 1866.

Sudurooddeen Mahomed Mooktear, *Appellant.*

Baboo Sreenath Banerjee for Appellant.

Any charge of misconduct against a pleader or mooktear holding a certificate under Act XX. of 1865 other than a recorded conviction of a criminal offence must be made and substantiated, and a report submitted to the High Court as provided by Section 16.

THE petitioner was a mooktear in the District of Noakolly, which is subject to the jurisdiction of the Judge of Tipperah. Two persons named Islam Meah and Chowdry Meah were committed to the Sessions Judge on a charge of falsely bringing a suit and fabricating false evidence. These persons were convicted and sentenced. A representation appears to have been made to the Judge that the petitioner was also implicated in the matter, and the Judge thereupon, without hearing the petitioner, summarily passed an order, declaring that it was not proper that he should be retained in the situation of mooktear, and ordering him to be removed.

The Judge's order is altogether irregular and beyond his power to make, and must be quashed. Any charge of misconduct against a pleader or mooktear holding a certificate under Act XX. of 1865, other than a recorded conviction of a criminal offence, must be made and substantiated, and a report submitted to this Court as provided in Section 16 of the Pleaders Act.

It is stated that the petitioner's certificate of mooktearship has been taken from him. If so, the Judge will restore it.

The 29th March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Jurisdiction (of High Court)—Small Cause Court—Res judicata.

Miscellaneous Appeal from an order passed by Mr. J. Weston, Judge of the Small Cause Court of Jenidah in Jessore, dated the 18th February 1867.

Brommo Roop Gossain (Plaintiff), *Appellant,*

versus

Anund Moyee Debia and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Sreenath Banerjee* for Appellant.

No one for Respondents.

The High Court has no jurisdiction to compel a Court of Small Causes to re-hear a suit dismissed by the latter Court on the ground of *res judicata.*

PETITIONER applies for an order to compel the Court of Small Causes of Jenidah to re-hear a suit brought by the petitioner which has been dismissed by that Court on the ground of the same cause of action having been already heard and determined by a Court of competent jurisdiction.

It appears to me that this Court has no authority to make such an order. This is not a case where the Court of Small Causes has declined jurisdiction, or has refused to do that which the law directs. The plaint has been received, the defendants' answer has been heard, an issue has been framed and tried, and upon that issue the Court has determined (it may be erroneously) that this was a suit, the cognizance of which is barred by Section 2 of the Civil Procedure Code. To enter into the correctness of the decision on this point would be, in fact, to entertain an appeal from the Court of Small Causes which this Court is not authorized to do. It might as well be said, in my opinion, that if, in the course of hearing a cause, the Court should have erroneously admitted that as evidence which was not

evidence, this Court would be competent to entertain an appeal on that ground to set aside the judgment passed.

It appears to me that this application must be refused.

The 29th March 1867.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Civil Court Ameen (Appointment of).

Case No. 140 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 22nd January 1867.

Mahomed Khairoollah, *Appellant.*

Mr. C. Gregory for Appellant.

A person, who does not hold a certificate of pleadership, is not eligible for a Civil Court Ameenship.

PETITIONER'S complaint is that, he being a person qualified for the situation of a Civil Court Ameen under the Circular Order of the late Sudder Court of the 6th November 1857, and having actually filled such an office until its abolition by reason of reduction of establishment, and a vacancy having again occurred in the situation of Civil Court Ameen in the District of Chittagong, he made application for the vacant office. The Judge held an examination of the candidates, and has appointed a person whom he considers to be better qualified, but who has not the qualifications prescribed by the Circular Order cited.

If this had been a case in which the Judge, having to choose between two persons similarly qualified under the Circular Order, had rejected the petitioner and appointed some one else, I should not have thought it proper to interfere. But, as it appears from the Judge's roobakaree, dated the 22nd January last, a copy of which is before me, that the person selected is not qualified by holding a certificate of pleadership, but merely passed what the local authorities considered a favorable examination, and was not passed by the High Court, I think it right to signify this Court's disapproval of the appointment made, and to direct the Judge to make a new appointment, and I accompany that direction with the strong expression of opinion that, if the petitioner has served with credit in his previous incumbency of the Ameenship, and if he be efficient, and there is nothing against his character, he ought not to be subjected, after having served several years in that capacity, to a fresh examination, but ought, if there be no preferable candidate properly qualified, to be appointed to the vacancy.

The 29th March 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale (Completion of)—Registration.

Case No. 3309 of 1866.

Special Appeal from a decision passed by the Judge of Dacca, dated the 12th September 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 20th February 1866.

Kalee Churn Giree Gossain (Plaintiff), *Appellant,*

versus

Lalla Muddun Kishore and others (Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A sale might be complete, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annul a sale if, by mutual agreement, a sale had already been made.

Pundit, J.—WE think it proper to remand this case to the Lower Appellate Court, in order that it may clearly find whether the deed of sale, which plaintiff says was executed in his favor, was returned by the plaintiff to his vendor after they both failed to get it registered, a fact found by the Court of first instance.

If this return of the deed be proved, the special appellant will have no case.

If that fact be not established, the Lower Appellate Court should more distinctly assert whether it agrees with the Court of first instance in holding that it is proved as a fact that the sale was not to be considered as complete before the entire purchase-money was paid and before the deed was registered; or whether it only decides that, the deed not being registered, and the entire consideration not being paid before the said vendor sold to another party, it is to be inferred as a question of law that the sale had not become complete,

so as to make the case only of a contract to sell.

A sale might be completed, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annul a sale if, by mutual agreement, a sale had already been made.

We, accordingly, remand this case to the Lower Appellate Court to re-try the case with reference to the above remarks; and the *evidence* of the vakeel employed, *viz.*, Boroda Kinkur Roy, might well be taken in order to arrive at proof of the acts and intention of the parties. His *kyfeut* is no legal evidence.

The 30th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

Sale under Act VIII. of 1835—Holding in a Khas Mehal—Rights of purchaser.

Case No. 3285 of 1866.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 20th September 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 21st March 1865.

Kylash Chunder Shaha (Plaintiff), *Appellant,*

versus

Ranee Shurno Moyee Dossee (Defendant), *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

Semble.—The purchaser of a holding in a khas mehal sold under Act VIII. of 1835 cannot claim the position or privileges accorded by Sections 37 and 52 of Act XI. of 1859 to purchasers of permanently-settled estates, or of estates sold in districts not permanently settled, sold for arrears of revenue.

Seton-Karr, J.—THE special appellant endeavours to contend that the plaintiff has acquired the rights of the holder at the original settlement, and that he is not bound by any laches of his predecessor such as the Lower Appellate Court has found to exist.

The purchase of the plaintiff, it appears, was a purchase of a holding in Dehee Punchanungram at a sale held by the Deputy Collector under Act VIII. of 1835. But there is nothing adduced, either in the shape of law or precedent, to convince us that a purchaser of a holding in a khas mehal such as Punchanungram, can at all claim the position or privileges accorded to purchasers of permanently-settled estates sold for arrears of revenue or of estates in districts not permanently settled sold under similar circumstances; in other words, that he can have the benefit of Sections 37 and 52 of Act XI. of 1859. Act VIII. of 1835, we observe, merely changes the course of procedure of sales in certain cases, and nowhere vests the plaintiff with any such rights as those claimed.

In short, there is nothing whatever to lead us to think that the finding of the Principal Sudder Ameen, to the effect that neither the plaintiff nor his predecessors ever were in possession, is at all wrong in law.

Under these circumstances we dismiss the appeal with costs.

The 30th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale of Howala for arrears of rent—Ousut Howalas—Rights of Co-sharers.

Case No. 3308 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 29th September 1866, affirming a decision passed by the Moonsiff of Choolneah, dated the 11th September 1865.

Huree Churn Bose (Plaintiff), *Appellant,*

versus

Meharoonissa Bibee and others (Defendants), *Respondents.*

Baboo Khetturnath Bose for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A shareholder is not precluded from purchasing the whole of a *howala* tenure sold *bonâ fide* for arrears of rent due from himself and his co-sharer. All *ousut howalas* created by the other co-sharers fall with the sale of the *howala*, unless specially protected by the *howala* lease.

A zemindar may bring a suit for arrears only against the tenant, whose name is recorded in his serishtah; and, in execution of a decree obtained in such a suit, the

whole tenure may be sold, though others not recognized by the zemindar as his tenants may be interested in the lease.

Pundit, J.—PLAINTIFF is the ostensible purchaser in execution of a decree for rent against Doorga Pershad Howaladar. Plaintiff asserts before us that, in the serishtah of the landlord, only the name of Doorga Pershad was recorded; that the decree was for arrears due from the *whole howala;* that, even if others had shares in it by rights acquired from Doorga Pershad, they also were liable for *these arrears* on account of the tenure recorded in the zemindar's serishtah.

These important points of the plaintiff have not been enquired into by the Lower Appellate Court as fully as they ought to have been.

It is said Doorga Pershad sold four annas to Wooma Churn, and four annas to another person. Neither this last alleged purchaser, nor indeed any one holding through such purchaser, appear in this case.

The dispute directly is between the plaintiff as purchaser in execution, and the defendant who sets up an *ousut howala* tenure for 2 annas of the 4 annas alleged to have been purchased by Wooma Churn. This ousut howaladar (of 2-annas share out of 4 annas of Wooma Churn's alleged howaladaree rights) proceeded on his alleged right by purchase to sue a ryot for rent and obtained a decree, which is now sued to be set aside.

Plaintiff has now brought this action to have his title and that of the ousut howaladar tried.

It is, under these circumstances, necessary *first* to know clearly whether the alleged two purchasers of 8 annas held jointly with Doorga Pershad, and if Wooma Churn held separate *lands*, whether the ousut howaladar of the 2-annas share held his land also *separate* as part of the separate lands of the four-annas share.

Plaintiff has the legal title. Nothing is shown to us in law to prevent Doorga Pershad as an original shareholder from purchasing the *whole* tenure, when *bonâ fide* sold for arrears due from *himself* and his co-sharers. Nor can the ousut howaladar show that the plaintiff, if permitted to carry on this suit, is likely to have any advantage which Doorga Pershad as plaintiff could not legally enjoy. We think, then, that defendants cannot *successfully* question the right of the plaintiff to sue, even after it has been found that plaintiff is a purchaser in trust for Doorga Pershad.

Now, if it be found that the conditions of the original howaladaree tenure of Doorga Pershad admitted of the landlord selling the tenure for arrears of rent, the sale in which plaintiff purchased will, under the Full Bench precedent of 13th March last, extinguish the ousut howala created by Wooma Churn, that is, when Wooma Churn's purchase of 4 annas is established. If Wooma Churn's right to create the under-tenure is *not* thus established, the under-tenure will fall. But, in that case, it will not do so by reason of the sale, but because it was not created by a party competent to create an incumbrance on the original parent tenure. If, then, plaintiff fails to prove such a reservation in the conditions of the lease of the howala, his action will fail. If, however, it be shown on the other hand by the defendant that Wooma Churn's purchase of 4 annas was duly registered or recognized by the superior landlord, and that Wooma Churn paid his rents *separately*, that, further, the suit against Doorga Pershad was for arrears so due only from Doorga Pershad, and that after a decree for arrears so due from Doorga Pershad alone the decree-holder expressly elected that the share of Doorga Pershad alone should be sold, then plaintiff will not be entitled to disturb the ousut howaladar, because his purchase will then be found not to extend to the *separate* share of Wooma Churn, within which the *ousut howala* is situated.

It will not, however, be sufficient for the defendant to show that Wooma Churn (as between him and Doorga Pershad) was *not* in arrears when the suit was brought, because, if he elected not to have his name recorded in the serishtah of the landlord, and the landlord did not legally recognize Wooma Churn as a purchaser, and further the landlord *bonâ fide* brought an action for arrears due to him from the howala against the person whose name alone was recorded in his serishtah, the decree obtained *in such a case* must be one against the *whole* tenure; and, consequently, in execution of it, the whole tenure must pass to the purchaser, though by way of description papers connected with the sale may use the terms that the property so sold consisted of the "interests of Doorga Pershad."

Under all these circumstances we think it right to remand the case to the Lower Appellate Court, with a view to its being re-tried with reference to the preceding remarks.

Court of first instance, although the ground of his intervention was clearly set forth in his pleading, and an issue drawn up, in accordance with it. The case went to trial on that issue amongst others, *viz.*, that the mortgage propounded by the plaintiff was false and collusive between him and the alleged mortgagor, for the sole end of depriving the intervenor of his mokurruree holding.

The Principal Sudder Ameen has held on the evidence that the mortgage was collusive and fraudulent in the terms of the special respondent's objection. We think that, under the circumstances, he was fully justified in considering the point, the mortgagor's admission notwithstanding; and as his decision on it is one of fact, we cannot interfere with it in special appeal.

We, therefore, reject this application with costs.

The 29th March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Pleaders and Mooktears (Charge of misconduct against).

Miscellaneous Appeal from an order passed by Mr. H. C. Richardson, Sessions Judge of Tipperah, dated the 4th December 1866.

Sudurooddeen Mahomed Mooktear, *Appellant.*

Baboo Sreenath Banerjee for Appellant.

Any charge of misconduct against a pleader or mooktear holding a certificate under Act XX. of 1865 other than a recorded conviction of a criminal offence must be made and substantiated, and a report submitted to the High Court as provided by Section 16.

THE petitioner was a mooktear in the District of Noakolly, which is subject to the jurisdiction of the Judge of Tipperah. Two persons named Islam Meah and Chowdry Meah were committed to the Sessions Judge on a charge of falsely bringing a suit and fabricating false evidence. These persons were convicted and sentenced. A representation appears to have been made to the Judge that the petitioner was also implicated in the matter, and the Judge thereupon, without hearing the petitioner, summarily passed an order, declaring that it was not proper that he should be retained in the situation of mooktear, and ordering him to be removed.

The Judge's order is altogether irregular and beyond his power to make, and must be quashed. Any charge of misconduct against a pleader or mooktear holding a certificate under Act XX. of 1865, other than a recorded conviction of a criminal offence, must be made and substantiated, and a report submitted to this Court as provided in Section 16 of the Pleaders Act.

It is stated that the petitioner's certificate of mooktearship has been taken from him. If so, the Judge will restore it.

The 29th March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Jurisdiction (of High Court)—Small Cause Court—Res judicata.

Miscellaneous Appeal from an order passed by Mr. J. Weston, Judge of the Small Cause Court of Jenidah in Jessore, dated the 18th February 1867.

Brommo Roop Gossain (Plaintiff), *Appellant,*

versus

Anund Moyee Debia and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Sreenath Banerjee* for Appellant.

No one for Respondents.

The High Court has no jurisdiction to compel a Court of Small Causes to re-hear a suit dismissed by the latter Court on the ground of *res judicata.*

PETITIONER applies for an order to compel the Court of Small Causes of Jenidah to re-hear a suit brought by the petitioner which has been dismissed by that Court on the ground of the same cause of action having been already heard and determined by a Court of competent jurisdiction.

It appears to me that this Court has no authority to make such an order. This is not a case where the Court of Small Causes has declined jurisdiction, or has refused to do that which the law directs. The plaint has been received, the defendants' answer has been heard, an issue has been framed and tried, and upon that issue the Court has determined (it may be erroneously) that this was a suit, the cognizance of which is barred by Section 2 of the Civil Procedure Code. To enter into the correctness of the decision on this point would be, in fact, to entertain an appeal from the Court of Small Causes which this Court is not authorized to do. It might as well be said, in my opinion, that if, in the course of hearing a cause, the Court should have erroneously admitted that as evidence which was not

evidence, this Court would be competent to entertain an appeal on that ground to set aside the judgment passed.

It appears to me that this application must be refused.

The 29th March 1867.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Civil Court Ameen (Appointment of).

Case No. 140 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 22nd January 1867.

Mahomed Khairoollah, *Appellant.*

Mr. C. Gregory for Appellant.

A person, who does not hold a certificate of pleadership, is not eligible for a Civil Court Ameenship.

PETITIONER's complaint is that, he being a person qualified for the situation of a Civil Court Ameen under the Circular Order of the late Sudder Court of the 6th November 1857, and having actually filled such an office until its abolition by reason of reduction of establishment, and a vacancy having again occurred in the situation of Civil Court Ameen in the District of Chittagong, he made application for the vacant office. The Judge held an examination of the candidates, and has appointed a person whom he considers to be better qualified, but who has not the qualifications prescribed by the Circular Order cited.

If this had been a case in which the Judge, having to choose between two persons similarly qualified under the Circular Order, had rejected the petitioner and appointed some one else, I should not have thought it proper to interfere. But, as it appears from the Judge's roobakaree, dated the 22nd January last, a copy of which is before me, that the person selected is not qualified by holding a certificate of pleadership, but merely passed what the local authorities considered a favorable examination, and was not passed by the High Court, I think it right to signify this Court's disapproval of the appointment made, and to direct the Judge to make a new appointment, and I accompany that direction with the strong expression of opinion that, if the petitioner has served with credit in his previous incumbency of the Ameenship, and if he be efficient, and there is nothing against his character, he ought not to be subjected, after having served several years in that capacity, to a fresh examination, but ought, if there be no preferable candidate properly qualified, to be appointed to the vacancy.

The 29th March 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale (Completion of)—Registration.

Case No. 3309 of 1866.

Special Appeal from a decision passed by the Judge of Dacca, dated the 12th September 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 20th February 1866.

Kalee Churn Giree Gossain (Plaintiff), *Appellant,*

versus

Lalla Muddun Kishore and others (Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A sale might be complete, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annul a sale if, by mutual agreement, a sale had already been made.

Pundit, J.—WE think it proper to remand this case to the Lower Appellate Court, in order that it may clearly find whether the deed of sale, which plaintiff says was executed in his favor, was returned by the plaintiff to his vendor after they both failed to get it registered, a fact found by the Court of first instance.

If this return of the deed be proved, the special appellant will have no case.

If that fact be not established, the Lower Appellate Court should more distinctly assert whether it agrees with the Court of first instance in holding that it is proved as a fact that the sale was not to be considered as complete before the entire purchase-money was paid and before the deed was registered; or whether it only decides that, the deed not being registered, and the entire consideration not being paid before the said vendor sold to another party, it is to be inferred as a question of law that the sale had not become complete,

so as to make the case only of a contract to sell.

A sale might be completed, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annul a sale if, by mutual agreement, a sale had already been made.

We, accordingly, remand this case to the Lower Appellate Court to re-try the case with reference to the above remarks; and the *evidence* of the vakeel employed, *viz.*, Boroda Kinkur Roy, might well be taken in order to arrive at proof of the acts and intention of the parties. His *kyfeut* is no legal evidence.

The 30th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

Sale under Act VIII. of 1835—Holding in a Khas Mehal—Rights of purchaser.

Case No. 3285 of 1866.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 20th September 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 21st March 1865.

Kylash Chunder Shaha (Plaintiff), *Appellant,*

versus

Ranee Shurno Moyee Dossee (Defendant), *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

Semble.—The purchaser of a holding in a khas mehal sold under Act VIII. of 1835 cannot claim the position or privileges accorded by Sections 37 and 52 of Act XI. of 1859 to purchasers of permanently-settled estates, or of estates sold in districts not permanently settled, sold for arrears of revenue.

Seton-Karr, J.—The special appellant endeavours to contend that the plaintiff has acquired the rights of the holder at the original settlement, and that he is not bound by any laches of his predecessor such as the Lower Appellate Court has found to exist.

The purchase of the plaintiff, it appears, was a purchase of a holding in Dehee Punchanungram at a sale held by the Deputy Collector under Act VIII. of 1835. But there is nothing adduced, either in the shape of law or precedent, to convince us that a purchaser of a holding in a khas mehal such as Punchanungram, can at all claim the position or privileges accorded to purchasers of permanently-settled estates sold for arrears of revenue or of estates in districts not permanently settled sold under similar circumstances; in other words, that he can have the benefit of Sections 37 and 52 of Act XI. of 1859. Act VIII. of 1835, we observe, merely changes the course of procedure of sales in certain cases, and nowhere vests the plaintiff with any such rights as those claimed.

In short, there is nothing whatever to lead us to think that the finding of the Principal Sudder Ameen, to the effect that neither the plaintiff nor his predecessors ever were in possession, is at all wrong in law.

Under these circumstances we dismiss the appeal with costs.

The 30th March 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale of Howala for arrears of rent—Ousut Howalas—Rights of Co-sharers.

Case No. 3308 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 29th September 1866, affirming a decision passed by the Moonsiff of Choolneah, dated the 11th September 1865.

Huree Churn Bose (Plaintiff), *Appellant,*

versus

Meharoonissa Bibee and others (Defendants), *Respondents.*

Baboo Khetturnath Bose for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A shareholder is not precluded from purchasing the whole of a *howala* tenure sold *bond fide* for arrears of rent due from himself and his co-sharer. All *ousut howalas* created by the other co-sharers fall with the sale of the *howala*, unless specially protected by the *howala* lease.

A zemindar may bring a suit for arrears only against the tenant, whose name is recorded in his serishtah; and, in execution of a decree obtained in such a suit, the

whole tenure may be sold, though others not recognized by the zemindar as his tenants may be interested in the lease.

Pundit, J.—PLAINTIFF is the ostensible purchaser in execution of a decree for rent against Doorga Pershad Howaladar. Plaintiff asserts before us that, in the serishtah of the landlord, only the name of Doorga Pershad was recorded; that the decree was for arrears due from the *whole howala;* that, even if others had shares in it by rights acquired from Doorga Pershad, they also were liable for *these arrears* on account of the tenure recorded in the zemindar's serishtah.

These important points of the plaintiff have not been enquired into by the Lower Appellate Court as fully as they ought to have been.

It is said Doorga Pershad sold four annas to Wooma Churn, and four annas to another person. Neither this last alleged purchaser, nor indeed any one holding through such purchaser, appear in this case.

The dispute directly is between the plaintiff as purchaser in execution, and the defendant who sets up an *ousut howala* tenure for 2 annas of the 4 annas alleged to have been purchased by Wooma Churn. This ousut howaladar (of 2-annas share out of 4 annas of Wooma Churn's alleged howaladaree rights) proceeded on his alleged right by purchase to sue a ryot for rent and obtained a decree, which is now sued to be set aside.

Plaintiff has now brought this action to have his title and that of the ousut howaladar tried.

It is, under these circumstances, necessary *first* to know clearly whether the alleged two purchasers of 8 annas held jointly with Doorga Pershad, and if Wooma Churn held separate *lands*, whether the ousut howaladar of the 2-annas share held his land also *separate* as part of the separate lands of the four-annas share.

Plaintiff has the legal title. Nothing is shown to us in law to prevent Doorga Pershad as an original shareholder from purchasing the *whole* tenure, when *bonâ fide* sold for arrears due from *himself* and his co-sharers. Nor can the ousut howaladar show that the plaintiff, if permitted to carry on this suit, is likely to have any advantage which Doorga Pershad as plaintiff could not legally enjoy. We think, then, that defendants cannot *successfully* question the right of the plaintiff to sue, even after it has been found that plaintiff is a purchaser in trust for Doorga Pershad.

Now, if it be found that the conditions of the original howaladaree tenure of Doorga Pershad admitted of the landlord selling the tenure for arrears of rent, the sale in which plaintiff purchased will, under the Full Bench precedent of 13th March last, extinguish the ousut howala created by Wooma Churn, that is, when Wooma Churn's purchase of 4 annas is established. If Wooma Churn's right to create the under-tenure is *not* thus established, the under-tenure will fall. But, in that case, it will not do so by reason of the sale, but because it was not created by a party competent to create an incumbrance on the original parent tenure. If, then, plaintiff fails to prove such a reservation in the conditions of the lease of the howala, his action will fail. If, however, it be shown on the other hand by the defendant that Wooma Churn's purchase of 4 annas was duly registered or recognized by the superior landlord, and that Wooma Churn paid his rents *separately*, that, further, the suit against Doorga Pershad was for arrears so due only from Doorga Pershad, and that after a decree for arrears so due from Doorga Pershad alone the decree-holder expressly elected that the share of Doorga Pershad alone should be sold, then plaintiff will not be entitled to disturb the ousut howaladar, because his purchase will then be found not to extend to the *separate* share of Wooma Churn, within which the *ousut howala* is situated.

It will not, however, be sufficient for the defendant to show that Wooma Churn (as between him and Doorga Pershad) was *not* in arrears when the suit was brought, because, if he elected not to have his name recorded in the serishtah of the landlord, and the landlord did not legally recognize Wooma Churn as a purchaser, and further the landlord *bonâ fide* brought an action for arrears due to him from the howala against the person whose name alone was recorded in his serishtah, the decree obtained *in such a case* must be one against the *whole* tenure; and, consequently, in execution of it, the whole tenure must pass to the purchaser, though by way of description papers connected with the sale may use the terms that the property so sold consisted of the "interests of Doorga Pershad."

Under all these circumstances we think it right to remand the case to the Lower Appellate Court, with a view to its being re-tried with reference to the preceding remarks.

The 12th March 1867.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Joint Hindoo Family—Construction (of Sontan).

Case No. 3131 of 1866.

Special Appeal from a decision passed by Baboo Luckee Narain Mitter, Additional Principal Sudder Ameen of Mymensingh, dated the 17th September 1866, affirming a decision passed by Baboo Joy Chunder Biswas, Sudder Ameen of that District, dated the 7th May 1866.

Kisto Kishore Bhuttacharjee and others (Plaintiffs), *Appellants,*

versus

Seetamonee Bhuttacharjee and others (Defendants), *Respondents.*

Baboo Nilmonee Sen for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

The word "*sontan*" occurring in a deed of agreement between co-sharers, members of a Hindoo family, was construed to mean issue generally, and not male issue merely.

Jackson, J.—This is a special appeal, which turns entirely upon the construction of the Bengalee word সন্তান (*sontan*) occurring in a deed reciting certain articles of agreement between co-sharers, members of a Hindoo family. The words, after setting out that there were four co-sharers, are যদি আমরা চারি জন সরিক মধ্যে কাহার সন্তান না থাকে, তাহার স্ত্রীও সরিকি হিস্যা না পাইবেক, that is to say, "if any of us co-sharers should have no off spring (*sontan*), then the wife of that one shall not take that co-partner's share, she shall receive only maintenance." The Bengalee as to that "*foutihissa*," or share which has lapsed, is the "*sontan* of all of us shall take it in equal parts."

The question is whether the word "*sontan*" means in its original sense "issue" generally, or in the more restricted sense in which it is sometimes employed locally "male issue." The plaintiffs in this case are the surviving co-sharers, and the defendant is the daughter of one of the co-sharers, and the plaintiff's suit is to obtain from the daughter the share which she has taken from her deceased father. Both the Lower Courts which, as it happens, have been presided over by Hindoo Judges have taken the view that *sontan* means "issue" generally, and that the use of the word is not intended to exclude daughters; they have consequently dismissed the suit. It would certainly be somewhat presumptuous in us foreigners, sitting here in special appeal, to overrule the decisions of these two Courts in a matter of purely vernacular usage and language. If I were at liberty to consider the effect of this expression and of the document independently, I should be inclined to say that the intention of the parties might have been to exclude the daughter, but that they had not carried out that intention in the words employed.

It is provided that, in the event of any of the co-sharers dying without *sontan*, the wife was not to take; it is not stated that the daughter was not to take; but on the death of such person, and his wife being excluded, the share is treated as *fouti*, that is, the share has lapsed. But then it is further provided that the *sontan*, that is, the *sontan* of the different co-sharers, shall take that share in equal parts. It appears to me that these words are not sufficiently stringent absolutely to exclude the daughter, and that we ought not to exclude a legal heir according to Hindoo Law from the share which would properly go to her, unless the intention—if there was an intention—and supposing the existence of a power of those in whom the property was vested to exclude her, has been expressed in legally sufficient language.

For these reasons I think we are bound to uphold the judgments of the Courts below.

But there is another circumstance which I think it would be wrong to exclude from our consideration, which is this. This document, of which our consideration is asked, is executed between four persons, three of whom were males, and the fourth was a lady, and she purports to execute it on behalf of her minor son, Dinonath Surmah. It is the daughter of this very Dinonath whom it is now sought to exclude by the interpretation of this document. It is not shown to us that Dinonath, when he arrived at maturity, either verbally or by any written document ratified this agreement, entered into on his behalf by his mother. It seems to me that it would be altogether impossible to exclude the daughter of Dinonath by a reference to the terms of a

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document which was never executed by him, but by his mother on his behalf and during his minority.

It seems, therefore, absolutely necessary to affirm the judgment of the Court below, and to dismiss the plaintiff's appeal with costs.

Glover, J.—I concur.

The 1st April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Hindoo Law—Guardianship and Marriage of minor—Grandmother—Step-mother.

Case No. 550 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 14th February 1867, reversing a decision passed by the Deputy Commissioner of Hazareebagh, dated the 18th September 1866.

Maharanee Ram Bunsee Koonwaree (Plaintiff), *Appellant,*

versus

Maharanee Soobh Koonwaree and others (Defendants), *Respondents.*

Mr. W. A. Montriou and *Baboo Sham Lal Mitter* for Appellant.

Messrs. R. V. Doyne and *R. T. Allan, Baboos Kishen Succa Mookerjee, Mohesh Chunder Chowdhry*, and *Dwarkanath Mitter*, and *Moonshee Ameer Ali* for Respondents.

According to Hindoo Law, a paternal grandmother has a preferential right over a step-mother to the guardianship of a minor.

The paternal grandmother, with the assent of the nearest male kinsman on the father's side, has (in preference to the step-mother) the right to dispose of a minor in marriage.

Semble.—The expression "Principal Court of Original Civil Jurisdiction in the district," as used in Act IX. of 1861, means the Principal Court of *Ordinary* Civil Jurisdiction.

Macpherson, J.—By consent this special appeal and motion came on together for hearing.

The suit out of which they arise was instituted in the Court of the Deputy Commissioner of Hazareebagh, the appellant being the plaintiff.

The suit was for a declaration of the plaintiff's right to the custody of her minor step-daughter, and for her custody, with a view to carry out a certain marriage-contract approved of by the plaintiff. There was also a prayer for an injunction to restrain the defendants from interfering with the plaintiff's right to the custody of her step-daughter, and from interfering with the plaintiff's giving her step-daughter in marriage in the manner proposed by her. The defendants to the suit were the grandmother and step-grandmother of the minor, the minor's nearest male kinsman (on her father's side), a person to whom the grandmother proposed to marry the minor, and the father of that person, with others whom we need not further refer to.

The plaintiff is the wife of the Rajah of Dhunwar, and the minor is his daughter by another wife now dead. There is no other child of the Rajah's now alive, nor any male relation nearer than the defendant Gunga Narain Deo, who is the paternal great-grandfather's brother's grandson, or second cousin once removed of the minor. The Rajah being a person of unsound mind, his estates have for many years been under the management of the Court of Wards, "he being a disqualified landholder." He has never been declared a lunatic under Act XXV. of 1858. Various questions might arise relating to the precise position of the Rajah, and to the right to the guardianship of his minor daughter under the peculiar circumstances. But we shall not enter upon those questions, for in the plaint the Rajah is said to be a lunatic, and the case has throughout been argued upon the footing of his being a lunatic, and as such civilly dead.

The plaint states that the plaintiff, with the consent of the grandmother and step-grandmother, and of Gunga Narain Deo, made a contract for the marriage of the minor to Aiswaj Narain Singh, son of Futh Narain Singh, of Benares, and that with the like consent, on the 2nd of May 1866, the preliminary ceremony of *teluck* was celebrated between Aiswaj Narain Singh and the minor, which ceremony (the plaint states) binds the marriage; that subsequently the grandmother and step-grandmother agreed to break off the first marriage-contract, and to enter into a fresh contract with one Krisnessur Pershad Singh, but the kinsman Gunga Narain Deo had not assented to this proposal. Amongst other reasons why the

first contract should be carried out, the plaint alleged that, to break it off after the solemn performance of the *teluck*, would inflict irreparable injury upon the honor and dignity of the plaintiff's family, and loss of caste upon the plaintiff herself.

The grandmother and step-grandmother, in their written statement, claim the right to be guardians of the minor, and state that they have for many years, in fact, been the guardians both of her and of her father, the Rajah. They object to the person chosen by the plaintiff as ineligible, both as being poor and as being a widower; and they state that the ceremonies towards the marriage of the minor with the person selected by them have gone so far that, by Hindoo Law. the marriage cannot now be stopped, but must be carried out.

Gunga Narain Deo did not at first appear at all; but, after the issues were settled, he came in. The Deputy Commissioner says he did not claim to be the guardian of the minor, but contended that he could carry out her marriage with the consent of the grandmother and step-grandmother, the guardians of the minor, without the consent of the plaintiff. "In fact," says the Deputy Commissioner, "he waived the guardianship question in favor of the grandmother and great-grandmother."

The Deputy Commissioner decided in favor of the plaintiff, being of opinion that she was the legal guardian, "not as being the step-mother, but as wife of her husband:" and it was ordered that an injunction which had been issued against the defendants should be made perpetual; and it was declared that the plaintiff was the legal guardian, and as such had the right of giving the minor in marriage, subject to the control of the kinsman Gunga Narain Deo.

On appeal the decision was reversed by the Judicial Commissioner, who, being of opinion that, whatever the Hindoo Law on the subject might be, our Courts would never force a girl between 15 and 16 years old (that being the age of the minor in this case) into a marriage to which she had an aversion, issued a commission for the examination of the minor herself. On the return to this commission being made, the Judicial Commissioner considered that the minor was "undoubtedly desirous of being guided in the choice of her husband by her grandmother," and that the minor's wishes must and did govern his decision of the case. He, accordingly, reversed the order of the Deputy Commissioner, directed that the grandmother and step-grandmother should be allowed to dispose of the minor's hand, and declared that as yet no valid marriage had taken place with either of the aspirants to it.

An order was immediately obtained from this Court to stay execution of the decree of the Judicial Commissioner until an appeal from his decision could be disposed of. The order was made in the shape of a rule to show cause why the order of the Judicial Commissioner should not be set aside, and in the meantime that execution should be stayed. By consent the argument of the rule and of the special appeal came on together.

On behalf of the respondents, it is contended that the whole proceedings are irregular on the part of the plaintiff, inasmuch as the suit was brought for a declaration of the right to the guardianship of the minor, and for such a purpose a regular suit will not lie. It is argued that the only course open to the plaintiff was a summary proceeding under Act IX. of 1861, and that, if the proceedings ought to have been under Act IX. of 1861, the present regular suit cannot be substituted for them, inasmuch as suits under that Act must be instituted in the "Principal Civil Court of Original Jurisdiction in the district," whereas (it is contended) not the Deputy Commissioner's Court, but the Court of the Judicial Commissioner, is the Principal Court of Original Civil Jurisdiction throughout Chota Nagpore.

It seems to us that the expression "Principal Court of Original Civil Jurisdiction in the district" means "Principal Court of Ordinary Original Civil Jurisdiction:" and that the Court of the Judicial Commissioner is not a Court of that description, even if it can be said to be a Court "in the district." But we need not decide this point, because we think that the suit was in substance not a suit for a guardianship of the minor, but a suit to declare the right to dispose of her in marriage, and to restrain the defendants from carrying out a marriage to which the plaintiff objected. It is clear that the plaintiff could never have obtained the immediate relief which she sought by a summary proceeding under Act IX. of 1861, and she was, therefore, right in bringing a regular suit, if she was to bring the matter into Court at all.

For the appellant it is argued that the Judicial Commissioner was wholly wrong in deciding the case on any consideration of the wishes of the minor; that her wishes are immaterial according to Hindoo Law;

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that the whole question ought to be determined by Hindoo Law, and that, according to that law, the plaintiff is entitled to what she prays for. Objections are also taken to the return to the commission which was issued for the examination of the minor, and it is contended that that examination has evidently been irregularly and improperly conducted.*

We are clearly of opinion that this is not a case which can be properly decided merely upon an expression by the minor of her wishes; and we think, moreover, that no reliable proof of what the wishes of the girl are has in fact been given. If, therefore, our decision is unfavorable to the appellant, it is based on grounds totally distinct from those put forward by the Lower Court as the grounds upon which it acted.

The minor appeared by her pleader Baboo Dwarkanath Mitter. But we declined to hear him, the minor not being a party to the suit, and her interests being very sufficiently represented for all purposes by those formally upon the record as parties. In no event do we think she could have had a right to appear as she did.

The question which we have to decide is, whether the plaintiff has any cause of action; in other words, whether the plaintiff, who is the step-mother of the minor, has a right to prevent her being given in marriage by her grandmother with the consent of Gunga Narain Deo, the nearest male relation on the paternal side.

So far as the formal issues framed by the Court of first instance are concerned, the right of guardianship was deemed to be the main issue, the pleaders of the parties apparently considering that whoever was legally entitled to be the guardian of the minor was also entitled to give her away in marriage. The Deputy Commissioner himself, however, was aware that the real issue was as to the right to give the girl in marriage; and we cannot admit that the person who has the right of guardianship of a female minor is *necessarily* the person who has the right of disposing of her in marriage. It appears to us rather that, while in certain cases the two rights will be found to go together, in other cases they will be found to be severed and to vest in different persons. We are led to this conclusion by the fact that, whereas the mother is unquestionably* entitled to be guardian failing the father, she does *not* stand next to the father as regards the right of giving her daughter in marriage. In a case reported at Volume II. of Macnaghten's Hindoo Law, page 204, it was held that the elder brother of a minor, and not the minor's mother, was entitled to dispose of him in marriage, "because it is laid down in the Mitak-"shara that in the first instance the father "is to perform the initiatory ceremony such "as the marriage of his daughter: in "default of him, the grandfather; on failure "of the grandfather, the brother; the uncle "and his son (next in order): and that, *on "failure of all the persons above enumerat-"ed, the mother has the right of disposing "of her in marriage.*" The order in which the persons having the right of giving a minor in marriage are here ranked is that laid down by Jagnyavulkya, and with slight variations by Vishnu and Nareda also. *See* the Vyavastha Durpana of Baboo Shama Churn Sircar, page 704, and the extracts there given. *See* also Strange's Hindoo Law, I. 36, II. 28, 30, and the younger Strange's Manual of Hindoo Law (1863), page 8. And this view of the law seems to have been adopted by Sir Charles Jackson in *ex parte* Janky Pershad Agurwallah, 2 Boulnois' Reports 114. The learned Judge, however, expresses an opinion (in which we do not concur) that the brother of the minor and not the mother was her legal guardian, and it is therefore not clear that he did not consider that the one right carried the other with it.

Although the plaintiff prays that it may be declared that she alone is entitled to give the minor in marriage, she nevertheless practically by her plaint admits that she is not competent alone to give away the minor, for she makes Gunga Narain Deo a defendant, styling him "a distant kinsman," relying on the assent which he is alleged to have given in the first instance to the marriage proposed by her, and denying that he has ever withdrawn that assent.

Under the circumstances, however, it is not necessary that we should express any positive opinion on this point; because we think that the step-mother is not the legal guardian of the minor so long as the paternal grandmother is alive, and the plaintiff's case must fail if she is not the legal guardian, and if the nearest male relative of the minor on the father's side supports the legal guardian.

This brings us to the question whether the step-mother or the grandmother is the legal guardian of the minor. We put the claims

*Macnaghten's Hindoo Law, I. 103, and II. 205, S. D. A., 1850, 471 *et passim*.

of the other defendant, the step-grandmother, entirely out of consideration: because every objection which can be brought to bear against the step-mother's right necessarily operates with increased force against any such right when asserted by a step-grandmother, any claim by whom in the present case we accordingly set aside without hesitation.

There is some authority for the contention that the step-mother is the legal guardian; but it will be found on examination to be but slight, and based entirely on an old decision of the Bombay Sudder Court in 1821 in the case of Lukmee *versus* Umur Chund Deo Chund, II. Bombay Sudder Court Reports 144. In that case a question arose as to whether the step-mother or the paternal uncle was the legal guardian of a minor. The Court referred the question to the shastrees who decided it in favor of the step-mother, whom the Court accordingly declared to be entitled. The shastrees declared the step-mother entitled, because, according to Manu, "the child's step-mother is "in the place of a real mother to him, and "must take care of him, providing him with "food and raiment out of his share of the "estate." But the only authority quoted in support of this opinion is Manu, Chapter IX., verse 188. "If, among all the wives "of the same husband, one bring forth a "male child, Manu has declared them all, "by means of that son, to be mothers of "male issue." This verse, however, does not, in our opinion, justify the conclusion arrived at by the shastrees and the Court. It may be that the existence of a son by one wife may, according to Hindoo Law, put all the wives of the son's father in the position of mothers in a religious point of view and as regards their future state. But it by no means necessarily follows that all the wives are therefore in the same position towards the child as its actual mother. Manu does not say that the step-mother is to stand in all things in the same position towards the son as his mother; and if it be clear and settled law that she does *not* do so in some respects, we fail to see anything in the verse referred to which leads directly or indirectly to the inference that she stands in that position as regards guardianship. That she does not stand as a mother for all purposes is unquestionable. For, under no circumstances, can she inherit from her stepson (*see* the decision of a Full Bench in the case of Lalla Jotee Lal *versus* Mussamut Dooranee Koer, Weekly Reporter, Full Bench, p. 173). If the text of Manu does not make the step-mother a mother, so that she may inherit, we cannot see what there is in the text which makes her a mother, so as to make her the legal guardian.

Sir William Macnaghten nowhere in the text of his work says that the step-mother is the legal guardian. But after saying in page 103 "when the father is dead, the "mother may assume the guardianship," he adds in a foot-note "and this has been "held to include the step-mother," referring as his authority to the case in the Bombay reports which we have already mentioned. There is no expression of any opinion of his own as to the soundness of the decision in the Bombay case—which, therefore, remains unsupported so far as Macnaghten is concerned.

There is a case in the Sudder Court of the North-Western Provinces (Nunkoo Lal *versus* Mussamut Sohodra, Decisions for 1847, p. 115) in which a single Judge held that the step-mother was the legal guardian in preference to the paternal uncle. This case, however, is of but little value. No authority is quoted, and all we gather from the report is that the point was "determined by the *vyavastha* of the Law Officer, which declares the step-mother to be the legal guardian of the minor, even though the parents of the said minor child have made him over to the paternal uncle."

In the Vyavastha Durpana, page 563, it is stated that the step-mother is the legal guardian on failure of the father. But the only authority quoted in support of this position is the reference contained in the note at the foot of page 103 of Macnaghten's Hindoo Law to the Bombay decision of 1821.

These are the only direct authorities which have been brought to our notice in support of the right of the step-mother, and we confess that we attach but little weight to any of them. On general grounds it is argued that the step-mother ought to have the preference, as she is not excluded by the Hindoo Law expressly, and as she is the father's wife, and is more closely connected than any one else with the father, and is in all respects the person most likely to carry out his wishes and attend to the welfare of his children. Looking at the case in this point of view, we have no hesitation in saying that, as a rule, we should in this country expect the minor to be better cared for, and his property to be better managed by the grandmother than by the step-mother, especially if, as in the present instance, the step-

mother is herself only two or three years older than the minor. As to any claim to the guardianship by reason of being the father's wife independently of being the minor's step-mother (if it be possible to consider the one character as apart from the other), we think that it is not merely because she is the father's wife that the guardianship can be held to devolve on the step-mother in preference to the paternal grandmother. Whatever the position of step-mother may be, no separate position as father's wife is, so far as we know, recognized by Hindoo Law, except possibly as regards maintenance which must be allowed by the son out of the inheritance to his step-mother and certain other relatives.

It rests with the sovereign to take care of the infant and his property, and to appoint a guardian for the purpose (Manu, Chapter VIII., verse 27; Colebrooke's Digest (Madras Ed), II. 574, 575). It belongs to the Courts as representing the sovereign to protect the rights of the minor. There is very little in the Hindoo Law on the subject; and the Courts, when no distinct rule is to be found, must exercise their discretion as may be most advantageous for the interests of the minor, being guided by such principles of Hindoo Law as may be applicable to the case, and selecting at the same time the fittest among the minor's relations, if there be suitable persons of that class. The practice has always been to give the preference to the father, then to the mother (whose right, as indeed also the right of the father and others, though long and, we may say, universally acknowledged, is one of practice rather than positive law. Colebrooke's Digest, Madras Edition, II. 576), and after the mother to the male paternal relations.* Whether the defendant, Gunga Narain Deo, as nearest male paternal relative, might not claim the guardianship, we need not now decide, for he practically waives all his rights (if any) in favor of the grandmother, leaving the question an open one between the grandmother and the plaintiff.

* Macnaghten's Hindoo Law, I. 103, 104.
Strange's Hindoo Law, I. 70, 71.
Vyavastha Durpana, 561, 562.

It appears to us that the paternal grandmother is a relative of the minor's, more fitting, as a rule, to be selected as guardian than is the step-mother, because we are of opinion that her appointment as guardian is the more likely to be for the minor's interests, and is the appointment most in accordance with the general principles of Hindoo Law. When we findt hat under no circumstances can a step-mother inherit from her step-son (*see* the case referred to above, Weekly Reporter, Full Bench, 173), and that on partition the step-mother does not get a share, because she is not included in the term "mother" (Dyabhaga, Chap. III., Section 2, Clauses 29, 30), and when we find that the grandmother can inherit from her grandson (a point as to which there can be no dispute, and on which it is therefore unnecessary to refer to authorities), we cannot but come to the conclusion that, according to Hindoo Law, the connection between the paternal grandmother and her grandchild is to be deemed closer than the connection between the child and its step-mother. Blood relationship, especially on the father's side, is usually preferred by Hindoo Law. In the case of the paternal grandmother, we have that relationship: in the case of the step-mother, we have it not.

We hold, therefore, that the grandmother has a right to the guardianship of the minor in preference to the plaintiff; and that, in the present case, the grandmother (with the assent of Gunga Narain Deo, if not without it) has the right of disposing of the minor in marriage.

It has been contended that, even supposing the plaintiff has not in strict law the right to claim to be guardian or to dispose of the minor in marriage, still the case as set forth in the plaint has not been properly tried, and ought to be remanded. It is true the plaint alleges that, before the marriage-contract was entered into, the preliminaries of which are said to have been celebrated by the direction of the defendants, the preliminary ceremonies connected with a prior contract negotiated by the plaintiff had been performed; and it is further alleged that there will be disgrace to the family and other inconvenient consequences to the plaintiff if the first contract be not carried out. But the Lower Appellate Court finds as a fact that no valid marriage has yet taken place. And we do not think that a suit will lie by the plaintiff suing on her own behalf to enforce one marriage-contract, and to prevent the celebration of a marriage under a different contract not in itself illegal, merely on the general ground of personal inconvenience or disgrace to the plaintiff or her family.

As regards the allegations in the plaint that the plaintiff entered into the contract

with Aiswaj Narain Singh, with the consent of the grandmother and Gunga Narain Deo, no issue was raised on this point in the Lower Courts, and it evidently was not considered by any of the parties to be one of material questions in dispute. On the whole, therefore, we see no cause for remanding the case.

In coming to the conclusion at which we have arrived, we have wholly kept out of our consideration the supposed wishes of the minor herself. She is said to have been examined under a commission, but there are many grave objections to the return to that commission. Taking, however, the view which we take of the plaintiff's rights, it is unnecessary for us to go into this part of the case more particularly.

In deciding as we have done in favor of the right of the grandmother, we have the satisfaction of knowing (for it appears in the written statement of the grandmother, and is not contradicted or made the subject of a formal issue) that the grandmother is in fact the person who has throughout acted as the guardian of the minor, who appears to have been at all times, as she is now, under her charge and living with her.

As to any question of the comparative merits of the aspirants (neither of them in themselves legally ineligible) to the minor's hand, no Court can enter upon the merits of any such issue, for very obvious reasons.

We declare that the grandmother, with the assent of Gunga Narain Deo, has the right of giving the minor in marriage; and that neither the plaintiff, nor the step-grandmother, has any right to interfere in the matter.

The order of the Lower Appellate Court is amended accordingly, and the parties will respectively bear their own costs of all the proceedings in this Court.

Of course, the stay of execution will be removed.

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The 3rd April 1867.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

Remand (Effect of order of)—Section 354, Act VIII. of 1859 (Trial of additional issues).

Case No. 3193 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 27th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 29th July 1864.

Kebul Kishen Muzoomdar (Defendant), *Appellant,*

versus

Mussamut Ambala (Plaintiff), *Respondent.*

Mr. J. S. Rochfort for Appellant.

Baboos Greeja Sunkur Muzoomdar and *Sreenath Banerjee* for Respondent.

An order of remand to a Lower Appellate Court implies a reversal of the first judgment of that Court. Section 354, Act VIII. of 1859 (relating to the trial of additional issues), is only applicable to Courts hearing regular and not special appeals.

Jackson, J.—It appears to us that the judgment of the Lower Appellate Court is erroneous. The plaintiff's case was this. There was a decree obtained against one Ram Tunnoo, and the party entitled proceeded to execute that decree. Intermediately, it appears, Ram Tunnoo died, leaving a widow named Huro Soonduree and a nephew named Kewul Kishore. In execution of that decree, certain landed property was attached under the law in force previously to Act VIII. of 1859. On the attachment taking place, Kewul Kishore came up with an objection before the Court executing the decree, and alleged that the property was his and in his possession. That objection was enquired into and disallowed, and the property was

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sold and purchased by a person who afterwards sold his rights to the present plaintiff. The attachment and the objection by Kewul Kishore, and the adjudication on that objection, all took place in the year 1853. The sale took place on the 3rd January 1854. This plaintiff instituted his suit on the 30th December 1863, alleging that his vendor had acquired a right to the property by the sale in execution, and by the disallowing of the defendant's objection: and he asked the Court to confirm the sale and to put him into possession. The case, after a decision by the Court of first instance, came before the Principal Sudder Ameen, who gave a decree against the defendant. The defendant appealing to this Court, the Court (Norman and Campbell, JJ.) recorded the following order: "It is quite clear that "this case must go back to the Principal "Sudder Ameen, who will take it up and "record a distinct finding upon the issues of "limitation." Upon that order the case went back to the Principal Sudder Ameen, and he has found that the plaintiff's cause of action arose upon the date of the order disallowing the defendant's objection, and that, consequently, his suit, which was brought within 12 years from the date of that order, is in good time, and not barred by limitation.

Against this decision, the defendant once more appeals specially.

It is quite clear that the Lower Appellate Court was wrong in holding that the period of limitation was to be computed from the date of the order disallowing the defendant's objection. The plaintiff, it will be observed, never alleged that he or his immediate vendor had been in possession of the property. He simply set up a sale and the disallowance of the defendant's objection. The defendant, on the other hand, objected that neither the plaintiff, nor any person under whom he claimed, had been in possession within the period of 12 years. That at least is the effect of his answer. That being so, it was thrown upon the plaintiff to show that he, or his vendor, or any other person under whom he claimed, had been in possession within 12 years.

The special respondent contends that he is in possession of a finding of the Lower Appellate Court recorded at the first hearing of the appeal; that such finding is still in force; and that consequently it is not open to this Court to go into that question.

Upon this contention it is necessary for us to determine what was the precise effect of the order of this Court when the special appeal was first before it. It appears to us that the order was in fact an order of remand, and that implied in that order is the reversal of the first judgment of the Lower Appellate Court. It could not be an order under Section 354 merely remitting the case for trial of an additional issue, for that is a Section only applicable to Courts hearing regular appeals which have authority to consider finding under such orders, and to determine the appeal on questions both of fact and law. This consequently was an order of remand, and we must hold that the decision of the first Appellate Court was in fact reversed, and cannot be made use of by the respondent. It appears to us that it would be inequitable at once to dismiss plaintiff's suit where the Lower Court has clearly misapprehended the point on which its decision ought to have turned. We think that justice will be best served by once more remanding the case, reversing the decision that has been passed, and directing the Lower Appellate Court to try the issue whether the plaintiff or any person under whom he claims has been in possession of the property within 12 years next preceding the suit.

The 3rd April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Sale in execution of decree—Section 14, Act XIV. of 1859.

Case No. 322 of 1866.

Regular Appeal from a decision passed by the Officiating Principal Sudder Ameen of Shahabad, dated the 27th July 1866.

Sheo Narain and others (Defendants), *Appellants,*

versus

Jhoogul Kishen Ram (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellants.

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Respondent.

Suit laid at Rupees 6,878-6-5.

Suit by purchaser of a share of a decree for his portion of the decretal money by the sale of a share of the property of the judgment-debtors, against the auction-purchasers of the same property at a sale, in satisfaction of other shares of the same decree—HELD that the defendants could plead limitation, and that the plaintiff was not entitled to the benefit of Section 14, Act XIV. of 1859, which refers to *suits* only, and not to summary applications or proceedings in execution.

Glover, J.—THE plaintiff, in this case, purchaser of a 6-annas 4-pie share of a decree, passed against Akoree Ram, Rucha Singh, and another in 1848, sues to recover the amount of his portion of the decretal money, *viz.*, Rupees 6,878-6-5 (including interest and costs), by the sale of a two-third share of Mouzah Chuckeryah, the property of the judgment-debtors. He sues, further, to have a miscellaneous order of the Principal Sudder Ameen refusing his petition for the sale cancelled.

The defendants are auction-purchasers of the mouzah in question at a sale in satisfaction of other shares of the same decree; and for the purposes of this appeal it will be sufficient to say that they object to the plaintiff's claim as barred by the Statute of Limitations.

The original decree was upon a bond which admittedly hypothecated the Mouzah Chuckeryah as security for the money lent; but the decree itself was a simple money-decree, and in accordance with the Full Bench Ruling of this Court in the case of Goopeenath Singh, Defendant, Appellant, *versus* Sheo Suhaye Singh, 1 Weekly Reporter 315, the plaintiff was declared unable to follow the hypothecated property against the parties in possession under the auction-purchase, without first proving his lien by a regular suit.

The decree itself was destroyed by the mutineers in 1857; but there was admittedly an application on the part of the judgment-debtor on the 1st of December 1856, admitting the judgment, praying for time to pay the money, and pledging the Mouzah Chuckeryah as security.

As the appellant comes up to this Court on the plea of limitation, it will be convenient to consider his argument first.

In support of it, he quotes a decision of this Court in the case of Seetul Singh and others, Defendants, Appellants, *versus* Baboo Sooruj Buksh (6 Weekly Reporter 318), in which it is laid down that a party having a lien on property as security for a loan must obtain a decree both for the money and for the realization of it by the sale of the property within six years and three years respectively of the date on which the money became due, according as the bond was or was not registered.

And with reference to this decision, which appears to be on all fours with the present case, the defendant argues that, as the bond must have been anterior in date to 1848, the year in which the decree was given, the claim is barred; that, even assuming the judgment-debtor's petition of 1856 to be a fresh starting point for the plaintiff, he is equally beyond the furthest period, *viz.*, six years allowed by law, this suit not having been brought till the 7th of June 1866.

Mr. Allan for the respondent contends

(1.) That the petition of 1856 must be looked upon in the same light as a decree in a regular suit, by which Mouzah Chuckeryah was hypothecated for the money due; and that, as there is no question that the respondent has taken continual proceedings to have the estate sold from that time to the present, he has kept his decree alive, and no question of limitation can arise.

(2.) That, if the petition of 1856 be considered only as a fresh cause of action to the respondent, he is entitled, under Section 14, Act XIV. of 1859, to a deduction of the time during which he has been *bond fide* prosecuting his claim in a wrong Court, and that he is, therefore, still within time; and

(3.) That the appellants being in the same position as the respondent, *viz.*, a purchaser of a share of the same original decree, cannot plead limitation against him.

We will take the last objection first, and, with reference to it, observe that the parties to this suit cannot be held to be in the same position. Appellants bought at auction the rights and interests of the defaulting judgment-debtors, which were sold in satisfaction of a decree obtained by Heera. Heera, no doubt, was a shareholder in the original decree, and so far in the same category as the present appellants; but the right sold was not Heera's right, but that of the judgment-debtors, and the appellants now occupy the position of those judgment-debtors. It cannot be contended that these parties would have been precluded from pleading limitation against their judgment-creditors, had the latter neglected to take out execution within time; and we do not understand how the appellants are prevented from doing so. The respondent's argument proceeds on the mistaken assumption that he and the

appellants are in the same position as joint sharers in a decree by which the Mouzah Chuckeryah was hypothecated.

With regard to the first objection, we altogether dissent from the proposition that the petition of 1856 is to be looked at as a decree in a regular suit. If it were so, it was obviously unnecessary to bring the present suit; indeed, this suit would then be a second one on a cause of action already determined, and be therefore inadmissible.

The utmost it could prove (supposing there to be no evidence of the first hypothecation) would be that the judgment-debtor in 1856, by his own admission, gave his creditor a further and particular security for his money, and, by so doing, allowed a fresh starting point from which to sue for the sale of it.

And granting, for the sake of argument, that there is no proof on the record of any prior hypothecation, the plaintiff would, by law, be obliged to bring a regular suit for the sale of the mortgaged property within six years of the date of the petition of 1856, supposing the original bond to have been registered (of which there is neither allegation nor proof), and the period of limitation would expire in 1862, four years before the institution of the present suit.

Then, as to the allowance of time under Section 14, Act XIV. of 1859, the respondent contends that the law which forbids the holder of a money-decree to follow property pledged to him under a bond by a miscellaneous proceeding, and obliges him to institute a regular suit, has only recently been settled; that he has been endeavouring for many years *bond fide* to get his rights by summary applications to the Principal Sudder Ameen, without any objection being taken by the appellants; and that, therefore, he is entitled to indulgence. He refers the Court to a decision of the Privy Council, Doorga Pershad Roy, Appellant, *versus* Tara Pershad Roy, Respondent, 8 Moore's Indian Appeals 308,* in support of his argument.

On this precedent it is only necessary for us to observe that the principal reason for taking the case out of the Statute of Limitations was that the cause of action did not arise as stated. Here there is no such question involved, for whether the plaintiff's cause of action arose in or before 1848, when the original bond was executed, for in 1856, when the petition for time was filed, he is still beyond time, unless he can get the benefit of Section 14.

Now, this Section refers to *suits* only. The words are "shall have been engaged in prosecuting a suit," and we do not consider that petitions in the Miscellaneous Department can be properly styled suits in the sense of the regulation. The relief, it appears to us, can only be granted where a regular suit has been wrongly brought in a Court that had no jurisdiction to try it, as in the case of a plaintiff seeking to recover a debt of 10,000 rupees and filing his plaint ignorantly but *bond fide* in the Court of a Moonsiff.

Moreover, even if summary applications can be in any sense styled suits, it is clear that the applications relied on in this case were "proceedings in execution," and it has been held by the High Court (Gossain Doss Day *versus* Khetturnath Dey, 4 Weekly Reporter, Miscellaneous Appeals, 18) that Section 14 does not apply to cases of execution.

Taking the case, therefore, from the respondent's own starting point, *viz.*, 1st December 1856, we think that his claim is barred, and that the precedent of the 10th December 1866 applies.

But we also think it amply proved that the first hypothecation took place some time before 1848 under the original bond, and that the respondent could not date his cause of action from 1856. Under the circumstances, however, it is unnecessary for us to go into this point further.

The appeal is decreed, and the order of the Principal Sudder Ameen reversed with costs.

The 3rd April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Section 204, Act VIII. of 1859—Execution of decree—Sureties.

Case No. 749 of 1866.

*Application for review of judgment passed by the Hon'ble Justices Loch and Macpherson on the 20th July 1866 in Miscellaneous Appeal No. 324 of 1866.**

Baboo Ram Kishen Doss and others (Decree-holders), *Petitioners,*

versus

Hurkhoo Sing (Judgment-debtor), *Opposite Party.*

* *See* also 3 Weekly Reporter, p. 11.

* *See* 6 Weekly Reporter, Miscellaneous Rulings, p. 44.

Mr. C. Gregory and *Baboo Poorno Chunder Shome* for Petitioners.

Baboos Kishen Succa Mookerjee and *Taruck-nath Sein* for Opposite Party.

Section 204, Act VIII. of 1859, applies to cases such as that of parties who become sureties under Section 76 or Section 83, but not to parties who become securities after a decree is passed.

Loch, J.—If Section 204 is applicable to a case of this kind, we think that the petitioners have certainly taken steps to keep their decree alive against the sureties, as well as against the original judgment-debtors; but we do not think that the provisions of Section 204 can be applied to the case of a party who becomes security after a decree is passed. The provisions of that Section apply to cases such as that of parties who become sureties under Section 76 or Section 83 of the Code, and not to parties who, as in this instance, agreed, after the decree was passed, to stand security for the payment of the debt if the judgment-debtors were unable to liquidate it. Under this view of the law, we see no grounds for allowing a review of our former judgment, and dismiss this application with costs.

The 3rd April 1867.

Present:

The Hon'ble G. Loch and L. S. Jackson.
Judges.

Limitation—Execution of decree—Sections 20 and 21, Act XIV. of 1859.

Case No. 743 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 19th May 1866, reversing an order passed by the Moonsiff of that District, dated the 22nd February 1866.

Nowaraja Chowdry and others (Decree-holders), *Appellants*,

versus

Ramkanaye Doss and others (Judgment-debtors), *Respondents*.

Baboo Gopal Lal Mitter for Appellants.

Baboo Nil Monee Sein for Respondents.

It is not necessary, under Sections 20 and 21, Act XIV. of 1859, that process of attachment should have been taken out within 3 years; but, in order to determine whether execution is barred or not, it must be seen whether, at the time of application to execute next after the passing of the Act, any portion of the time theretofore limited by law for issuing process of execution still remains, unless these three years from the passing of the Act have already expired.

Jackson, J.—The Judge holds execution of the decree in this case to be barred, because no process of attachment had been taken out within three years from the 5th May 1859, the decree being one which was in force at the time of the passing of Act XIV. of 1859.

It is not necessary under the terms of Section 20 (modified in these cases by Section 21) of the Act, that *process of attachment* should have been taken out within three years; but it must be seen whether, at the time of application to execute next after the passing of the Act, any portion of the time theretofore limited by law for issuing process of execution still remained (unless these three years from the passing of the Act had already expired). If the three years had expired, or if the twelve years previously allowed had run out, then the execution was barred, otherwise process of execution might be issued; and if the applicant did all that he was bound to do in pursuance of his application, the Court would be bound to issue process, and, if it failed to do so, the applicant would not be in default.

But it was not intended that, where the decree-holder had made such application within the time allowed in Section 21, subsequent applications were to be barred, because they were after three years, or because attachment had not actually followed. In such a case the rule in Section 20 would come into effect, and the Court would have to enquire whether any proceeding had been taken within three years next preceding the application.

In the present case it is quite clear that the applicant made repeated applications within three years from the passing of the Act, and also it seems within the period of twelve years according to the old law, and that he was simply prevented from taking effectual steps by the dilatory and most unsatisfactory proceedings of the Court itself. It would be monstrous to say that execution was barred in such a case as the present, and we set aside the orders of both the Lower Courts, and decree the special appellant entitled to execute his decree.

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The 4th April 1867.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal—Remand.

Case No. 2615 of 1866.

Special Appeal from a decision passed by Mr. H. C. Richardson, Judge of Tirhoot, dated the 6th August 1866, reversing a decision passed by Moulvie Mahomed Mahmood, Moonsiff of Nasirnuggur, dated the 4th April 1866.

Mussamut Kurumoonissa Bibee and others (Defendants), *Appellants,*

versus

Gooroo Pershad Shah and others (Plaintiffs), *Respondents.*

Messrs. J. Cochrane and *R. T. Allan* and *Baboo Obhoy Churn Bose* for Appellants.

Mr. R. V. Doyne and *Baboos Greesh Chunder Ghose* and *Rajendurnath Bose* for Respondents.

Where the first Court held a suit barred by limitation and on the ground of *res judicata*, and the Lower Appellate Court (in reversal of that Court's judgment) remanded the case for trial on its merits—HELD that an appeal lay from the Lower Appellate Court's order of remand.

Loch, J.—THIS suit was brought by plaintiffs to obtain possession of certain property alleged to have been purchased by them from Nuzur Ali, Tumeeza Bibee, and Shumsoolnissa Bibee, and to set aside a kabinamah of 9th Bysack 1256, and a decree of 12th August 1861, held by the defendant, Kurumoonissa, as fraudulently obtained.

The defendant Kurumoonissa Bibee pleaded that she received the kabinamah from her husband Nuzur Ali; that, on a previous occasion, she sued to obtain possession of the property covered by the kabinamah, which also forms the subject of litigation in the present suit, and obtained a decree on 12th August 1861; that Nuzur Ali, Tumeeza Bibee, and Gooroo Pershad Shah, one of the plaintiffs in this suit, were parties to that suit; that the other plaintiffs in this suit derive their title from Nuzur Ali and Tumeeza Bibee, the defendants in that suit; that, consequently, the question now before the Court has already been disposed of, and the present suit cannot be heard under the provisions of Section 2, Act VIII. of 1859; and, further, the suit is barred by limitation, more than 12 years having elapsed since the date of the kabinamah which her husband Nuzur Ali admitted in the former suit that he had executed in her favor.

The first Court held the present suit to be barred on both grounds taken by the defendant; but, on appeal, the Judge reversed the judgment of the Lower Court, and remanded the case for trial on its merits.

A special appeal has been preferred from the order of the Judge, to the hearing of which a preliminary objection was taken by the Counsel for the respondent. He urged that no appeal could lie from the order of remand, as it was not a final decision of the suit; and he quoted an order passed by Mr. Justice L. Jackson of 1st March 1867,* refusing to admit a petition of appeal from the judgment of a Lower Court disposing of one of the issues raised in a case on the ground that there had been no decree and no determination of the suit. The case before Mr. Justice Jackson is clearly distinguishable from the present case; and from the Full Bench precedents of 1 Weekly Reporter, page 51, 5 Weekly Reporter, page 91, and 6 Weekly Reporter, page 61, Civil Rulings, we have no doubt that this appeal as now brought can be heard and disposed of by us.

It is necessary, for the better understanding of this case, to give the dates of certain deeds of sale and other documents and proceedings. The plaintiffs in this case are Gooroo Pershad Shah, Goburdhun, and Ram Dhun, and they allege that they bought on different dates, from Nuzur Ali, Tumeeza, and Shumsoolnissa, 4-annas and 10-gundahs share of the property alleged by defendant to be covered by her kabinamah.

On 14th Kartick 1265, Nuzur Ali, the husband of Kurumoonissa, Mussamut Tumeeza, the mother, and Shumsoolnissa, the sister of Nuzur Ali, sold one anna of the property in dispute to Gooroo Pershad Shah.

On 13th Jeit 1269, Tumeeza Bibee sold 10 gundahs to Ramdhun Shah.

On 10th Aghraun 1269, Shumsoolnissa sold 10 gundahs to Goburdhun.

On 17th Bysack 1270, Nuzur Ali sold 12½ gundahs to the three plaintiffs in the name of one servant, and 12½ gundahs in the name of another servant.

On a subsequent date not given, Shumsoolnissa sold 1 anna 2½ cowrees to Ramdhun, and Tumeeza sold 2 cowrees to the same party.

The kabinama, upon which Kurumoonissa bases her claim, is dated 9th Bysack 1256

* *See* 7 Weekly Reporter, p. 222.

(1849); and the decree in the suit in which she was successful against her husband and his mother, and the plaintiff Gooroo Pershad, is dated 12th August 1861. In that suit she claimed under the kabinamah, and the defendants denied her title and possession. Nuzur Ali, however, subsequently admitted that he had executed the kabinamah, and a decree in consequence of this admission was passed in favor of Kurumoonissa, to which neither at the time, nor subsequently by appeal, did the other defendants Tumeeza and Gooroo Pershad raise any objection.

Another suit brought by one Gunesh against Nuzur Ali for debt, and Kurumoonissa, to set aside the kabinamah, was decided in favor of the defendant on 13th May 1862, when it was held that the deed of gift to Kurumoonissa was good, that the suit was barred by limitation, and also because the genuineness of that instrument had already been determined in a previous suit.

The objections taken by the special appellants in this Court to the order passed by the Judge are: *1st*, limitation; and, *2nd*, *res adjudicata*. With regard to the *first* point, it is urged that the present action is out of time, inasmuch as it has not been brought within 12 years from the date of the defendant's kabinamah; and on the *second* point, it is urged that the suit disposed of on 12th August 1861 is binding upon the plaintiff Gooroo Pershad, who was a party to that suit, as well as upon the other defendants in that suit, in which the right of Kurumoonissa to hold this property under the kabinamah was decreed, and that the other plaintiffs in this suit are equally concluded with Gooroo Pershad by the decree in the former suit, because they derive their title from Nuzur Ali and Tumeeza Bibee, the defendants in that suit.

On the other hand, it is urged that the decree in the former suit was collusively obtained by Kurumoonissa and her husband, Nuzur Ali, the one being plaintiff, and the other defendant; that the decree was given on the admission of Nuzur Ali only, who, having sold one anna of the property to Gooroo Pershad, and having denied the title of Kurumoonissa to any part of the property, turned round in order to defraud his vendee, and admitted that he had executed the kabinamah; that no adjudication as to the genuineness of that instrument took place, and it was not produced at the trial, and the object of the present suit is to set aside the decree obtained by Kurumoonissa as collusive; that the other decision quoted by the special appellants does not bind the plaintiffs, as they were not parties to it; and, further, that Shumsoolnissa, one of their vendors, was not a party to either of the above cases, and, as regards her share, they cannot be held to be concluded by the former judgments.

The judgment of 12th August 1861 has been read to us, and it is clear that the genuineness of the kabinamah was not tried in that case, even if it were produced, and that the decree was based on the admission of Nuzur Ali. It is true that no appeal was preferred by the other defendants from that judgment, and their silence looks like acquiescence in the judgment, and may render it difficult for the plaintiffs in the present case to show that the decree was collusively obtained. But as the object of the present suit, so we are informed, is to set aside that decree as collusively obtained, we think the case must be allowed to proceed, the plea of collusion being disposed of in the first instance. We do not think the suit is barred by limitation. The plea of limitation might be a good one against Nuzur Ali, who admits that he executed the kabinamah; but it is not good against subsequent innocent purchasers who were not aware of the existence of such a deed. We think, therefore, that the Judge's order of remand is correct, and we dismiss this appeal with costs.

The 4th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Recovery of possession—Limitation.

Case No. 2739 of 1866.

Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 12th July 1866, affirming a decision passed Baboo Mohesh Chunder Sein, Sudder Ameen of that District, dated the 27th March 1865.

Ameer Bibee and others (Defendants), *Appellants,*

versus

Tukroonissa Begum (Plaintiff) and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Otool Chunder Mookerjee for Respondents.

Long anterior possession only, without proof of title, cannot avail a plaintiff suing to recover possession after ouster, if he has failed to sue within 6 months of the alleged ouster as prescribed by Section 15, Act XIV. of 1859.

Glover, J.—THIS was a suit to recover possession of certain land, with damages for injury done to a house built thereon.

The plaintiff states that he purchased a one-and-a-half-anna share in the property through one Shumboo Chunder, who derived his title from Noor Jan Bibee, the wife of Muneeooddeen; Muneeooddeen having bought it originally from Sabir Bibee in 1249 B. S.

The dispossession complained of was caused by the defendant's turning plaintiff out of the house, and pulling down part of the building itself, and it occurred in the year 1268 B. S.

The suit for recovery was brought in 1864, or 1271 B. S.

The defence was "limitation." The plaintiff's title, it was contended, was declared invalid in a summary proceeding before the Principal Sudder Ameen in 1846, in which the defendant's husband had sued Sabir Bibee under Regulation II. of 1806, and in which Muneeooddeen with others, his brothers and sisters, intervened, declaring that the property was his under a kubalah, dated 1249.

This decision of the Principal Sudder Ameen adverse to plaintiff's vendor, given in 1846, never having been reversed within the time allowed by law, was conclusive against plaintiff's title, and cannot now be controverted. On the merits, defendant pleaded that the house and land were her ancestral property.

The first Court decreed for the plaintiff, on the ground that his title had been established in a previous suit in 1865, and the Judge, on appeal, confirmed that order.

The case then came up in special appeal to this Court, and was remanded for a distinct finding on the issue of limitation.

The Judge has now found that the plaintiff is not barred, and that his title and possession are established.

He has decided the first point on the ground that the order in the Regulation II. of 1806 case lost its effect through the decision of 1865.

We are at a loss to understand the Lower Appellate Court's reasoning on this point. The suit decided in 1865 was brought by the special appellant's husband against the special respondent on the ground of purchase from Sabir Bibee, and was given against him, because the agency of the mooktear, who concluded the sale, had previously determined by the death of his principal Sabir Bibee; and whatever effect this decision might have had as against the plaintiff in that suit, it clearly could have had none in determining the right of the plaintiff in this case, which had previously been decided adversely to her vendor Muneeooddeen in the suit of 1846, on the ground that his kubalah was false.

The case remains precisely where it was, *viz.*, that the person through whom the plaintiff claims was declared in 1846 to have no title to the property, and that decision not having been contested by a regular suit within one year would be final and conclusive, the parties to it being the same as those now litigating.

Then, with regard to the Judge's finding on the question of title and possession, the special respondent has none, as before observed; and the mere fact of long anterior possession cannot give the plaintiff, suing to recover possession after ouster, a claim on that ground. He must, like any other plaintiff in similar circumstances, prove his title.

And we observe that there is no hardship in his having to do so, for he might, had he chosen, have brought a possessory action under Section 15, Act XIV. of 1859, within six months of the alleged ouster to recover possession, and on proof of his having been dispossessed illegally, he would have been restored to possession, and have been able to plead limitation against whatever title the defendant might have set up. By not doing so, he has lost the benefit long anterior possession would have given him, and must take the consequences. He was, according to his own allegation, ousted in 1268, and did not bring a suit to recover possession till 1271.

We think, therefore, that, under the circumstances of this case, the special respondent out of possession could not recover against the special appellant in possession, without first proving her title to the property; and that, as she confessedly has no title (the order of 1846 being final), her case is remediless.

We decree the appeal, and reverse the Judge's order with costs on special respondent.

The 4th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Oral evidence (to vary written contract).

Case No. 3317 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 24th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 4th February 1865.

Mussamut Ramdee Koonwaree and another (Defendants), *Appellants,*

versus

Baboo Shib Dyal Singh (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboos Chunder Madhub Ghose and *Kalee Kishen Sein* for Respondent.

In a suit by a husband against his wife, to recover property alleged to have been nominally sold by him to her, oral evidence was not allowed to be admitted to prove that no consideration ever passed between them, after he had solemnly in a written document admitted that it had passed.

Glover, J.—This was a suit by a husband (special respondent in this case) to recover certain landed property which he stated that he had nominally sold to his wife, the defendant. He alleged that the sale was a sham one made "maslahattan" for the purpose of expediency, inasmuch as he was at the time leading a wild life, and would probably have wasted all his substance had he retained it in his own power. His wife now refuses to return him his property. Hence this suit.

The wife alleges out-and-out purchase under a kubalah, and full payment of consideration from her streedhun.

Both Lower Courts have held that no consideration passed, and that the plaintiff was, therefore, entitled to recover.

The point taken in special appeal is that parol evidence cannot be admitted to vary the express terms of a written agreement, and the Full Bench Ruling of this Court in the case of Kasheenath Chatterjee *versus* Chundee Churn Banerjee, 5 Weekly Reporter 68, is quoted.

This contention must be allowed. The kubalah filed by the defendant, which the plaintiff does not deny, admits on the part of the husband in express terms that the land was made over to the wife, and the consideration-money paid by her; and with advertence to the general rule of law as explained in the decision above referred to, we are of opinion that the special respondent cannot now bring oral evidence to prove that no consideration ever passed between himself and his wife, after having solemnly, and in a written document, admitted that *it had* passed. He is bound by his own deliberate act, and must take all the consequences of his own fraud.

The special appeal is, therefore, decreed, and the Principal Sudder Ameen's order reversed with costs.

The 4th April 1867.

Present :

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Registration—Kubooleut.

Case No. 2869 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 30th August 1866, affirming a decision passed by the Deputy Collector of that District, dated the 19th May 1866.

Syud Reza Ali (Plaintiff), *Appellant,*

versus

Bhikun Khan (Defendant), *Respondent.*

Mr. C. Gregory for Appellant.

No one for Respondent.

In a suit for rent, where the defendant admitted the plaintiff's right as landlord, and did not dispute the correctness of the rent, but pleaded payment, the non-registration of the kubooleut, filed by the plaintiff, was held to be no ground for dismissing the suit, which could have proceeded whether the kubooleut was or was not produced, the time for raising the objection as to non-registration being only when the kubooleut was tendered in evidence upon any disputed point.

Loch, J.—This case has been dismissed by the Lower Courts, because the kubooleut filed by the plaintiff was not registered under the provisions of Act XVI. of 1864; but, as the defendant admitted the plaintiff's right as landlord, and did not dispute the correctness of the rent, but pleaded payment of the rent sought to be recovered, the fact that the kubooleut was not registered was not a sufficient ground for dismissing the suit, which could have proceeded under the pleadings in this case whether the kubooleut was or was not produced. We remand the case to the first Court for trial on the merits.

Jackson, J.—I concur. The objection as to non-registration of the kubooleut would only arise when the document was tendered in evidence upon any disputed point. When the sole matter on which the parties were at issue was that of payment, it was unnecessary to tender the kubooleut, and the suit would not be affected.

The 4th April 1867.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Agent—Sale—Joint Hindoo Family—Estoppel.

Case No. 2856 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Cuttack, dated the 28th July 1866, affirming a decision passed by the Moonsiff of Dhamnuggur, dated the 16th November 1865.

Bhujonanud Mytee and others (Plaintiffs), *Appellants,*

versus

Radha Churn Mytee and others (Defendants), *Respondents.*

Baboos Mohendro Lal Shome and *Taruck-nath Sein* for Appellants.

Mr. C. Gregory and *Baboo Roopnath Banerjee* for Respondents.

A man's agent for the purchase of an estate is not necessarily his agent to re-convey the same.

Thus, where one member of an undivided Hindoo family, with the authority of his brothers, purchased a share in certain property, and afterwards (without any authority from them) cancelled the sale, received back the consideration-money, and surrendered the kubalah—HELD that the brothers were not estopped from suing the parties in possession of the whole property to set aside what the single brother had done, and to obtain possession of the share in question.

Jackson, J.—THE plaintiffs in this case alleged that they, being members of an undivided Hindoo family, authorized their brother, Radha Churn, to purchase, on behalf of the brothers, a 4-annas share in a certain property, and he made the purchase accordingly; that subsequently, without any authority from them, he cancelled the sale, received back the consideration-money, and surrendered the kubalah. They consequently sued the parties in possession of the 16 annas to set aside what the brother had done, and to obtain possession of the 4 annas.

The Moonsiff dismissed the suit, and the plaintiffs appealed. On hearing the appeal, the Principal Sudder Ameen was of opinion that, as the brothers had allowed Radha Churn to buy the property, and had further permitted him to bring a suit in his sole name for its recovery, they had constituted him their agent, and were bound by his acts. He, therefore, considered that they had mistaken their remedy, that they ought to have sued Radha Churn for damages, and that the present suit could not be maintained.

In special appeal it is submitted that this ruling is not good in law.

None of the defendants have appeared, except two persons, named Bissonath and Radha Sham, who have purchased 5 annas of the same property from the original vendor, but who have no concern with the plaintiff's claim for a separate 4-annas share.

We think the Principal Sudder Ameen's decision clearly erroneous. A man's agent for the purchase of an estate is not necessarily his agent to re-convey, nor would the very common incident of one member of a joint Hindoo family suing on behalf of the family constitute him their agent, so that a sale by him would bind the others.

The defendants may have other good defences to the suit into which we cannot at present enter. It is only necessary for us to say that the plaintiffs were not so far bound by their brother's act as to be estopped from maintaining the suit, and were entitled to a decision of their suit on its merits. We remit the case, reversing the judgment of the Court below for this purpose. We make at present no order as to costs.

The 4th April 1867.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Sale by Hindoo Widow.

Case No. 2473 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 31st July 1866, reversing a decision passed by the Moonsiff of Koolneah, dated the 4th July 1865.

Shoobhunkuree Dossee for self and as guardian of Gopal Chunder Bose, minor (Plaintiff), *Appellant,*

versus

Chand Monee Dossee and others (Defendants), *Respondents.*

Baboos Romanath Bose and *Bungshee Buddun Mitter* for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Semble.—A sale by a Hindoo widow for a just debt made in conformity with the Hindoo Law and with the consent of the reversioner may be valid, although the debt creating the necessity for the sale was a debt, not of the ancestor's time, but of the widow's own contracting.

Jackson, J.—We think the special appeal cannot be sustained. The Lower Appellate Court has found that the sale of the property in dispute was made by the widow for just debts in conformity with the Hindoo Law, and, moreover, recites the consent of the reversioner.

The special appellant contends that such sale could not, under any circumstances, be valid, because the debt which created the necessity was a debt, not of the ancestor's time, but of the widow's own contracting.

He is unable to produce any authority for this legal position, and it is not one which we can affirm.

The decision of the Court below must stand, the appeal being dismissed with costs.

The 4th April 1867.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Appeal (Dismissal of)—Pleaders.

Case No. 2847 of 1866.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 27th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th December 1865.

Brojo Soonduree Dossia (Defendant), *Appellant,*

versus

Mr. D. L. Gilmore (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Babu Kalee Kishen Sein for Respondent.

When one of the pleaders for an appellant states his inability to go on with an appeal, the Judge is not bound to send for any other pleader for the appellant, and ask him if he is ready to proceed with the case, but may at once dismiss the appeal.

Loch, J.—There are no grounds for admitting the special appeal. When the pleader for the appellant stated before the Judge that he was not prepared to go on with the case, the Judge was certainly not required to send for any other pleader whom the appellant had appointed to carry on the appeal, and ask him if he were ready to proceed with the case. Not, under such circumstances, was the Judge himself bound to go into the merits of the case. Under Section 349, the Judge is bound to hear the appeal, and, after hearing it, to pronounce judgment; but when the pleader for the appellant tells the Judge that he is unable to go on with the appeal, the only course left to the Judge is to dismiss the appeal. We dismiss this appeal with costs.

The 5th April 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Case No. 385 of 1866.

Limitation—Malikana.

*Application for review of judgment passed by the Hon'ble Justices Bayley and Shumbhoonath Pundit, on the 8th August 1866, in Special Appeal No. 1248 of 1866.**

Mussamut Ozeerun (Defendant), *Respondent, Petitioner,*

versus

Baboo Heeranund Sahoo (Plaintiff), *Appellant, Opposite Party.*

Mr. C. Gregory for Petitioner.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Opposite Party.

A suit for malikana is governed by the limitation prescribed by Clause 13, Section 1, Act XIV. of 1859.

Bayley, J.—The gist of this application for a review of our judgment in special appeal No. 1248 of 1866 is that we are wrong in holding that the cause of action arises from the last date upon which malikana might have been claimed to be paid (*viz.*, within 6 years of suit), and in our application of Clause 16, Section 1, Act XIV. of 1859.

It is pressed on us in argument in support of the application that what should have governed our decision and made it one in favor of defendant, the applicant for review, was the fact found by the Lower Appellate Court, that no payment of malikana had been made by defendant to plaintiff within 12 years of suit; and that, consequently, the

* *See* 6 Weekly Reporter, Civil Rulings, p. 151.

claim of the plaintiff to malikana should have been regarded as any other claim to money brought forward after 12 years had expired before suit, and dismissed accordingly under the ordinary Law of Limitation.

This malikana is not, as we before held, and still hold, rents due which would form a constantly recurring cause of action. It is true that the defendant, applicant for review, was bound to pay the plaintiff a certain sum of money, termed "*malikana*," from the profits of the landed estate. But still this is really a money-payment, and neither rent nor maintenance; in other words, it is to be regarded like a bond or other debt, the non-payment of which, within a certain legal period, bars an action to recover it.

On a re-consideration of the point, and after again hearing Counsel on both sides, we are of opinion that the money sued for is clearly a money-debt charged on the estate, and that, in this view, Clause 13, Section 1, applies. That Section enacts that the suits on such a case shall be brought within 12 years from the death of the parties who hold the estate, "or from the date of "the last payment to the plaintiff, or any "person through whom he claims, by the "person in possession or management of "such property or estate."

Now, clearly by the pleading here, it was alleged by plaintiff and failed to be proved by him that payment was made up to date of plaintiff's father's death by defendant as in possession of such estate.

Now, the date of such death of plaintiff's father being alleged by plaintiff to bring the last payment within 12 years, and it having been found as a fact (with which we cannot interfere in special appeal) that this was not so, we think plaintiff is barred, and, therefore, reversing our former order, we dismiss the plaintiff's special appeal with costs, and affirm the order of the Lower Appellate Court.

The 5th April 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Admission of appeal after time—Power of High Court.

Miscellaneous Appeal from an order passed by Mr. A. Hope, Judge of Sarun, dated the 22nd January 1867, affirming an order passed by Baboo Kedarnath Dutt, Deputy Collector of that District, dated the 29th November 1866.

Raj Coomar Roy (Defendant), *Appellant,*

versus

Shaikh Mahomed Wais and others (Plaintiffs), *Respondents.*

Baboo Rajendronath Bose for Appellant.

No one for Respondents.

It is in the discretion of the Judge to consider whether sufficient cause has been shown for the non-presentation of an appeal in proper time owing to delay on the part of the Collector to whom the appeal was wrongly preferred in the first instance, and the High Court has no authority to interfere with such exercise of discretion by the Judge.

THE petitioner asks the Court to direct the Zillah Judge to receive and to proceed with the appeal which was filed after the time prescribed for the filing of appeals in the Zillah Judge's Court had expired. It appears that the original decision was one which was a decree for rent at an enhanced rate. That being a decision which involved the title of the zemindar to vary the rent of the ryot, the appeal should have gone to the Judge, and not to the Collector. The Collector, after some delay, rejected the appeal, and the petitioner then went to the Zillah Judge, some three weeks in excess of the prescribed period having elapsed. The Zillah Judge observed that great delay had taken place, and that he could not allow the appeal.

The petitioner's vakeel contends that his client was entitled to the deduction of the period during which the appeal was pending in the wrong Court, and he considers that the right is given by analogy to Section 14, Act XIV. of 1859.

It appears to me that the Section cited really has no bearing whatever upon the present case; that it was entirely in the discretion of the Judge to consider whether sufficient cause had or had not been shown for not presenting the appeal within proper time, and that this Court has no authority to interfere with the exercise of this discretion.

The application, therefore, must be refused.

The 5th April 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Special appeal—Order dismissing an appeal—Sections 5 and 6, Act XXIII. of 1861.

Miscellaneous Appeal from an order passed by Mr. F. Tucker, Judge of Dinagepore, dated the 31st December 1866.

Indur Chunder Baboo (Decrée-holder), *Appellant,*

versus

Oozeer Ali Khan (Judgment-debtor), *Respondent.*

Baboo Khetter Mohun Mookerjee for Appellant.

No one for Respondent.

A special appeal lies from an order dismissing an appeal under Sections 5 and 6, Act XXIII. of 1861.

It appears to me that the Deputy Registrar has been mistaken in refusing to receive this appeal, which he supposes to be a case analogous to that reported in 8 Sevestre's Reports, page 633. That was a case where the suit had been dismissed under the provisions of Section 5, Act XXIII. of 1861, and the plaintiff under the 7th Section of the same Act had undertaken to satisfy the Court that there was a sufficient excuse for his not making the deposit. He failed so to satisfy the Court, and the application to restore his appeal was refused. On that it appears to me that no appeal either to the Zillah Court or to this Court lay. In the present case, there was an appeal preferred against an ordinary decision of an inferior Court to the Zillah Judge, and the appellant committed default. Under Section 6, which extends Section 5 to appeals, his appeal was dismissed. He complains of that order as being unwarranted by law, and desires to appeal to this Court. It appears to me that he is entitled to do so. At all events, the case is not governed by the case cited by the Deputy Registrar, and it must be admitted, subject to all exceptions and objections of the respondent.

I may add that the vakeel of the petitioner cites a case directly in favor of the admission of this appeal from the 3 Weekly Reporter, Miscellaneous Appeals, page 23.

The 5th April 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal to Privy Council (Admission of—without registered security-bond).

Rajah Saheb Pershad Sein, *Appellant to England,*

versus

Rajah Rajendro Kishore, *Respondent to England.*

Baboo Kalee Prosunno Dutt for Appellant.

No one for Respondent.

The High Court has no authority to receive a petition of appeal to England tendered without the usual security-bond duly registered, as provided by the 8th rule of the 7th December 1858.

It appears to me that I have no authority to receive a petition of appeal to England, which has been tendered without the usual security-bond duly registered, as provided by the 8th rule of the 7th December 1858.

The petitioner must make his application to the Privy Council.

The 6th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Evidence—Estoppel—Judgments in rem.

Cases Nos. 158 and 226 of 1866.

Regular Appeals from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 12th March 1866.

No. 158.

Kanhya Loll and others (Plaintiffs), *Appellants,*

versus

Radha Churn and others (Defendants), *Respondents.*

Messrs. W. E. Peacock, R. T. Allan, and *R. E. Twidale,* and *Baboos Dwarkanath Mitter, Unnoda Persad Banerjee, Onookool Chunder Mookerjee,* and *Kishen Kishore Ghose* for Appellants.

Baboos Mohesh Chunder Chowdry, Pearee Loll Roy, and *Romesh Chunder Mitter* for Respondents.

(No. 226 is a Cross-Appeal.)

A decision by a Court that a Hindoo family is joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in any particular family, or upon any other question of the same nature in a suit *inter partes*, is not a judgment *in rem* or binding upon strangers (*i. e.*, persons neither parties to the suit nor privies); and a decree in such a case is not admissible as evidence at all against strangers.

No judgment of a Mofussil Court can be a judgment *in rem*.

Per Peacock, C.J., and L. Jackson, J.

By a decree brought by *A* against a widow as heiress of her husband to set aside alienations by her and establish *A*'s right as reversioner, it was declared that *A* was reversioner. Subsequently *B* (who was not a party to the former suit) sued to have it declared that he, and not *A*, was the person legally entitled to succeed on the widow's death. HELD that the judgment in the former suit was not (upon the ground of its having been made in a suit brought against the widow when holding the estate as heiress) admissible as evidence against the plaintiff *B* in the second suit.

The suits to which the Privy Council intended to refer in the Shiva Gunga case (2 W. R. 31 *P. C.*) are suits in which the title of the settlor or the validity of the estate tail has been in issue, and not to suits against the tenant-in-tail in which a question has incidentally arisen and been determined as to who was the remainderman entitled to succeed upon the termination of the estate tail.

This case was referred to a Full Bench by Peacock, C.J., and L. S. Jackson, J., with the following order :—

Referring Order.—It has been contended before us on behalf of the defendants, who are respondents in Regular Appeal No. 158, and who have also filed a separate Appeal No. 226, that the judgment of the 26th September 1853 in favor of Radha Churn in the suit which he brought against Ramnarain's widow was admissible in evidence and conclusive against plaintiff.

First.—Because the plaintiff having intervened, he was substantially a party to the suit.

Secondly.—Because the plaintiff had brought a cross-suit against the defendants.

Thirdly.—Because the suit of Radha Churn was brought against Ramnarain's widow as heir of her deceased husband, and was consequently binding after her death as against the plaintiff who was only the reversionary heir at the time when that suit was instituted.

Fourthly.—Because the judgment was a judgment *in rem* deciding upon the *status* of the plaintiff.

We think that there is nothing in the first two grounds. As to the *first*, because, although the plaintiff petitioned to be allowed to adduce evidence in the suit, he was not made a party to it, nor allowed to adduce evidence. It is clear that he was not treated by the Principal Sudder Ameen as a party. Some reliance has been placed upon the expression "third parties" used by the Principal Sudder Ameen at the end of his judgment; but that expression did not, and could not, constitute the plaintiff a party to the suit or to the decree. If the plaintiff had been made a party to the suit, or the decree was intended as a decision against him as a party, there would have been no necessity for the Principal Sudder Ameen to refer to the petition as requiring no order. In the translation of the judgment which is embodied in the *fysallah*, the word used is not "party," but *sail*, which simply means petitioner.

The *fysallah* shows that the plaintiff in his petition prayed that he might be allowed to adduce evidence, but there was no order on that petition that he should be made a party or be allowed to adduce evidence in the suit; and therefore, even if the Principal Sudder Ameen had, by his judgment, treated the plaintiff as a party, the decision would not be evidence against him.

As to the *second* ground, the plaintiff's suit was dismissed for default, and was not, as I had at first supposed, set down for hearing with the suit brought by the defendants in which the plaintiff had petitioned. Nothing, therefore, was determined in that suit, and the institution of it could not constitute the plaintiff a party to the suit in which the defendant was plaintiff, or entitle the present plaintiff to be heard in that suit.

As to the *third* ground, we think that this case is clearly distinguishable from the Shiva Gunga case, reported in 9th Moore's P. C. C., which was cited in behalf of the defendants. If it becomes necessary, after the decision of the Full Bench, we will express our reasons as to this point more fully.

As to the *fourth* ground, we are not prepared to admit the correctness of the decision on the third point in the case of Rajkisto Roy *vs.* Kishoree Mohun Muzoomdar, which was cited in behalf of the defendants from the 3rd Vol. of the Weekly Reporter, page 14.

Our present impression—subject, however, to correction by a Full Bench—is that the judgment which was held conclusive by the Principal Sudder Ameen in this case was not a judgment *in rem;* that it does not fall within the exception to the general rule that a judgment is not evidence against persons who are not parties or privies to it; and that it was not conclusive evidence or

even *primâ facie* evidence against the plaintiff. We, however, feel ourselves bound, in consequence of the decision above referred to, to refer to a Full Bench the following question, *viz.*, whether, independently of the three grounds upon which we have already decided, and upon which the case cited is no authority in favour of the defendants, the judgment of the 26th September 1853 was admissible as evidence against the plaintiff, and, if so, whether it was conclusive or merely *primâ facie* evidence against him.

As to the contention on the part of the defendant that he ought to be allowed to adduce fresh evidence, our opinion is against him on that point. He has not shown us that he has any evidence to adduce; and if he had intended to apply for liberty to adduce fresh evidence upon the ground, as he now contends, that he was misled by the decision as to the effect of the judgment in the suit brought by the defendant, he ought, as soon as he knew that this appeal was preferred upon the ground that the judgment was not admissible in evidence, to have ascertained whether there was any evidence, which, if adduced, would prove the adoption, and he should have been prepared now to show us of what the proposed evidence consists. This he has not done. We are therefore of opinion that the appeal of the appellant ought to be allowed; that the decree of the Lower Court ought to be reversed, and a decree given for the plaintiff with costs in the Lower Court, and of this appeal, if the Full Bench hold that the judgment above referred to was not admissible against the plaintiff, or, being admissible, that it was not conclusive, for, unless it is conclusive in law, it is not such evidence as would induce us to find that Ramnarain was adopted, and to decide against the plaintiff. If the Full Bench hold it is conclusive evidence, then this Court will decide as to whether the adoption, being in the Kirtima form, caused Ramnarain to cease to be a member of his actual father's family so as to alter the line of inheritance.

The decree, if given for the plaintiff, will not extend to the setting aside of the decrees of the former 2nd Principal Sudder Ameen and Judge, or the kobalas and zur-i-peshgee pottahs, as prayed in the relief sought by the plaintiff. Those decisions are not binding upon the plaintiff, nor will the kobalas or other incumbrances effected by Radha Churn be operative against the plaintiff. There is no necessity, therefore, for us to set them aside.

If the plaintiff's appeal be allowed, the defendant's cross-appeal No. 226 will be dismissed with costs.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—This suit was brought by Kanhya Lall, as heir of Ramnarain Singh, for a declaration of his right of heirship and for possession of certain lands with mesne-profits. The other plaintiffs claimed a portion of the estate by purchase from Kanhya Lall.

The plaintiff alleged that Ramnarain obtained the property from Jhoomuck Lall, his maternal grandfather, by deed of gift; that Ramnarain died without issue, leaving Mussamut Deo Koonwur his widow; and that, upon her death, the property descended to the plaintiff as the nephew and heir of Ramnarain, the plaintiff being the son of Ramnarain's natural brother and grandson of his natural father.

The principal defendant, Radha Churn, denied the plaintiff's right as heir of Ramnarain. He alleged that Ramnarain was adopted by Jhoomuck Lall; and that, on the death of Ramnarain without issue, the right accrued to defendant, Radha Churn, as an agnate of Jhoomuck Lall, and did not descend to plaintiff as the son of Ramnarain's natural brother.

The other defendants claimed by purchase from Radha Churn.

The plaintiffs denied that Ramnarain was adopted by Jhoomuck. The defendants in support of their allegation of the adoption relied upon a decree obtained by defendant Radha Churn in a suit brought by him against Mussamut Deo Koonwur, the widow of Ramnarain, to set aside certain alienations made by her, and to have his title as reversionary heir established.

The suit was defended by Mussamut Deo Koonwur, on the ground that her husband had not been adopted, and that he took the property by deed of gift from Jhoomuck Lall, and consequently that Radha Churn was not heir in reversion. The present plaintiff presented a petition in that suit, asserting his right on the same ground as that on which he now sues; but the Court held that no order was requisite on his petition, and he was not made a party to the suit.

The Court in that case found that Ramnarain was adopted by Jhoomuck Lall, an

that the then plaintiff and now defendant Radha Churn was the reversionary heir. The judgment was affirmed in appeal in 1863.

It was contended on the part of the defendants in this case that that judgment was a judgment *in rem* as to the adoption.

On the trial of this case, the Judge, upon the authority of a case reported in the Weekly Reporter, Vol. III., p. 14, Civil Rulings, in which Rajkisto was appellant, held that the judgment was a judgment *in rem quoad* the adoption, and that it was final and conclusive against the present plaintiff upon that point.

The First Bench before whom this case came felt themselves bound, in consequence of the decision above mentioned, to refer to a Full Bench the following question, *viz.*, whether the judgment was admissible as evidence against the plaintiff; and, if so, whether it was conclusive or merely *primâ facie* evidence against him.

The case has been fully argued before us, and we are of opinion that the judgment was not a judgment *in rem*, and that it was not admissible in evidence against the plaintiff.

The petition of the plaintiff in the suit brought by Radha Churn having been rejected, the plaintiff was no party to that suit.

The general rule was clearly laid down by Chief Justice De Grey in the Duchess of Kingston's case in answer to certain questions put to the Judges by the House of Lords. He said: "It is certainly true as a general principle "that a transaction between two parties in "judicial proceedings ought not to be bind-"ing upon a third; for it would be unjust "to bind any person who could not be ad-"mitted to make a defence, or to examine" (and, he might have added, to cross-examine) "witnesses, or to appeal from a judgment "which he might think erroneous; and "therefore the depositions of witnesses in "another cause in proof of a fact, the "verdict of a jury" (or, in this country, of a Court) "finding the facts and the judg-"ment of the Court upon the facts found, "although evidence against the parties and "all claiming under them are not, in general, "to be used to the prejudice of strangers. "There are some exceptions to this general "rule, founded upon particular reasons; but, "not being applicable to the present subject, "it is unnecessary to state them.

See 2 Smith's Leading Cases, page 424.

"From a variety of cases relative to judg-"ments being given in evidence in civil "suits, these two deductions seem to follow "as generally true: *first*, that the judgment "of a Court of concurrent jurisdiction, "directly upon the point, is, as a plea, a bar "or, as evidence, conclusive between the "same parties, upon the same matter, direct-"ly in question in another Court" (or, he might have added, in another action between the same parties in the same Court); "*second-*"*ly*, that the judgment of a Court of exclu-"sive jurisdiction directly upon the point "is, in like manner, conclusive upon the "same matter between the same parties, "coming incidentally in question in another "Court for a different purpose. But "neither the judgment of a concurrent or "exclusive jurisdiction is evidence of any "matter which came collaterally in question, "though within their jurisdiction, nor of "any matter incidentally cognizable, nor of "any matter to be inferred by argument from "the judgment."

The principle that a judgment is not to be used to the prejudice of strangers was adopted from the Civil Law, of which the following were maxims, that "*Res inter alios judicata nullum inter alios prejudicium facit*," or "*Res inter alios acta alteri nocere non debet.*" The principle was not applicable to judgments in actions *in rem*. The exception of judgments *in rem* in the Civil Law was, no doubt, the foundation of the exception in the English Law.

The question as to what is a judgment *in rem* was fully considered by Mr. Justice Holloway in Madras Regular Appeal No. 48 of 1864, 2 Stokes and O'Sullivan's Reports 276.

Although I cannot concur in the whole of Mr. Justice Holloway's reasoning, I consider that the full investigation which the subject received at his hands in that case has been of great benefit in removing many erroneous impressions which previously existed. I concur with him entirely in the conclusion at which he arrived, *viz.*, that a decision by a competent Court that a Hindoo family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes*, or more correctly speaking in an action *in personam*, is not a judgment *in rem* or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies. I would go further, and say that a decree in

such a case is not, and ought not to be, admissible at all as evidence against strangers.

I do not think that Mr. Smith's definition of a judgment *in rem* is accurate. But Mr. Justice Holloway has not, I think, attached sufficient importance to the words used by Mr. Smith, "which very declaration operates upon the status of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be." This would not be the effect of a finding upon a question of status in a suit *in personam*, though it might have been so under the Civil Law in a suit *in rem*, not for the purpose of asserting a right against a particular person, but for the purpose of adjudicating upon the status.

I do not agree with Mr. Justice Holloway in his remark at page 281 of his judgment "that the effect of a decree of every competent Court is to render the person or thing that which it declares him or it to be." A decree, according to the nature of it, may prevent particular persons or the subjects of a particular Government, or it may be the whole world, from averring to the contrary.

According to the Civil Law, a suit in which a claim of ownership was made against all other persons was an action *in rem*, and the judgment pronounced in such action was a judgment *in rem* and binding upon all persons whom the Court was competent to bind; but if the claim was made against a particular person or persons, it was an action *in personam*, and the decree was a decree *in personam*, and binding only upon the particular person or persons against whom the claim was preferred or persons who were privies to them.

This will be made more clear by referring to the note of Mr. Sandars upon Section 1, Book 4, Tit. 6, of the Institutes of Justinian, a Section which is quoted by Mr. Justice Holloway in his judgment above referred to. He says: "The first and most important "division of actions is that into actions *in rem* "and actions *in personam*, by the *first* of which "we assert a right over a thing against all "the world—by the *second* we assert a right "against a particular person (*see* Introduc- "tion, Section 61); and, accordingly, speak- "ing technically, an action was called real "when the formula in which it was con- "ceived embodied a claim to a thing without "saying from whom it was claimed; and "personal, when the formula stated upon "whom a claim was made. If Titius said "that a piece of land belonged to him, there "was no necessity that the name of the "wrongful occupier should appear in the "formula; at any rate not in the *intentio* "the part of the formula always considered "characteristic of the *actio*. '*Si paret Titium* "*esse rem*.' This was all; the question to "be decided was, Does the thing belong to "Titius? It was only as a consequence of "Titius's proprietorship being established "that the wrongful occupier, whose name "might appear in the *condemnatio*, was con- "demned to lose the possession. But in an "action arising on a contract, the name of "a person was necessarily introduced into "the *intentio*. Titius could not merely say "that a thing was owed to him; he must "add that it was owed by a particular "person. There are, indeed, some cases, "as for instance, a deposit, in which the "action may be equally well shaped with or "without the insertion of the name of a "particular person. There may either be a "real action in which the plaintiff claims "the thing, or a personal one in which he "says that the depositary ought to give it "him. Whenever the action is made to "rest on an obligation, it is personal; when "on a right of proprietorship, it is real."

The case is made still more clear in para. 61 of the Introduction. There Mr. Sandars says: "His special interests prompt each "man to claim, as against his fellows, an "exclusive interest in particular things. "Sometimes such a claim sanctioned by "law is urged directly; the owner, as he is "said to be of the thing, publishes this claim "against all other men, and asserts an "indisputable title himself to enjoy all the "advantages which the possession of the "thing can confer. Sometimes the claim is "more indirect. The claimant insists that "there are one or more particular individual "or individuals who ought to put him in "possession of something he wishes to obtain, "or do something for him, or fulfil some pro- "mise or repair some damage they have made "or caused. Such a claim is primarily urged "against particular persons, and not against "the world at large. On this distinction "between claims to things advanced against "all men, and those advanced primarily against "particular men, is based the division of "rights into real and personal, expressed by "writers of the middle ages on the analogy "of terms found in the writings of the Roman "jurists, by the phrase *jura in re*, and "*jura ad rem*. A real right a *jus in re*, "or, to use the equivalent phrase preferred "by some later commentators, *jus in rem*, "is a right to have a thing to the ex-

"clusion of all other men. A personal "right *jus ad rem*, or to use a "much more correct expression, *jus in per-* "*sonam*, is a right in which there is a "person who is the subject of the right, "as well as a thing as its object, a right "which gives its possessor a power to oblige "another to give or procure, or do or not "do something." It is true that, in a real "right, the notion of persons is involved, "for no one could claim a thing if there "were no other persons against whom to "claim it; and that in a personal right is "involved the notion of a thing, for the "object of the right is a thing which the "possessor wishes to have given, procured, "done, or not done."

Besides actions *in rem* which related to property, there were certain actions called *actiones prejudiciales*. Of these it is said in the Institutes, Book 4, Tit. 6, Sec. 13, that they seem to be actions *in rem*, such as "those by which it is enquired whether "a man was born free or had been made "free; whether he was a slave, or whether "he was the offspring of his reputed "father." These actions, no doubt, were the origin of the rule laid down as to judgments on actions in which questions relating to status were determined.

Mr. Sandars in his note to that Section says: "The object of a *prejudicialis actio* "was to ascertain a fact, the establishing "of which was a necessary preliminary to "further judicial proceedings. Such actions "differ from actions *in rem*, because in an "*actio prejudicialis* no one is condemned, "only the fact is ascertained; but they are "said in the text to resemble actions *in rem*, "because they were not brought on any "obligation, and because in the *intentio*, "which indeed composed the whole formula "in this case, no mention was made of any "particular person."

"Questions of status, such as those of "paternity, filiation, and the like, were "most commonly the subjects of *actiones* "*prejudiciales*, but were by no means the "only ones. We hear of others."

In Austin on Jurisprudence, Vol. III., p. 165, it is said: "In case a child is detained "from his father, the latter can recover him "from the stranger by a proceeding in a "Court of Justice which, let it be named "as it may, is substantially an action *in* "*rem*."

"In case a slave be detained from his "master's service, the master can recover "him *in specie* from the stranger who "wrongfully detains him."

It is a mistake, I think, to call such actions *in rem*: they are strictly actions *in personam*.

An action by a person alleged to be a slave claiming to have it declared as against all men that he was a free man, was an *actio prejudicialis* in which the judgment would have contained a declaration upon the status.

Great misunderstanding and error has been caused, as is shown by Mr. Justice Holloway, from the use of the words "status," and "judgments *in rem*" in some of our English text-books, without any precise definition, and, indeed, in some cases, without any accurate conception, of their meaning. For instance, I have seen it stated that "judgments declaring personal status or conditions, as judgments of adultery, are conclusive upon all the world." What a judgment of adultery is, or how adultery can be said to declare a personal status or condition, it is difficult to conceive. Possibly, it means a judgment of divorce on account of adultery; but, if so, it is not a judgment *in rem* or conclusive upon all the world of the fact of adultery.

It is unnecessary to consider more minutely the Civil Law upon the subject of judgments *in rem* or of *actiones prejudiciales*. It is sufficient to say that they were not actions *in personam*, and that the claims in them were advanced generally against every one, and not against particular individuals.

From what has been said, it will readily be seen that there are no suits in this country with the exception of those in the High Court in the exercise of Admiralty and Vice-Admiralty jurisdiction which answer to the actions *in rem* of the Civil Law, and none corresponding with the *actiones prejudiciales*. We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is therefore unnecessary to refer to them. We have not as yet any suits here for divorce *a vinculo matrimonii* so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suits.

Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce, or sets aside a marriage between Mahomedans or Hindoos, it puts an end to the relationship of husband and wife, and is

binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife. This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit as Mr. Justice Holloway appears to think; for, if they had notice, they could not intervene or interfere in the suit, but upon the principle that, when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons. A valid marriage causes the relationship of husband and wife, not only as between the parties to it, but also as respects all the world: a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Mahomedan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world.

The record of a decree in a suit for divorce or of any other decree is evidence that such a decree was pronounced (*see* cases referred to in Smith's Leading Cases, Vol. II., page 439); and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive or even *primâ facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a decree between *A* and *B* were granted upon the ground of the adultery of *B* with *C*, it would be conclusive as to the divorce, but it would not be even *primâ facie* evidence against *C* that he was guilty of adultery with *B*, unless he were a party to the suit.

So, if a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity, as, for instance, in the case of a Mahomedan, that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters.

It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question, and the Indian Succession Act, No. X. of 1865, Section 242, points out expressly the effect which they are to have over property, and the extent to which they are to be conclusive.

It is quite clear that there are no judgments *in rem* in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers either as conclusive or even as *primâ facie* evidence, to prove the truth of any matter directly or indirectly determined by the judgment or by the finding upon any issue raised in the suit whether relating to status, property, or any other matter.

If a judgment in a suit between *A* and *B* that certain property for which the suit was brought belonged to *A* as the adopted son of *C*, were a judgment *in rem* and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused.

For instance, suppose that a Hindoo, one of four brothers, should be entitled to a large zemindaree, yielding an annual profit of two lacs of rupees, and also of a small piece of land in a distant zemindaree, and that, upon his death without issue and without leaving a widow, surviving brothers as his heirs should enter into possession and sell the small piece of land, and that afterwards a person claiming to be the adopted son of the deceased brother should sue the purchaser in the Moonsiff's Court to recover the land so sold upon the ground that, he being the heir by adoption, the brothers of the deceased had no title to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant might succeed without any collusion in establishing the alleged adoption and recover the land. Moreover, the purchaser might not have the means to enable him to appeal. Now, if this judgment were a judgment *in rem* and conclusive against the brothers as to the status created by the alleged adoption in a suit brought against them for the zemindaree, they would have no means of defending their possession, however clearly they might be able to prove that there was no foundation whatever in support of the claim of adoption. Assume that the purchaser in the Moonsiff's Court was perfectly honest and *bonâ fide*, and that the Moonsiff's Court was one of competent jurisdiction, having regard to the situation and value of the property, and hold that the decree was a judgment *in rem*, and there would be no means of getting rid of the

decree of the Moonsiff's Court, and thus the decree of the Moonsiff in a suit for land within his competency would finally and conclusively determine the title to the zemindaree against persons who might never even have heard of the suit in the Moonsiff's Court whilst it was going on. There is no ground upon which it could be held that the decree in such a case would be admissible merely as *primâ facie* evidence. It must either be conclusive as a judgment *in rem*, or fall within the general rule, and not be admissible at all upon the question of adoption. If it could be admitted as even *primâ facie* evidence, it might work the greatest injustice by throwing the burthen on to the defendants, and compelling them to prove a negative, *viz.*, that the claimant had not been adopted, and this probably after many years from the time at which the adoption is alleged to have been made.

The fact is that the Moonsiff, in such a case, would be competent to try the right of the parties to the land claimed, and incidentally to determine the question of adoption. But he would have no power to entertain a suit merely for the purpose of determining a question of status.

We have no hesitation in answering both the questions in the negative, and in stating that the judgment of the 26th September 1853 was not admissible either as *primâ facie* or conclusive evidence against the plaintiff upon the question of adoption.

This decision is quite in accordance with the decision of the Privy Council in the Rajah of Shiva Gunga's case, reported in 9 Moore's Indian Appeals, page 539. In that case their Lordships remarked that "a "judgment is not a judgment *in rem*, because "in a suit by *A* for the recovery of an estate "from *B*, it has determined an issue raised "concerning the status of a particular person "or family. It is clear that this particular "judgment was nothing but a judgment "*inter partes*."

In the case No. 299 of 1864, in consequence of which this case was referred to a Full Bench, the Judges, referring to the Shiva Gunga case, say: "In Goodeve on "Evidence,* adoption, like "marriage and bastardy, is "expressly mentioned as one of the cases in "which a judgment would be final and "conclusive. The reasoning of their Lord-"ships of the Privy Council in the case† "reported at pages 36 "and 37 of the Weekly "Reporter for April 1865, No. 12, seems to "point to the same conclusion."

* Pp. 288-290.

† The Shiva Gunga case.

So far from this being the case, the decision of the Privy Council appears to us to be in direct opposition to the rule laid down by Mr. Goodeve.

The case will be sent back to the First Bench which referred it.

The case accordingly came back to the Division Bench, and the following further reasons given by that Bench on the third issue were delivered by—

Peacock, C.J.—When this case was referred by us to the Full Bench, we stated, with reference to the third issue, that, after the decision of the Full Bench, we would, if necessary, express our reasons more fully for holding that this case is clearly distinguishable from the Shiva Gunga case.

The passage in the judgment in the Shiva Gunga case upon which it was contended that the plaintiff was bound by the decision in the suit brought by Radha Churn against Mussamut Deo Koonwur, Ramnarain's widow, is as follows: "It seems to be necessary, in "order to determine the mode in which this "appeal ought to be disposed of, to consider "the question whether the decree of 1847. "if it had become final in Unga Mootoo's "lifetime, would have bound those claiming "the zemindaree in succession to her. And "their Lordships are of opinion that, unless "it could be shown that there had not been "a fair trial of the right in that suit, or, "in other words, unless that decree could "have been successfully impeached on "some special grounds, it would have been "an effectual bar to any new suit in the "Zillah Court by any person claiming in "succession to Unga Mootoo. For, assuming "her to be entitled to the zemindaree at all, "the whole estate would, for the time, be "vested in her, absolutely for some purposes, "though in some respects for a qualified "interest, and until her death it could not "be ascertained who would be entitled to "succeed. The same principle which has "prevailed in the Courts of this country as "to tenants-in-tail representing the inherit-"ance would seem to apply to the case of "a Hindoo widow, and it is obvious that "there would be the greatest possible in-"convenience in holding that the succeeding "heirs were not bound by a decree fairly "and properly obtained against the widow."

The question in the suit brought by Unga Mootoo referred to above was, whether the estate of her deceased husband was self-acquired, and as such, descended to her as

one of his widows, and to his daughters in succession to her, or whether it survived to the nephews of the deceased under the Mitakshara Law.

According to the case set up by the widow, the daughters, if they had survived the widow, would have succeeded as reversionary heirs. The widow having failed to make out the case which she set up against the nephews, her suit was dismissed; and the Privy Council held that the heirs in reversion would have been bound, after the death of the widow, by a final decree against her in that suit, and that it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to the widow.

The present is a very different case. The suit relates to the estate of Ramnarain, and the question is, who, upon the death of Ramnarain's widow, was the reversionary heir; and with reference to that question it was important to ascertain whether Ramnarain obtained the estate from Jhoomuck Lall by gift or by inheritance as the adopted son of Jhoomuck Lall. Upon the death of Ramnarain without issue, his widow obtained possession of the estate as his heir, and she was his heir, whether he was adopted by Jhoomuck Lall or not. The question of adoption or non-adoption did not affect the right of the widow to inherit, though it affected the question who was the reversionary heir upon her death.

The plaintiff claimed as the son of Ramnarain's natural brother: the defendant, Radha Churn, claimed as an agnate of Jhoomuck Lall. The decree which is relied upon as binding upon the plaintiff upon the question of adoption was pronounced in a suit brought by Radha Churn against Ramnarain's widow to set aside certain alienations made by her, and to have his title as reversionary heir established. If Ramnarain was not adopted by Jhoomuck Lall, Radha Churn, the plaintiff in that suit, had no right to set aside the alienations made by the widow, nor was he the reversionary heir. The plaintiff in this suit intervened in the suit brought by Radha Churn against the widow; but his petition was rejected, and he was consequently no party to the suit. The Court held that Ramnarain was adopted, and that Radha Churn was the reversionary heir after the death of Ramnarain's widow. Radha Churn did not impeach Ramnarain's title to the estate; in fact, his case depended upon Ramnarain's title, nor did he impeach the title of Ramnarain's widow. The plaintiff also commenced a suit against the widow to set aside the alienations, but he did not proceed with it. The widow had an interest in supporting her own alienations, because she had made them: as protector of the estate, her interest was the other way.

As protector of the estate, or even as the supporter of the alienations which she had made, it could make no difference to her in point of law, whether the alienations were impeached by Radha Churn or by the plaintiff. She had no legal interest in the determination of the question whether Radha Churn or the plaintiff would be the reversionary heir upon her death, any more than a tenant-in-tail in England, to which a Hindoo widow taking by inheritance was compared by the Privy Council, would have in the question whether, upon the termination of the estate tail, the estate would go to *A* or *B* as remainderman. I do not well see how a similar question to that raised in this suit could arise between persons claiming to be remaindermen.

The suits to which the Privy Council intended to refer appear to us to be suits in which the title of the settlor or the validity of the estate tail was in issue, and not to suits against the tenant-in-tail in which a question might incidentally arise and be determined as to who was the remainderman who would be entitled to succeed upon the termination of the estate tail.

For these reasons we think that the judgment in Radha Churn's suit was not conclusive against the plaintiff, or admissible in evidence against him, upon the ground that it was brought against Ramnarain's widow whilst she was holding the estate by inheritance from her husband.

f

The 6th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Evidence—Judgment in rem.

Case No. 2622 of 1866.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 28th July 1866, affirming a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of that District, dated the 9th February 1865.

Gungadhur Roy (Plaintiff), *Appellant*,

versus

Umasoondery Dossee (Defendant), *Respondent*.

Baboo Tarucknath Sein for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondent.

A judgment against one sharer in a mokurruree pottah declaring the pottah to be a forgery is not a judgment *in rem*, nor is it admissible as evidence against another sharer (not a party to the former suit) suing to obtain declaration of his rights and interests under the pottah.

This case was referred to a Full Bench by Kemp and Markby, JJ., with the following orders:—

Markby, J.—In this case the plaintiff sued to reverse a decree which he alleged to have been obtained by collusion against his co-sharer, and to declare his rights under a certain mokurruree pottah.

By the decree now alleged to be collusive, the pottah in question had been declared to be a forgery. That suit was brought by the present defendant against a co-sharer of the present plaintiff under the mokurruree pottah, but the present plaintiff was not made a party.

In the present suit it was held that the decree in the former suit was not obtained collusively, and upon this part of the case no question arises. But upon the material point in this suit, namely, the right of the plaintiff to have his rights declared as mokurrureedar, the Lower Appellate Court held that the decree in the former suit "was a "judgment *in rem* regarding this mokur-"ruree pottah between a co-sharer of the "present plaintiff. and the present defendant "himself; and that, as it was not shown, "either that the Court which gave the judg-"ment had no jurisdiction, or that it was "obtained by fraud or collusion, no evi-"dence could be given in this civil suit for "the purpose of disproving the facts adjudi-"cated; the judgment was conclusive evi-"dence, therefore, against the parties who "were the actual litigants in the former "case as well as against all others." Accordingly, the Lower Appellate Court refused to enter into the merits of the case, and dismissed the appeal.

The point to be now considered is, whether the Lower Appellate Court is right in this view. On the one hand, the vakeel for the appellant has produced a decision of this Court of the 5th December 1864,* in which it appears that one Abbott, the holder of an 8-annas share in a putnee, having attempted to enhance the rents of the holders of the land, was met by a claim of talookdaree rights on the part of the defendants, which they succeeded in establishing. Subsequently, other persons, who, it appears, did not claim through Abbott, sued the same defendants for the purpose of enhancing the rents of the same lands, when the defendants set up the same talookdaree rights. This Court held on appeal, in the latter case, that the decision in Abbott's suit was not conclusive as to the evidence of the talookdaree rights.

On the other hand, the respondents have relied on a decision of the 9th August 1865. That suit ultimately resolved itself into a suit to set aside an alleged mokurruree pottah. Two of the plaintiff's co-sharers had previously brought a suit to set aside this mokurruree pottah in which they succeeded. This Court held that the mokurruree pottah having been set aside by a judgment, as it were *in rem*, in a case between the shareholders of the plaintiff and the defendant, it was for ever inoperative against the plaintiff also.

I entirely concur in the earlier judgment to which I have referred. I think it is impossible to consider a judgment pronounced under such circumstances as a judgment *in rem*. By a judgment *in rem* is meant a judgment binding against all the world; the words "*in rem*" being a phrase borrowed by modern civilians from the Roman Law, and

* See Weekly Reporter, p. 270.

signifying *general* as opposed to *special;* as in the following passages, "prœtor hoc edicto generaliter et *in rem* loquitur, nec adjicit a quo gestum" (Dig. IV., 2, 9, § 1); "Specialiter exprimendum est de cujus dolo quis queratur, non *in rem*" (Dig. XLIV., 4, 2, §§ 1, 2). If this be a judgment *in rem*, it would be binding, though all the parties, both plaintiff and defendants, were different. The reasoning founded on the form of the decree that by it a particular document has been declared to be spurious, and therefore that it is a judgment passed upon what is sometimes called the status of the thing itself, appears to me to originate in a misconception of the phrase *in rem*. A judgment *in rem* no more means a judgment of or concerning a *thing* than *jus in rem* means a right of or concerning a thing: in both expressions the words *in rem* have precisely the same meaning, and which may be best paraphrased by the words "availing against all the world."

The question whether or no the proceedings in the former suit against the plaintiff's co-sharer are evidence in this suit does not now arise.

The plaintiff has mistaken his rights in this case, in asking to have the former decree reversed; that cannot be done in this suit, but he ought to have his rights declared under the mokurruree pottah if they exist, and I think the suit ought to be remanded to try the validity of the alleged mokurruree pottah, and to declare the plaintiff's rights accordingly.

In consequence, however, of the conflicting decision of the 9th August 1865, we think this special appeal ought to be referred to the decision of a Full Bench. The point upon which we differ from the decision referred to is in considering that the judgment in that case was a judgment *in rem*, and, as such, binding and conclusive on persons not parties or privies thereto. This special appeal is referred to the Full Bench accordingly.

Kemp, J.—I concur with my learned colleague. I was one of the Judges who passed the decision, dated the 5th December 1864, alluded to in my learned brother's judgment.

This case must be submitted to the Full Bench.

The Judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—This was a suit brought by the plaintiff alleging himself to be a co-sharer in a mokurruree pottah, to set aside a decree which had been obtained against another sharer in the mokurruree, and to declare the plaintiff's rights and interests under the pottah.

The decree was in a suit to which the plaintiff was no party, and in which the mokurruree was declared to be a forgery.

The Judge, on appeal from the decision of the Principal Sudder Ameen, held that the judgment was a judgment *in rem*, and conclusive against the plaintiff.

The Division Bench considered that the judgment was not a judgment *in rem*, but in consequence of the conflicting decision of the High Court, dated 9th August 1865, reported at page 192, 3 Weekly Reporter, Civil Rulings, referred the question to a Full Bench.*

We are of opinion that the judgment was not a judgment *in rem*, and was not admissible as evidence against the plaintiff. *See* the Regular Appeals Nos. 158 and 226 of 1866 decided to-day by this Bench.

In the case cited, the Court held that a mokurruree pottah, which had been set aside in a suit brought by two shareholders in the estate against the defendant, would be inoperative against the plaintiff who was also a co-sharer in the estate. It was said that the judgment was "as it were *in rem*"; but, as I understand the case, the Court merely held that a mokurruree under which the defendant claimed having been wholly set aside in a suit against him could not be set up against a third shareholder, although the former suit was brought by only two of the shareholders, and the third shareholder was not a party. But this is a very different case, for it must be remarked that the defendant in that case was a party to the former suit in which the mokurruree under which he claimed had been set aside. Here the plaintiff who claimed under the mokurruree was no party to the suit in which the mokurruree under which he claimed was set aside.

The case will go back to the 6th Bench which referred it to us, in order that the appeal may be finally disposed of.

* *See* preceding case, page 338.

The 6th April 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Waste Land—Stamp-duty.

Reference to the High Court by Mr. F. J. Cockburn, Judge of Sylhet, under Section 15, Act XXIII. of 1863.

Greesh Chunder Roy and others, *Plaintiffs*,

versus

The Collector of Sylhet on the part of Government, *Defendant.*

In a suit under Section 5, Act XXIII. of 1863, by a claimant to waste-land proposed to be sold or otherwise dealt with on account of Government, or by an objection to the sale or other disposition of such land, the plaint must be on a stamp of 100 rupees.

Case.—By the concluding words of Section 5 of Act XXIII. of 1863, it is enacted that, "if such claimant or objector shall not, within 30 days from the delivery of such notice from the Court, institute a suit in such Court," &c.

By Section 11 of the same Act, it is enacted that, "in suits instituted under the Act, the proceedings shall be regulated so far as they can be by the Code of Civil Procedure."

By Section 25 of Act VIII. of 1859, it is enacted that all suits shall be commenced by a plaint.

Section 30 of Act X. of 1862, in connection with Article XI. of Schedule B annexed to the said Act, shows, *first*, that plaints have to be filed on stamp-paper; and, *secondly*, how the value of the stamp-paper is to be calculated.

By Section 31 of Act VIII. of 1859, it is enacted that, if a plaint be written on stamp-paper of inadequate value, the plaintiff may be required to supply such additional stamp-paper as may be necessary; and, on his failure to do so, the Court shall reject the plaint.

Under the provisions above quoted of Section 5, Act XXIII. of 1863, a suit has been instituted by Greesh Chunder Roy and others, against the Collector of Sylhet on the part of Government, in which the plaintiff sues for an order for confirmation of his right to and possession in certain land. Plaintiff valued his suit at 3,000 rupees.

The plaint is on a stamp-paper of the value of 8 annas only. Under Section 15 of Act XXIII. of 1863, the opinion of the High Court is requested as to whether an 8-annas stamp-paper is sufficient, or whether the plaint ought to be on stamp-paper of the value of 100 rupees under Article XI., Schedule B, Act X. of 1862.

This reference is made on the application of the plaintiff, whose Counsel argues that an 8-annas stamp is sufficient, because, *1st*, the Act (XXIII. of 1863) is silent on the point; *2ndly*, because the Act being a special Act, the Court ought to be regarded much in the light of a Special Commissioner's Court, in which (Act III. of 1828, Section 13) stamp-paper of the full value is not required; and, *3rdly*, because in other cases under Act XXIII. of 1863, plaints have been admitted on 8-annas stamp-paper; and, *4thly*, because, under Section 14 of Act XXIII. of 1863, no appeal lies from any decision or order passed under the said Act.

In my opinion the plaint ought to be on stamp-paper of the value of 100 rupees. The Principal Sudder Ameen of Sylhet, a member of the Court, is of the same opinion.

The opinion of the High Court was pronounced by—

Peacock, C.J.—We are of opinion that the plaint required a stamp of 100 rupees.

The 6th April 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Jurisdiction—Temporary residence in Jail—Commission for examination of witnesses—Issue of (by Small Cause Court to Magistrate).

Reference to the High Court by Mr. C. D. Linton, Judge of the Court of Small Causes at Meherpore.

Gopal Chunder Sircar, *Plaintiff*,

versus

Kurnodhar Moochee and others, *Defendants.*

Temporary imprisonment beyond the jurisdiction of a Small Cause Court was held not to bar the jurisdiction of that Court in respect of defendants who formerly resided within its jurisdiction, and whose families continued to reside there, there being, moreover, nothing to show that the defendants had no intention of not returning to their former place of abode on the termination of their imprisonment.

A Magistrate is not bound to execute a commission of a Small Cause Court directing him to take the evidence of prisoners in jail, in a case in which none of the circumstances existed authorizing that Court to issue the commission.

Case.—This is an undefended case; but, as the defendants were, at the time of the

filing of the plaint, and still are, prisoners in the Jail at Kishnagur, having been sentenced, on the 11th of October last, to two years' rigorous imprisonment each, I have given judgment against 1st defendant only, and dismissed it on its merits against the other defendants contingent on the opinion of the High Court on the following point :—

Whether the defendants, at the time of the commencement of the suit, did dwell within the local limits of the jurisdiction of the Meherpore Small Cause Court, it being alleged in the plaint and proved at the trial that the defendants did, prior to their imprisonment, dwell in Gungree, within the local limits of the jurisdiction of the said Court.

The question is, what is the precise meaning of the word "dwell" as used in the 8th Section of Act XI. of 1865, and whether it can be said that the defendants are subject to the jurisdiction of the Small Cause Courts of Meherpore and Kishnagur, or to that of Kishnagur alone.

As to what constitutes "dwelling" in a place, there seems to be no other rule than that each case must depend on its own circumstances.

Now, the word "dwelling" is synonymous with the term "place of abode or residence." It is the place where a man lives and what he considers his home. A dwelling is constituted by an actual occupancy coupled with an intention to give the character of permanency to such occupancy." Residence," said Parke, B., "means a domicile or home" (Lamb *vs.* Smith, 15 L. J. 207, Exchequer).

A man's dwelling is *primâ facie* the place where his wife and family reside, and if he has a family dwelling in some place, and he occupy a house and occasionally sleep in another, he will not be a resident in the latter place, for his residence is his domicile, and his domicile is his home, and his home where his family reside (Story's Conflict of Laws, Section 63; R. *versus* The Duke of Richmond, 6 T. R. 561), and where a man had a shop and private parlour in which he carried on his business and entertained his friends, but neither himself nor his servant slept there, the Judges held that such occupation did not constitute a dwelling (R. *vs.* Martin, R. and R. 108). A man may have two dwelling-places at the same time. Thus, it was held by the Judges that, when a man has two houses, and servants in both, and lives sometimes in one, and sometimes in the other, both will be his dwelling-houses (C. Rep. 389), and during his temporary absence, each house, although empty, if there be the *animus revertendi*, will yet be his dwelling-house (Rex *versus* Murray, 2 East P. C. 496).

So, also, in the case of Whithorne, Appellant, *versus* Thomas, Respondent (7 Man. and Gr. 5), where the question was as to the meaning of the word "residence" in the Reform Act, Earle, J., said : "The fact of sleeping in a place by no means constitutes a residence, though, on the other hand, it may not be necessary, for the purpose of constituting a residence in a place, to sleep there at all. If a man's family are living in a borough, and he is absent for six months, but with the intention of returning, he will still be considered as residing there."

In the case of Macdougall *versus* Paterson (21 L. J., 27 C. B., 5 C. C. Chron. 5) the plaintiff resided in Inverness in Scotland, where his permanent dwelling was, but every year before the shooting season he usually came to London, where he took lodgings for his business, and at the time the action was brought, he had a stand at the Great Exhibition, and resided in Golden Square, London, which he also had for a place of business, and had been there from March to October. The Court of Common Pleas held that the plaintiff did not dwell in London within the meaning of the 28th Section. "We are of opinion," said Jervis, C. J., "that, under the circumstances, the plaintiff did not dwell in Golden Square. Each case must depend upon its particular circumstances ; but when a party has a permanent place of dwelling, we do not think that he dwells, in the sense of that word as used in the Statute, at a place where he has lodgings for a temporary purpose only."

A person ceases to have a domicile or dwelling in a place the moment he abandons it without an intention of returning there, though he has not established a dwelling elsewhere (Nutbrown's case, 2 East P. C. 496). It was held in the case of Reg. *versus* Salford (3 Bit. and Par. new Mag. case 5) that a prisoner resides where the prison is, and the Judge of the London Sheriff's Court held that an inhabitant of Dublin, who was imprisoned for debt within the city of London, was a resident within the city, and, as such, liable to be sued in the Sheriff's Court (Aitkin *versus* Buny, 2 C. C. Chron. 292). But in Dunston *versus* Paterson, 28 L. J. (N. S.) C. P. 97, it was held that confinement in a jail was not a dwelling.

Looking at Explanation A, Section 8, Act XI. of 1865, I think by "dwelling" must be meant the ordinary, and not a temporary, place of residence, and that, therefore, the defendants are subject to the jurisdiction of both the Small Cause Courts of Meherpore and Kishnagur, as I hold thata mere temporary imprisonment cannot constitute a dwelling within the district where the prison is situate, and that the prisoner's former home continued to be his dwelling, unless he has made up his mind to abandon it upon his release from jail.

On the 2nd February 1867, the following order was passed by the Court:—

Peacock, C. J.—The facts are not sufficiently found to enable us to determine the question of law referred to us.

The defendant Kurnodhar is described as of Elangee, the defendant Wootsub as of Gopalnuggur, and the defendant Pooran Moochee as of Solotaka, and all are said to be now residing in the jail of Kishnagur. It is stated that it was alleged in the plaint and proved at the trial that the defendants did, *prior* to their imprisonment, reside at Gangree within the jurisdiction of the Small Cause Court of Meherpore. Whether their families continued to reside at Gangree is not found, nor are any facts found to show that the defendants continued to dwell there, or at the time of the commencement had an intention of returning to their former dwellings, notwithstanding their temporary imprisonment.

The case should be returned to the Judge for a finding upon the facts sufficient to enable the Court to determine the point of law.

The Judge's finding was submitted with the following remarks:—

I have found as a fact that the families of the defendants were at the time of the filing of the plaint, and still are, living and residing at Elangee, Gopalnuggur, and Solotaka, within the jurisdiction of this Court; but I have been unable to find as a fact whether it is the intention of the defendants, on their release from the prison, to return to their former dwellings, as the commission which I issued to the Magistrate of Kishnagur to take their evidence on this point has been returned unexecuted for the reasons set forth in the accompanying copy of a letter from Mr. H. Bell, Officiating Magistrate of Nuddea.

It would appear from Section 175 of Act VIII. of 1859 that there are only three conditions stated under which a Civil Court is empowered to issue a commission, *viz.*, *1st*, when the witness is resident at some place more than 100 miles from the Court requiring his evidence; *2ndly*, when the witness is unable from sickness or infirmity to be personally examined in Court; and, *3rdly*, when the witness is a person exempted from personal appearance by reason of rank or sex, and there is no other rule or Circular Order which empowers the Judge of a Civil Court, whenever it shall appear to the satisfaction of the Judge that the personal attendance of any prisoner confined in any Criminal Jail is necessary, either as a party or witness in a suit, to issue a writ under its hand and seal addressed to the officer in charge of the Jail calling upon him to make over charge of the prisoner named therein to any officer of the Court, but Circular Order No. 45 of 1866 lays down rules for the personal attendance of any prisoner confined in a Civil Jail when required either as a party or a witness in a civil suit.

Under the peculiar circumstances of the case noted above, and as there was no other mode of obtaining the evidence of the defendants, I thought I was justified in issuing a commission to Kishnagur, which is distant less than 100 miles from Meherpore, directing the Magistrate to take their evidence.

Should the Hon'ble Judges of the High Court be of opinion that the Magistrate ought to execute the commission, I beg that their answer may be forwarded to me for transmission to him.

Mr. Bell's letter above referred to was as follows:—

With reference to your proceeding of the 25th February 1867, I am not aware of any law which authorizes the Small Cause Court Judge to issue a commission, directing me to take the evidence of prisoners in Jail, and I must, therefore, decline to act upon the commission. The proper course, as it appears to me, is for the Small Cause Court Judge to serve a summons on the prisoners through the Jailor, and the prisoners can then, if they wish, communicate with their friends at home as to the course to be adopted in defending the case.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We think that the Magistrate was not bound to execute the commission, inasmuch as none of the circumstances existed in this case which authorized the Judge of the Small Cause Court to issue

commission for the examination of witnesses. But, as the Judge has found that the families of the defendants continue to reside at their former place of abode within the jurisdiction of the Small Cause Court of Meherpore, we are of opinion that the Judge would be at liberty from that to infer that the defendants had the intention of returning to that place of abode on the termination of their imprisonment, and consequently that they were subject to the jurisdiction of that Court, notwithstanding that they were temporarily detained in prison beyond the jurisdiction.

The 6th April 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

References by Small Cause Court—Interference by one Judge with decision of his predecessor.

Reference to the High Court by Mr. H. Bell, Judge of the Principal Court of Small Causes at Kishnagur.

Umanund Roy, *Plaintiff*,

versus

Lord H. U. Browne, *Defendant*.

Where a case was determined by a former Judge of a Small Cause Court contingent upon the opinion of the High Court upon the question submitted by that Judge, and the parties had an opportunity of appearing and being heard in the High Court before the Judges expressed their opinion—HELD that, when that opinion was expressed, the case was at an end, and that it was irregular for the present Judge of the Small Cause Court to interfere in the matter.

Case.—IN the case of Umanund Roy *versus* Lord H. Ulick Browne, Chairman of the Kishnagur Municipality, decided by the High Court on a reference from this Court on the 8th December last, and quoted at page 30, Vol. VI., Weekly Reporter, Civil References, I have been requested by the defendant to make a second reference on the ground that the case was not carefully stated by my predecessor Baboo Doorgapershad Ghose. The letter of the Chairman of the Municipality is herewith submitted.

I have given the letter of the Chairman of the Municipality full consideration, and, taking the facts as stated by him to be correct, as they are admitted by the parties to be, I see no reason to arrive at a different conclusion from that expressed by my predecessor in the former reference. The mistake my predecessor made was in stating in his last para. but one that the "bill issued by the Municipality was for the tax of the house owned by Ramnath, and not for the land on which it stood." This was a mistake; the bill was for the entire property, the house and the land; the house belonging to one person, and the land to another; the owner of the house occupying the land. When the building, therefore, was cleared away, the owner of the land would only be liable, under Section 26, Act III. of 1864 B. C., to an annual rate not exceeding $7\frac{1}{2}$ per cent. of the annual value of the land, and would not, of course, be liable for the house-tax which had been assessed with the land.

With these remarks I beg most respectfully to submit the case for the orders of the High Court.

The letter of the Chairman of the Municipality above referred to was as follows :—

With respect to the case of Umanund Roy *versus* the Municipality of Kishnagur, referred to the High Court by your predecessor, I observed, on reading the decision (which is not at hand just now), that the High Court Judges used words to this effect :—

"The question submitted to us is whether the owner of the land on which a house belonging to another person is situated is liable for the tax assessed on that house."

An inspection of the case will show that the Hon'ble Judges were unintentionally misled by the wording of the reference made to them.

The question was this. One single tax is levied on land and house together as one item of property, and not two separate items; that being so, is not the owner of the land liable for the tax assessed on it, and everything on it, *as one item of property?*

I shall be obliged if you will make a second reference to the High Court, as the point is one of general importance in municipal administration.

The Judgment of the High Court was pronounced by—

Peacock, C. J.—The case was originally determined by the former Judge of the Small Cause Court contingent upon the opinion of the High Court upon the question submitted by that Judge. The parties had an opportunity of appearing and being heard in the High Court before the Judges expressed their opinion. The opinion having been expressed, the case was at an end, and it was irregular for the present Judge of the Small

Cause Court to express any opinion with reference to the former decision, or to refer the matter to the High Court in consequence of a letter received by him from the Chairman of the Municipal Commissioners, or to act judicially upon any such letter.

The Court decline to interfere in the matter, or to express any further opinion.

The 6th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Parol Evidence (to prove verbal Contract).

Reference to the High Court under Section 22, Act XXI. of 1863, by Dr. Clarke, Recorder of Rangoon.

Ram Guttee, *Plaintiff*,

versus

Ibrahim Ismailjee Seedat and another, *Defendants*.

Parol evidence is admissible to prove a verbal contract.

Case.—THIS case was argued by Mr. Agabeg for the plaintiff, and Mr. Macleod for the first defendant, and is a suit brought by the plaintiff against two defendants to compel them to execute and register a deed of partition of certain property which the plaintiff and defendants purchased jointly on the 9th June 1865. The purchase-deed or Government grant is in the names of plaintiff and the two defendants, and contains no stipulation for a subsequent partition, nor does the deed show what proportion of the purchase-money was paid by the three purchasers, but rather leaves it to be inferred that each paid share and share alike. The plaint goes on to aver that, about ten days after the purchase, the plaintiff and defendants, by mutual consent, made a parol agreement to a partition of the said land, the plaintiff taking the southern half of the said land measuring 50 by 60 feet as shown in the annexed plan made by the Town Surveyor and marked B; that plaintiff has since, at a great outlay, built a house on the said land so partitioned and taken over by him by "mutual consent."

The plaintiff next complains that the first defendant refuses to execute the deed of partition, and prays that he may be compelled by the Court to do so, or that, in default, the Court do so on his behalf under the provisions of Act VIII. of 1859.

It does not appear either from the plaint or from the grant why the plaintiff should be entitled to a half share in the property, and presumably he would only be entitled to one-third; but it does appear from an answer put in by the second defendant that he, the second defendant, is willing to accede on his part to plaintiff's application, and execute the partition as desired.

To the plaint the first defendant answers that he never made any agreement for the partition of the property; that no consideration is averred for such contemplated partition; and that, in point of fact, he never agreed to or promised to make such partition, but that the property was to be held jointly and in connection by the three purchasers of the same.

On this state of facts, the first question arising for the consideration of the Court is, whether the plaintiff can be permitted, by parol testimony, to vary or qualify the *quasi* contract which, by their joint purchase, the parties created between themselves; and thereafter will arise the question whether this subsequent agreement did take place, and was, in point of fact, actually carried out; and, lastly, whether the first defendant is compellable to ratify such agreement by being constrained to execute a conveyance to the plaintiff.

It will be observed that, though a written instrument passed between Government and the parties, there was no contract reduced to writing between the three parties themselves; and it is clearly laid down by Sugden, first, that "parol evidence is not admissible to vary substantially a written agreement, and that, by the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties at any time so as to add to, or subtract from, or in any manner vary or qualify, the written contract." It is true that Sugden goes on to say that, "after the agreement has been reduced into writing, it is competent to the parties at any time, before breach of it by a new contract not in writing, to vary or qualify the terms of such contract;" but this is only where there is a written contract between the two parties, which there is not in this case.

So, again, "verbal evidence is inadmissible, either at law or in equity, to enable a plaintiff to prove a parol agreement that part of the estate should not be conveyed" (*see* Sugden, page 159), and it would be so difficult to draw the line between parties who have not taken the ordinary precaution clearly to state their intentions in writing that it must be manifest these doctrines are based on expediency and common sense.

There is no suspicion of fraud in this case; and had there been even a deed between the parties, and any provision been omitted in that, and they had trusted to each other's honor, Sugden says, page 173, "they must rely upon that, and cannot require the defect to be supplied by parol evidence."

On these considerations the Court is of opinion that the prayer of plaintiff's petition cannot be entertained, nor can he be permitted to go into evidence to prove the fact raised by the three issues declared. As, however, this is a point upon which I entertain some doubt, and one upon which it would be desirable to have an explicit ruling by the highest authority, I think it right to grant to the plaintiff's advocate, under Section 22 of Act XXI. of 1863, a reference for the decision of the High Court of Judicature at Fort William in Bengal, to which the record will be immediately forwarded.

It is decreed that the plaintiff's case be dismissed with costs: no execution to issue under Section 23, until the receipt of the order of the High Court.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—It is clear that parol evidence was admissible to show the terms upon which the plaintiff and the two defendants agreed amongst themselves to purchase the allotment from the Government, and also as to the mode in which the land so taken was to be divided. Consequently, the plaintiff ought to be at liberty to go into such evidence.

It is scarcely necessary to say that the conveyance from the Government to the plaintiff and the defendants was not a written agreement between the plaintiff on one side, and the defendants on the other, and, therefore, parol evidence is not sought to be given for the purpose of varying a written contract between the parties, but to prove another and distinct contract.

The 6th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Limitation—Suit on unregistered bond with lien of immoveable property.

Reference to the High Court by Mr. Coryton, Recorder of Moulmein.

John Lyster, *Plaintiff*,

versus

Ko Mihone and Mah Byaw, *Defendants*.

A suit to recover the balance due on account of principal and interest upon an unregistered bond with lien of immoveable property is governed by the limitation prescribed by Clause 10, Section 1, Act XIV. of 1859.

Case.—In pursuance of the provisions of Section 22 of Act XXI. of 1863, the Recorder of Moulmein submits the following case for the consideration of the High Court of Judicature at Fort William in Bengal:—

The point involved arises under the Act for the limitation of suits.

The plaint in the suit (omitting formal part) was as follows:—

"Suit for Rupees 3,952-7, principal and interest, due on a mortgage-bond filed herewith, dated the 11th July 1862.

"Plaintiff states that, on the 11th July 1862, he lent the defendants Rs. 5,000, with interest at the rate of 1½ per cent. per mensem payable in four months, for securing the re-payment of which defendants mortgage the land, houses, and sawpits, described in grants No. 382 of 5th January 1859, No. 1148 of 29th February 1848, No. 1149 of 28th February 1848, No. 1150 of 22nd February 1848, and No. 1151 of 22nd March 1848.

"That, on the 8th Jan. 1863, defendants paid the interest on the said loan up to date, and Rupees 1,433 towards the principal, leaving a balance of Rupees 3,567.

"That, on the 31st March 1866, defendants paid the interest up to date, leaving a balance of principal, as before mentioned, Rs. 3,567, and interest from 1st April to 6th November Rupees 385-7; total Rupees 3,952-7, for which sum plaintiff brings the suit, and prays that a summons may issue, and that the amount sued for be decreed to him with all costs and interest a tsuch rate as the Court may determine from date of institution of suit to date of realization of decree."

The instrument sued on ran as follows :—

"Four months after date, we, the undersigned, Ko Mihone and Mah Byaw, of Moulmein, for ourselves, our heirs, and assigns, promise to pay to Captain J. Lyster, his heirs or assigns, or order, the sum of (5,000) five thousand rupees, with interest at the rate of 1½ per cent. per mensem to date of payment for value received in cash this day.

"For the better security of the re-payment of the above sum of rupees five thousand and all the interest that may be due thereon, we do hereby, for ourselves, our heirs, and assigns, mortgage all those pieces of land and house and sawpits as described in the following grants: Grant No. 385, dated 5th January 1859, situated in the District of Moungan, 2nd Division. Grant No. 1148, dated 29th February 1848, Myangoon, 3rd Division. Grant No. 1149, dated 28th February 1848, Myangoon, 3rd Division. Grant No. 1150, dated 22nd February 1848, Myangoon, 3rd Division. Grant No. 1151, dated 22nd day of March 1848, District Myangoon, 3rd Division."

Defendants pleaded that the action was barred by the Statute of Limitations as the suit was based on an unregistered bond, and it was governed by Clause 10, Section 1, Act XIV. of 1859, and cited the case of Pareshnath Misser *vs.* Shaik Bunda Ally, 6 Weekly Reporter, Civil Rulings, p. 132.

Plaintiff contended that, independent of the acknowledgment, as the suit was one in which an interest in immoveable property was sought to be recovered, the action came under Clause 12, Section 1 of Act XIV. of 1859, and that it was not barred, and cited the case of A. Kristna Row *vs.* H. Hachapa Sugapa, Madras High Court Reports (Stokes's), Vol. II., page 307.

The Recorder submits, for the opinion of the High Court, the question which of the above provisions of Act XIV. of 1859 applies to the plaintiff's claim.

The Judgment of the High Court was delivered as follows by—

Peacock, C. J.—Assuming that the contents of the plaint are completely and accurately set out in the case submitted for our opinion, it appears that the plaintiff seeks to recover a balance due to him for principal and interest, and asks that that amount may be decreed to him.

The case is governed by Clause 10, Section 1, Act XIV. of 1859. A suit to recover the lands mortgaged, and to hold them as security for what might be found due on the bond as principal and interest, would be governed by Clause 12 of the same Section. But this suit, according to the case stated, is not to recover possession of the land.

The 6th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Damages—Attachment by order of Court.

Reference to the High Court under Section 28, Act XXIII. of 1861, by Mr. O. Toogood, Judge of Beerbhoom.

Rajbullub Gope (Plaintiff), *Appellant*,

versus

Issan Chander Hujrah (Defendant), *Respondent.*

A party is not liable to damages in respect of an attachment made under a warrant issued by a Court.

Case.—In this case it appears that the defendant in this suit was a decree-holder in another suit, and proceeded under Section 233 of Act VIII., and attached 4 bullocks. The plaintiff in this suit preferred a claim in the execution-case, which was allowed. The defendant in this suit brought a regular action to establish the right of his debtor to the whole of the property, and got a decree for a half share. Whilst litigation was pending, and it extended over 4 years and 11 months, two out of the four bullocks died. The remaining two were sold for 6 rupees, and the defendant in this suit took half that sum, and prayed that the other half might be paid to the present plaintiff, but this he refused, and he now sues for the half value of the two bullocks which are dead, which he fixes at Rupees 7-8, and for damages for the alleged attachment of the other two bullocks, which he fixes at 4 annas per diem, for 4 years and 11 months; total claim being 450 rupees, of which 301 rupees have been relinquished, and 194 rupees is now claimed.

The plaintiff claimed all the bullocks as his own private property, and the defendant as that of the judgment-debtor. It was decidedly a regular suit brought after the death of two of the bullocks that the remaining two were the joint property of the plaintiff and the debtor of the defendant,

the respondent in this case. No decision was given with reference to the two bullocks which died, and until the plaintiff has established his right to a share in this property, he cannot sue any person for damages under this head.

Now, the bullocks were sold on the 6th February 1866, and this action was instituted on the 30th June following. Consequently, as the cause of action continued up to the date of sale, the Moonsiff was wrong in holding that the suit, so far as regarded the claim to the amount of damages, was barred. The plaintiff, in the event of his proving that the attachment was illegal, is entitled to damages accruing within one year prior to the date of institution of the suit.

The next question for consideration is whether the attachment was illegal. It has been proved in a civil action that the debtor had only a half share of the two surviving bullocks. The attachment was made under Section 233 of Act VIII. of 1859, and the bullocks were kept in the custody of the Nazir. The plaintiff's pleader argues that the attachment should have been made under Section 234; but this Section relates to moveable property to which a debtor is entitled, subject to a lien or right of some other person, to the immediate possession thereof. Hence both the plaintiff and the debtor, being owners of half shares, were both equally entitled to the immediate possession of the property. It would appear, therefore, that this Section does not apply. On the other hand, it is not right that a co-parcener should be deprived of his right to the possession of a property by his attachment in consequence of the other co-parcener's debt. In my opinion, the half share of the two bullocks should only have been sold, but such could not be effected without attachment, and this could only be done by seizing the animals, which act, by depriving, as it did, the plaintiff of his right to the half share, must be considered unfair and opposed to equity.

It seems necessary, therefore, that a reference on this question should be made to the High Court as prescribed in Section 28 of Act XXIII. of 1861, and that the Court should proceed in this case under Section 29 of the Act, and pass a decree contingent upon the opinion of the High Court on the point referred.

Being of opinion, therefore, that no specific rule exists relative to this attachment, I conceive that the Lower Court has acted in accordance with justice, equity, and good conscience as enjoined in Regulation III. of 1793, Section 21; and that, as the plaintiff and defendant (the debtor) were brothers, and the plaintiff claimed the bullocks as his own exclusive property, and thus tried to deprive the judgment-debtor of his just rights to the half share of the property, there was no other course left to the Lower Court than to proceed as it did. I, therefore, do not interfere with the attachment and sale of the property, and consequently no damages can be awarded.

The appeal is dismissed with costs and interest, but execution is stayed until the opinion of the High Court is ascertained.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We think that the defendant is not liable to damages in this suit in respect of the attachment of the bullocks. They were attached under a warrant issued by the Court. We do not understand why so long a period as 4 years and 11 months was occupied in determining such a question as whether 4 bullocks belonged to the judgment-debtor or to the present plaintiff, or whether they were jointly entitled to them. Nor do we understand why the bullocks were detained under attachment pending that litigation, and after the claim preferred to them by the plaintiff had been allowed.

The 6th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Jurisdiction (of Assistant and Deputy Commissioners in Chota Nagpore).

Reference to the High Court by Lieut.-Col. Davies, Judicial Commissioner of Chota Nagpore.

Dhodheyah (Defendant), *Appellant*,

versus

Munaran Tewary and others (Plaintiffs), *Respondents*.

An Assistant Commissioner in Chota Nagpore (exercising the powers of a Sudder Ameen) has no jurisdiction to try a suit valued at 2,800 rupees. The suit is cognizable by a Deputy Commissioner, who has the powers of a Principal Sudder Ameen.

Case.—On the 7th January last a petition of appeal was filed in this Court against the order of Lieutenant E. G. Lillingston, Assistant Commissioner, Loharduggah Division, dated 18th December last, refusing to admit to review his own judgment, dated 5th idem, in a suit for possession under Section 15, Act XIV. of 1859.

Colonel Dalton, who then held temporary charge of my office, sent for the proceedings of the Lower Court, with a view to ascertain how a dispute between landlord and tenant for possession was adjudicated under Act XIV. of 1859, and the papers have now come before me.

The law is silent as to the class of Courts before which suits of this nature should be brought; but, as Lieutenant Lillingston, Assistant Commissioner, is vested with the powers of a Sudder Ameen only, and this suit is valued at Rupees 2,800, it appears to me that Lieutenant Lillingston had no jurisdiction in the case, but that it ought to have been filed in the Court of the Deputy Commissioner vested with the powers of a Principal Sudder Ameen. If this view is correct, the proceedings of the Assistant Commissioner, Lieutenant Lillingston, should be quashed as being without jurisdiction, and, consequently, null and void.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We think that the Assistant Commissioner, exercising the powers of a Sudder Ameen, had no jurisdiction to try this suit, and consequently that his proceedings ought to be quashed. We think, also, that the plaint ought to be returned, in order that the same may be presented in the Court of the Deputy Commissioner (who has the powers of a Principal Sudder Ameen) and heard by him, and we order that that be done, unless cause be shown before this Court to the contrary within three weeks from the date of the service of this order upon the parties.

The 8th April 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Case No. 260 of 1866.

Limitation—Section 11, Act XIV. of 1859—Reversioner—Adoption.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 15th January 1866.

Juggendronath Banerjee (Plaintiff), *Appellant,*

versus

Rajendronath Holdar and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Kalee Mohun Doss* and *Annund Chunder Ghosal* for Appellant.

Baboos Kishen Kishore Ghose, Juggodanund Mookerjee, Kadernath Chatterjee, Sreenath Doss, Ashootosh Dhur, Dwarkanath Banerjee, and *Romesh Chunder Mitter* for Respondents.

The right of a reversionary heir to succession on the death of a widow in possession is a contingent one. It is only on the death of the widow, when his rights as reversioner are converted into a right to immediate possession, that he is required to sue for possession of the estate. The mere fact of the adoption of another party does not prejudice his rights. Those rights are invaded only when the adopted son, on the death of the widow, takes possession of the property as adopted son. Section 11, Act XIV. of 1859, has no application to such a case.

Trevor, J.—Plaintiff Juggendronath Banerjee sues the defendant Rajendronath Holdar and others for possession of certain real and personal property.

Plaintiff alleges that the late Kalee Pershad Holdar, his maternal uncle, died in the month of Assin 1244, leaving his childless widow Matunginee Debea as his heiress; that she, during her lifetime, held possession of the entire estate left by him, and died on the 29th Jeyt 1221; that, on her death, plaintiff and his minor brother Kamikhanath Banerjee were, according to the Hindoo Law, the surviving heirs to her husband, they being the grandsons, the daughter's sons of her husband's father: that as his, plaintiff's, brother was a minor, he, plaintiff, proceeded to take possession of his maternal uncle's estate and of his right of rotation of worship in the temple

the respondent in this case. No decision was given with reference to the two bullocks which died, and until the plaintiff has established his right to a share in this property, he cannot sue any person for damages under this head.

Now, the bullocks were sold on the 6th February 1866, and this action was instituted on the 30th June following. Consequently, as the cause of action continued up to the date of sale, the Moonsiff was wrong in holding that the suit, so far as regarded the claim to the amount of damages, was barred. The plaintiff, in the event of his proving that the attachment was illegal, is entitled to damages accruing within one year prior to the date of institution of the suit.

The next question for consideration is whether the attachment was illegal. It has been proved in a civil action that the debtor had only a half share of the two surviving bullocks. The attachment was made under Section 233 of Act VIII. of 1859, and the bullocks were kept in the custody of the Nazir. The plaintiff's pleader argues that the attachment should have been made under Section 234; but this Section relates to moveable property to which a debtor is entitled, subject to a lien or right of some other person, to the immediate possession thereof. Hence both the plaintiff and the debtor, being owners of half shares, were both equally entitled to the immediate possession of the property. It would appear, therefore, that this Section does not apply. On the other hand, it is not right that a co-parcener should be deprived of his right to the possession of a property by his attachment in consequence of the other co-parcener's debt. In my opinion, the half share of the two bullocks should only have been sold, but such could not be effected without attachment, and this could only be done by seizing the animals, which act, by depriving, as it did, the plaintiff of his right to the half share, must be considered unfair and opposed to equity.

It seems necessary, therefore, that a reference on this question should be made to the High Court as prescribed in Section 28 of Act XXIII. of 1861, and that the Court should proceed in this case under Section 29 of the Act, and pass a decree contingent upon the opinion of the High Court on the point referred.

Being of opinion, therefore, that no specific rule exists relative to this attachment, I conceive that the Lower Court has acted in accordance with justice, equity, and good conscience as enjoined in Regulation III. of 1793, Section 21; and that, as the plaintiff and defendant (the debtor) were brothers, and the plaintiff claimed the bullocks as his own exclusive property, and thus tried to deprive the judgment-debtor of his just rights to the half share of the property, there was no other course left to the Lower Court than to proceed as it did. I, therefore, do not interfere with the attachment and sale of the property, and consequently no damages can be awarded.

The appeal is dismissed with costs and interest, but execution is stayed until the opinion of the High Court is ascertained.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We think that the defendant is not liable to damages in this suit in respect of the attachment of the bullocks. They were attached under a warrant issued by the Court. We do not understand why so long a period as 4 years and 11 months was occupied in determining such a question as whether 4 bullocks belonged to the judgment-debtor or to the present plaintiff, or whether they were jointly entitled to them. Nor do we understand why the bullocks were detained under attachment pending that litigation, and after the claim preferred to them by the plaintiff had been allowed.

The 6th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Jurisdiction (of Assistant and Deputy Commissioners in Chota Nagpore).

Reference to the High Court by Lieut.-Col. Davies, Judicial Commissioner of Chota Nagpore.

Dhodheyah (Defendant), *Appellant*,

versus

Munaran Tewary and others (Plaintiffs), *Respondents.*

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Case.—On the 7th January last a petition of appeal was filed in this Court against the order of Lieutenant E. G. Lillingston, Assistant Commissioner, Lohardaggah Division, dated 18th December last, refusing to admit to review his own judgment, dated 5th idem, in a suit for possession under Section 15, Act XIV. of 1859.

Colonel Dalton, who then held temporary charge of my office, sent for the proceedings of the Lower Court, with a view to ascertain how a dispute between landlord and tenant for possession was adjudicated under Act XIV. of 1859, and the papers have now come before me.

The law is silent as to the class of Courts before which suits of this nature should be brought; but, as Lieutenant Lillingston, Assistant Commissioner, is vested with the powers of a Sudder Ameen only, and this suit is valued at Rupees 2,800, it appears to me that Lieutenant Lillingston had no jurisdiction in the case, but that it ought to have been filed in the Court of the Deputy Commissioner vested with the powers of a Principal Sudder Ameen. If this view is correct, the proceedings of the Assistant Commissioner, Lieutenant Lillingston, should be quashed as being without jurisdiction, and, consequently, null and void.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We think that the Assistant Commissioner, exercising the powers of a Sudder Ameen, had no jurisdiction to try this suit, and consequently that his proceedings ought to be quashed. We think, also, that the plaint ought to be returned, in order that the same may be presented in the Court of the Deputy Commissioner (who has the powers of a Principal Sudder Ameen) and heard by him, and we order that that be done, unless cause be shown before this Court to the contrary within three weeks from the date of the service of this order upon the parties.

The 8th April 1867.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Case No. 260 of 1866.

Limitation—Section 11, Act XIV. of 1859—Reversioner—Adoption.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 15th January 1866.

Juggendronath Banerjee (Plaintiff), *Appellant,*

versus

Rajendronath Holdar and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Kalee Mohun Doss* and *Annund Chunder Ghosal* for Appellant.

Baboos Kishen Kishore Ghose, Juggodanund Mookerjee, Kadernath Chatterjee, Sreenath Doss, Ashootosh Dhur, Dwarkanath Banerjee, and *Romesh Chunder Mitter* for Respondents.

The right of a reversionary heir to succession on the death of a widow in possession is a contingent one. It is only on the death of the widow, when his rights as reversioner are converted into a right to immediate possession, that he is required to sue for possession of the estate. The mere fact of the adoption of another party does not prejudice his rights. Those rights are invaded only when the adopted son, on the death of the widow, takes possession of the property as adopted son. Section 11, Act XIV. of 1859, has no application to such a case.

Trevor, J.—Plaintiff Juggendronath Banerjee sues the defendant Rajendronath Holdar and others for possession of certain real and personal property.

Plaintiff alleges that the late Kalee Pershad Holdar, his maternal uncle, died in the month of Assin 1244, leaving his childless widow Matunginee Debea as his heiress; that she, during her lifetime, held possession of the entire estate left by him, and died on the 29th Jeyt 1221; that, on her death, plaintiff and his minor brother Kamikhanath Banerjee were, according to the Hindoo Law, the surviving heirs to her husband, they being the grandsons, the daughter's sons of her husband's father: that as his, plaintiff's, brother was a minor, he, plaintiff, proceeded to take possession of his maternal uncle's estate and of his right of rotation of worship in the temple

of Kaleeghât; that he was opposed by Rajendronath Holdar and the other defendants who hold possession of the property without any title to it; that, as his brother is a minor, he now sues for his own eight annas of his maternal uncle's property.

The defendant Rajendronath Holdar pleads that he is the adopted son of Kalee Pershad, plaintiff's maternal uncle, having been duly adopted by his wife Matunginee Debea in Assin 1255, in conformity with a deed of permission executed and dated 16th Assin 1244 or in 1857, and that he has been in possession of the property, holding adversely to the plaintiff, and with his knowledge since the month of Assin 1255, when he was adopted by Matunginee Debea under permission from her husband Kalee Pershad Holdar since deceased; that, consequently, he is out of Court under the Statute of Limitation, he not having sued within such time after his minority as is prescribed by law; that, the late Kalee Pershad having no child of his loins, he, previous to his death, on the 16th Assin 1244, executed and delivered to his wife Matunginee Debea a deed of permission to adopt a son, which provided that his, Kalee Pershad's, mother Jeomonee should hold possession as manager of his entire estate during her lifetime; and that, on her death, his widow should remain in possession of nine annas during her lifetime and his, Kalee Pershad's, four sisters of seven annas of the estate, and, on the death of his widow, his adopted son should be entitled to possession of the nine annas, and, on the death of the aforesaid four sisters, the children of such of them as might have offspring should take the seven annas; that, under this deed, his, defendant's, paternal grandmother, Jeomonee, held possession as manager of the entire estate; that, after her, Matunginee remained in possession of nine annas, aud Jugodumba Debea and others four sisters, remained in possession of seven-annas share; that the said Matunginee, on the 31st Assin 1255, his natural father and mother having given him for adoption when only a year old, adopted him with all the proper ceremonies, and that his mother Matunginee started for Benares on the 21st Jeyt 1271, and died there on the 23rd of the same month; that he consequently is entitled to, and holds, nine annas of the property of Kalee Pershad Holdar according to the tenor of the deed of 16th Assin 1244 executed by him; that plaintiff's mother and her sister hold possession of the other seven annas, and plaintiff has been living always with his mother and managing the worship of the temple at Kaleeghât during his mother's term of rotation; that, under these circumstances, plaintiff's present unfounded action should be dismissed with costs.

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The Principal Sudder Ameen laid down the following issues:—*1st*, Is the suit barred by Limitation?

* * * * * *

"The issue in bar of the hearing of the "suit arises," remarks the Principal Sudder Ameen, "from the averment contained in "the defendant's answer to the effect that "the adoption now sought to be set aside "under color of an action for possession of "maternal grandfather's property by right "of inheritance took place on the 31st "Assin 1256, and the suit was brought on "the 24th Aghran 1271 B. S., that is, 16 "years, 7 months, and 23 days after; it was, "therefore, clearly barred by time, the more "so as the plaintiff was now 24 years of "age after attaining his majority as required "by Section 11, Act XIV. of 1859."

The Principal Sudder Ameen then proceeds to cite a decision of the late Sudder Court, dated 3rd August 1850 (Printed Reports, page 369) as relied on by the defendant's pleaders, and a decision of the High Court, dated 13th December 1862, Marshall's Reports, page 221) as relied on by the defendant.

"The points, therefore," proceeds the Principal Sudder Ameen, "which have to "be enquired into and determined with "reference to the law, as laid down by the "two decisions cited, are—

"*1st*.—Had the widow formally assented "to the succession of the defendant Rajen-"dronath Holdar as an adopted son to "the estate of her husband? and

"*2nd*.—Did the plaintiff, by his acts and "conduct or declaration, show that he did "not know of the adoption, or ignored it "as valid?"

The first question the Principal Sudder Ameen answers in the affirmative, and the second in the negative, and he then sums up the first issue in the following terms:—

"Plaintiff thus comes into Court nearly "16 years after the defendant's adoption, "when the defendant had been received into "the family and recognized and treated by "every member thereof as the adopted son "of Kalee Pershad, to deny and dispute it, "placing the defendant therefore in a position "of no ordinary difficulty to prove the "genuineness of the deed of permission and "the validity of the adoption when no one

" within this long period had questioned it. " From these circumstances I am of opinion " that plaintiff's suit, not having been brought " within three years after attaining his ma- " jority, as provided by Act XIV. of 1859, is " clearly barred by time, as ruled by the " two decisions of 1850 and 1856 referred " to in the High Court's decision of 1862."

* * * * * * *
* * * * * *

The issue in bar, observes the Principal Sudder Ameen, arises from the averments made in defendant's answer. What, then, are defendant's averments? The defendant's averments connected with his plea in bar on the Statute of Limitation are that "he has acquired his title in the estate of his adopting father, and held adverse title and possession in the presence and with the knowledge of plaintiff and his late eldest brother since the month of Assin 1255, when he was adopted by Matunginee Debea, under permission from her husband Kalee Pershad Holdar; that, as he was adopted according to Hindoo Law, and has, by a title adverse to plaintiff, become legally entitled to the property in suit as adopted son in the presence of the plaintiff, his, plaintiff's, suit is barred by limitation under Act XIV. of 1859, he not having sued within such time after the attainment of his majority as prescribed by law. He is now more than 24 years old; and as he has sued after the lapse of more than three years from the attainment of majority, he is out of time."

Now, it is clear that the defendant considers his adoption by his mother as creating a title adverse to plaintiff's cause of action, and that, as plaintiff was then a minor, as he has not instituted his suit within three years from the attainment of his majority, plaintiff is out of Court; but we think that this view of plaintiff's position is altogether erroneous. The plaintiff is the reversionary heir of Kalee Pershad Holdar, and, under Hindoo Law, his rights to succession until the death of Kalee Pershad's widow was a contingent one, that is, he might, on her death, be the reversionary heir, or he might not. Consequently, until her death, when his rights as reversioner were converted into a right to immediate possession, he was not required to sue for possession of the estate of Kalee Pershad Holdar. The mere fact of the adoption of the defendant did not prejudice plaintiff's eventual rights. Those rights were only invaded so as to give him a cause of action against Rajendronauth Holdar, when the defendant, on the death of Matunginee, took possession of the property of Kalee Pershad Holdar as adopted son, and, as he could not succeed of right as reversioner to any of the property during Matunginee's lifetime, it was not incumbent upon him to consider the possession of Kalee Pershad's sisters as aught, save Matunginee's possession. But, even if their possession be considered adverse to plaintiff, and plaintiff's cause of action to have arisen as regards them at the date of the death of Jeomonee, when, under the will, they were entitled to succeed to the seven annas, plaintiff is within time, Jeomonee, it appears from the evidence, having died within twelve years prior to the institution of the suit.

We think, therefore, that the application by the Principal Sudder Ameen of Section 11 of Act XIV. of 1859 to the present case is altogether erroneous.

Bhyrub Chunder Chowdhry, Plaintiff, Appellant,
versus
Kallykishen Roy and others, Defendants, Respondents, page 369 of Decisions for 1850.

Moreover, the two decisions of the late Sudder Court cited by him in support of the view which he has taken by no means support that view. In the case of 1850 there was not only an adoption, but a succession to the estate of the deceased father under that adoption during the lifetime of the widow. Under these circumstances the Court held that there was a clear proprietary possession in the adopted son from the date on which his name was recorded in the public revenue books as owner; that he had since then the whole proprietary right in himself, and that the injury or cause of action to the plaintiff was from the date at which proprietary possession, not as by title from the widow, but as by rightful descent from her husband, was assumed by the alleged adopted son.

Gobind Kishore Roy, Defendant, Appellant,
versus
Radha Madhub Udhicaree and Chunder Madhub Udhicaree, Plaintiff's Respondents, page 450 of Decision for 1856, and page 377 of Decisions for 1857.

Again, in the case of 1856, which was reviewed in 1857, the Court remarks "that there is the fact of adoption; there is the fact that, for 25 years, either alone or in concert with his adopted mother, the name of Gobind Kishore was recorded as proprietor; and that he was in possession either sole or jointly with her of the property under the adoption; and that the parties now suing to set aside the adoption have, by their repeated presence at ceremonies, recognized the status of the defendant."

In both these cases there was an adverse possession taken up and asserted by the adopted son during the mother's lifetime, and in the latter case there were some other strong facts showing the recognition of the defendant's status by the plaintiff, and on these grounds the Court held that the Statute would run against the reversioner before the death of the widow. But in the present case, it is not averred, nor is it attempted to be proved on the evidence, that the adopted son obtained possession of nine annas of the property during his mother's lifetime, or that plaintiff ever by any act recognized the status of the defendant. In fact, we observe that the Principal Sudder Ameen considered that the plaintiff was bound to prove that he did not know of the adoption or regarded it as valid, entirely reversing the correct order of things. These cases in no way, therefore, support the Principal Sudder Ameen's finding, and we may add that the ruling in these cases can never be applied to simple averments made in a defendant's written statement, but are applicable only after those averments have been proved by the parties making them by good and sufficient evidence.

For the reasons stated above, we think that the plaintiff, suing as reversionary heir of the husband of Matunginee, who died in Jeyt 1271, is quite within time, and that his suit is not barred by the Statute of Limitations.

* * * *

The 8th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution—Sale of rights of decree-holders.

Case No. 706 of 1866.

Miscellaneous Appeal from an order passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 18th June 1866, affirming an order passed by Baboo Kylash Chunder Deb, Principal Sudder Ameen of that District, dated the 20th April 1866.

Huro Pershad Roy Chowdhry and another (Judgment-debtors), *Appellants,*

versus

Ram Chunder Baboo (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboos Onookool Chunder Mookerjee and *Anund Chunder Ghosal* for Respondent.

A and other decree-holders sold their right and interest in the decree to *B*. Subsequently *A*'s right and title were sold in satisfaction of a decree against him, and purchased by *C*. *B* sued *C*, but failed to establish her title to *A*'s share and to set aside the sale to *C*. The decree-holders having appeared in that case and deposed that they had parted with their rights to *B*—HELD that they could not now be allowed to resume them without a re-transfer from her, or because she failed to make good her title in her suit against *C*.

Loch, J.—THE decree in this case was obtained on 12th May 1840, giving possession to the plaintiffs, Luckhee Narain and three others. Application for execution was made on 20th June 1849, but was rejected on the ground that no boundaries were given in the decree, and consequently the decree could not be enforced. A fresh application was made on 3rd June 1860. Notice was served on the judgment-debtor on 29th November 1860, and on 5th December 1860 he appeared and raised certain objections to the execution. The case remained pending till 26th December 1861, when an order was passed for hearing the case on 20th January 1862. It was not, however, finally disposed of till the 22nd August 1862, when it was struck off the file without any determination being come to on the objection raised by the debtor. Applications for execution were made in 1864 and 1865, and the present application was put in on the 8th January 1866.

On the application for execution presented in 1864, notice was served on the debtor, and return made by the Nazir on 29th August 1864, and the case was struck off on 16th December following. In 1865 a notice was served on 3rd March, and the defendant appeared and raised certain objections. The case was heard, and the objections were overruled, and possession was directed to be given. An application for review was put in on 28th August 1865, and the execution-case was struck off the file on 15th September 1865.

Three objections are raised in special appeal to the orders passed by the Lower Courts directing the execution to proceed: *1st*, limitation; *2nd*, that the decree-holders have no longer any interest in the decree which they seek to execute; and, *3rd*, the decree cannot be executed, there being no boundaries mentioned in the decree.

We think the plea of limitation must be rejected, for we find that in 1865 the decree-

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holder did take effectual steps to execute the decree, and the Court, after disposing of the objections raised by the debtor, directed possession to be given. Why possession was not taken at that time, we are not shown.

The *second* objection is to the following effect: The original decree-holders, Luckhee Narain and others, sold their right and interest in the decree to Doya Moyee Chowdhrain. Subsequently, the right and title of Luckhee Narain in the decree were sold in satisfaction of a decree against him, and were purchased by one Sutrooghun. Doya Moyee brought a suit to substantiate her title to this share, and to set aside the sale; and, though she was successful in the first Court, her suit was dismissed by the High Court in special appeal as having been brought after time. The decree-holders appeared in that case, and deposed that they had parted with their rights to Doya Moyee, and they cannot now be allowed to resume them without a re-transfer from her, or because she failed to make good her title in the suit she brought against Sutrooghun. A judgment of the Full Bench reported in 3 Weekly Reporter, page 90, Civil Rulings, is quoted in support of the objection now raised. But we find that the facts of that case were quite different from those in this case. In that case the plaintiff purchased the lands of certain parties which had been pledged as security for a debt to one Seeta Ram, who obtained a decree on his bond for the sale of these lands. Plaintiff, to protect these lands from sale, purchased the decree from Seeta Ram. After he had sold the decree, Seeta Ram took out execution and sold the property in question and purchased it himself, and the plaintiff then sued to set aside the sale and to recover the property. The Court held that Construction 1341 was never intended to enable a person in the position of the defendant Seeta Ram to commit a fraud by first selling a decree, and then suing out execution upon it. In this case, there is no allegation of fraud. Besides, a charge of fraud of the nature mentioned in Seeta Ram's case cannot be raised by the judgment-debtor. No fraud is practised towards him. A question of the kind might arise, between the purchaser Doya Moyee and the original decree-holders, her vendors, but cannot be advanced by the debtor as a bar to execution. Nor have we any ground for supposing that the purchaser is not taking out execution in the name of the original decree-holders, she having for some reason failed to have her own name substituted for theirs. We reject the second objection.

As to the *third* objection we see no force in it. The property called a "gurbari" describes itself, and does not require to be more particularly described. It is a dwelling place and premises surrounded with a moat, and this description is sufficiently explicit to allow of the decree for possession being executed. We reject this appeal with costs.

The 8th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Section 11, Act XXIII. of 1861—Execution—Sale.

Case No. 3103 of 1866.

Special Appeal from a decision passed by Baboo Kalee Kinkur Roy, Principal Sudder Ameen of Chittagong, dated the 3rd May 1866, affirming a decision passed by Moulvie Syud Mazum Hossain, Sudder Ameen of that District, dated the 24th November 1865.

Issan Chunder Doss (Defendant), *Appellant,*

versus

Chundro Bodinee and others (Plaintiffs), *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboo Bamachurn Banerjee for Respondents.

A decree-holder took out execution against *A* and *B*. When *B's* property was attached, his widow *C* came forward and laid claim to it on the part of her minor son, urging that, as *B* was not liable under the decree, his property could not be sold. The objection was disallowed, and the property was sold. HELD that Section 11, Act XXIII. of 1861, did not prevent *C* from suing to set aside that sale and recover *B's* property, on the ground that B was not liable under the decree.

Loch, J.—ISSAN CHUNDER, the defendant in this suit, brought an action for damages against Pitambur and Chundro Bodinee and others, and on 8th May 1860 obtained a decree against Pitambur personally and against Chundro Bodinee, Pitambur, and Haroo Dass, as heirs and in possession of the property left by Umbabutty. In that case, Chundro Bodinee, styling herself the widow of Haroo Dass, appealed to the Sudder Court; and from the judgment of that Court, dated 24th February 1862, it appears that

the suit of Issan Chunder was held to be barred by limitation, and Chundro Bodinee was released from the claim in the following words: "We reverse the judgment below so far as it affects the present appellant." Issan Chunder then sought execution of his decree against Pitambur and Haroo Dass. When the property of the latter was attached, Chundro Bodinee came forward and laid claim to it on the part of her minor son, urging that, as Haroo Dass was not liable under the decree, his property could not be sold. The objection was disallowed, and the property was sold; and the object of the present suit is to set aside that sale, on the ground that Haroo Dass was not liable under the decree.

The Lower Courts have given the plaintiff a decree, and the defendant comes up in special appeal, on the ground that the Judge has misconstrued the former decree; that the present suit cannot lie under the provision of Section 11, Act XXIII. of 1861; that, as Umbabutty's estate was made liable, the sale of it must stand; that the Lower Courts have fallen into the error of supposing that, under the decree of 1853, the whole property in dispute in the present case belonged to Haroo Dass, whereas he held only an equal share of two-thirds left by his father Tarinee Sunkur to his widow Umbabutty, and his sons Pitambur and Haroo Dass.

We find from the decision of 1860 (the copy before us being a translation into Bengalee of the Judge's decree, and not a copy of the original) that, when Issan Chunder brought that suit, Chundro Bodinee was a widow. The name of her husband Haroo Dass does not appear among the defendants. Chundro Bodinee does not appear to have had any right except through her husband, and, when she appealed to the late Sudder Court, it is evident that she did so as the widow of Haroo Dass, and the effect of the Court's order dismissing the plaintiff's suit against her was to release the property of Haroo Dass which she held for her son. How that property was afterwards allowed to be sold by the Lower Court, we do not understand. The present suit is brought by Chundro Bodinee in her son's name to set aside that sale, and the first question to be disposed of is whether, looking to the provisions of Section 11, Act XXIII. of 1861, such a suit can be entertained. The Lower Courts have looked upon the plaintiff's son as not a party to the suit of 1860; but, though his name does not appear, it is evident that his mother, as representative of his father Haroo Dass, was a party. But the fact is that, in that case, Chundro Bodinee was not personally liable for the amount decreed. She was made a party as representing her deceased husband Haroo Dass, who had succeeded to a share of Umbabutty's property, and she was liable only to the extent of that property which had come into her hands. She was released from the claim by the Sudder Court, and cannot, therefore, be considered as a party to the suit in such a sense as to enable the decree-holder to take out execution against her or any property of Umbabutty's found in her hands, for the Court declared the plaintiff's claim in that case to be barred by limitation. If, then, the property of Haroo Dass was subsequently sold, notwithstanding the order of the Sudder Court dismissing the plaintiff's claim against her, Section 11, Act XXIII. of 1861, cannot be held as applicable to her case, so as to prevent her bringing this suit to set aside the sale and recover her husband's property.

With regard to the second objection, we find on a reference to the decree of 1853, in which Haroo Dass was plaintiff, that he stated that his father, Tarinee Sunkur, had given one-third of his property to his wife Chundro Bullee and her son, and the remaining two-thirds to his other wife, Umbabutty, and her two sons Pitambur and Haroo Dass. On the death of Umbabutty, her sons would succeed to her share of the property, and thus the share of Haroo Dass in his paternal property would be one-third, and to that, and no more, the plaintiff in this case is entitled.

We see no grounds for admitting the special appeal, and dismiss it with costs.

The 8th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Resumption—Suit between lakherajdars.

Case No. 2441 of 1866.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 30th July 1866, affirming a decision pass-

ed by the Moonsiff of that District, dated the 31st January 1866.

Kaem Khan (one of the Defendants), *Appellant,*

versus

Mussamut Bibee Saheba Jan and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Kalee Kishen Sein and *Dabendro Narain Bose* for Appellant.

Baboo Pearee Lal Roy for Respondents.

One lakherajdar cannot maintain a suit for *resumption* against another, and force the defendant to prove his title.

Norman, J.—This was a case which was remanded for trial upon the principle laid down in the decision of the Full Bench of the 22nd of February 1865, *i. e.*, as a resumption-suit.

It turns out that the suit is by a lakherajdar for the resumption of a plot of alleged lakheraj land within his lakheraj mehal.

It is well established that a lakherajdar cannot, under the circumstances, maintain any suit for resumption. The suit should, therefore, have been at once dismissed by the Lower Court. Had the facts been brought to the notice of this Court on the former occasion, no remand would have taken place.

We reverse the decision of the Lower Court, and dismiss the suit with costs of all the Courts and interest.

Seton-Karr, J.—I concur in holding that this suit should have been dismissed.

When the case was remanded by the Divisional Bench, of which I formed one, the Court was under the impression that the case, like so many others remanded about the same time, was a simple one between zemindar and lakherajdar.

It turns out that the suit is one by a lakherajdar against another lakherajdar for resumption.

In this state of things, it was wholly improper and irregular for the Lower Courts to take on themselves to put aside the order of remand altogether, and to say that it did not apply. The Courts ought either to have stayed their hands, and have recommended the parties to apply for a review, or they should have proceeded to carry out the order of the remand, and to apply it to the case before them.

Both the Courts are wholly wrong in law in casting the *onus* of proving his rent-free title on the defendant. There is no law or custom that I know of, which places a lakherajdar, suing to resume from another lakherajdar, in such a favorable position, or which gives to the former the advantage which, before the late Full Bench Ruling in resumption-cases, had been notoriously possessed by ordinary zemindars who sued to resume.

But the truth is that the principle enunciated in the Full Bench Ruling might apply with greater force to this case, and might have been applied by the Lower Courts had they properly considered the matter.

The plaintiff had no inherent right of resumption in the ordinary sense of the term. Had any portion of his land been filched away by any other person, ryot, or lakherajdar, or encroached on, the party injured would, of course, have had his right of action like any other injured person, but then, like any other plaintiff, he must have started and proved his case.

I concur in thinking that his claim, as brought, should at once have been dismissed, and that the Lower Courts should never have enquired into the validity of the defendant's sunnuds.

Had the facts been properly laid before the remanding Bench, the remand might never have taken place.

The decisions of both the Courts are reversed, and the appeal is decreed with all costs.

The 8th April 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Conditional Sale—Prior Incumbrances.

Case No. 2945 of 1866.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 26th July 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 19th February 1866.

Radha Mohun Deb (Defendant), *Appellant,*

versus

Nund Lal Dey (Plaintiff), *Respondent.*

Baboo Anund Churn Ghosal for Appellant.

Baboo Mohendro Lal Shome for Respondent.

A purchaser under a conditional sale takes the property with all *bonâ fide* incumbrances created by his vendor previous to the sale.

Pundit, J.—THE special appellant rightly argues that the Lower Appellate Court is wrong in holding that plaintiff can question the *validity* of the lease acquired by the special appellant from plaintiff's vendor long before the conditional sale to the plaintiff of the property covered by the lease as well as of other property, but after a previous mortgage of all these properties to another person, whose claims are admitted to have been paid off from the consideration paid by the plaintiff.

It is not shown or pleaded that plaintiff received any assignment of the rights of the previous mortgagee. If he did not, he could not acquire his rights.

If, again, between the vendor of the plaintiff and the previous mortgagee, the vendor could not legally execute the lease to the special appellant, he could not equally execute the conditional sale (or second mortgage) to the plaintiff. The conditional sale to the plaintiff may be good as even against the said previous mortgagee as his dues were paid thereby; but it does not follow that, on that account, the lease by the plaintiff's vendor to the special appellant can become void as between plaintiff and the special appellant.

None but the first mortgagee could take steps to render void the lease of the special appellant, and that only after showing that any part of his dues yet remained unpaid. The plaintiff accepted the conditional sale, and under this state of facts he took it with all *bonâ fide* incumbrances created by his vendor previous to the sale, such as this registered lease.

Plaintiff may or may not have a right to question the *bona fides* of the lease set up by the defendant, but not its *invalidity*.

As the question of the *bona fides* of the lease has not been tried by the Lower Appellate Court, the case is remanded to the Lower Appellate Court to try whether the lease to the special appellant was a *bonâ-fide* transaction, or is merely a collusive arrangement fraudulently set up to defraud the plaintiff.

The 9th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgage—Mesne-profits.

Case No. 333 of 1866.

Regular Appeal from a decision passed by Baboo Gobind Chunder Sandyal, Principal Sudder Ameen of Sarun, dated the 30th June 1866.

Baboo Gour Kishen Singh (Plaintiff), *Appellant,*

versus

Sahay Fukeer Chund and others (Defendants), *Respondents.*

Mr. R. T. Allan, Moonshee Ameer Ali, and *Baboo Romanath Bose* for Appellant.

Messrs. A. T. T. Peterson and *C. Gregory* and *Baboo Kishen Kishore Ghose* for Respondents.

A suit for redemption does not bar the mortgagor from afterwards suing the mortgagee in possession for mesne-profits payable between the date of suit and the execution of decrees.

Kemp, J.—THIS was a suit for mesne-profits, Rupees 8,14,403-12.

The extent of the wassilat and the period over which it is to be calculated are not now in contention. The Principal Sudder Ameen has refused to entertain the plaintiff's suit, on the ground that he ought to have included the claim for wassilat in a former suit brought by him to redeem the mortgaged properties. Circular Order, Sudder Court, 11th January 1839, and Sections 187 and 196 of Act VIII. of 1859, are quoted.

It appears that the plaintiff sued on his equity of redemption, and, as the mortgaged properties were in possession of the mortgagee, he was compelled, under the provisions of Regulation I. of 1798, to set out clearly in his plaint the sum recovered from the usufruct, and to tender the balance, if any. In doing this, a mortgagor runs a great risk, for if, on taking an account, one rupee is found to be due to the mortgagee, the mortgagor would be liable to lose his suit.

The suit for redemption was instituted in 1847, and, after a long and harassing litigation, it was finally decreed by the late Sudder Court in 1862, June, that the plaintiff was entitled to redeem.

In the former suit it was alleged that there was a small surplus, some 600 rupees and odd, due to the mortgagee: but the pre-

sent suit is on a totally distinct cause of action, *viz.*, for mesne-profits from 1847 to 1862, during which period the mortgagee has been in wrongful possession.

The provisions of the Circular quoted by the Principal Sudder Ameen can have no possible application to a suit instituted after Act VIII. of 1859 came into operation. By that Act, Section 10, it is provided that a claim for the recovery of land and a claim for mesne-profits shall be deemed distinct causes of action. Section 187 refers to costs which are left in the discretion of the Court. Section 196 enacts that the Court "may," not shall, provide in the decree for the payment of mesne-profits.

Section 11, Act XXIII. of 1861, enacts that all questions regarding the amount of mesne-profits, which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or which may become payable in respect of the subject-matter of a suit between date of suit and execution of the decree, shall be determined by the order of the Court executing the decree, and not by separate suit. In this case no mesne-profits were the subject of the former suit, and no question as to the amount thereof was reserved for adjustment in the execution-stage. The suit of the plaintiff is, therefore, clearly one that can be entertained, and the Principal Sudder Ameen must try it. The question, to what extent the claim is barred, if barred at all, will, of course, be tried.

The suit is remanded, and the appeal decreed with costs and interest.*

The 9th April 1867.

Present:

The Hon'ble G. Loch and L. S. Jackson,

Judges.

Sale Law—Contribution—Default by shareholder with separate account.

Case No. 2922 of 1866.

Special Appeal from a decision passed by the Judge of Jessore, dated the 17th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th May 1866.

Kishen Chunder Ghose and another (Defendants), *Appellants,*

versus

Muddun Mohun Muzoomdar (Plaintiff), *Respondent.*

Baboo Bhuggobutty Churn Ghose for Appellants.

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Respondent.

A shareholder voluntarily coming forward and paying an arrear of revenue due by a defaulting co-shareholder, who has a separate account, before the share of such defaulter has been put up for sale under the provisions of Section 13, Act XI. of 1859, cannot claim to be reimbursed by such defaulter, nor is the defaulter under any legal obligation to re-pay the amount advanced.

Loch, J.—THE question before us is whether a shareholder, who has had a separate account opened for his share of the estate under the provisions of Section 11, Act XI. of 1859, is liable for contribution to another shareholder, who pays the arrears due upon the share so separated in account, under the belief that his own interest may suffer, if the arrears of revenue due by the defaulting shareholder be not paid up.

Section 13 of Act XI. of 1859 provides that, whenever a Collector shall have ordered a separate account to be kept for a share of an estate, if the estate become liable to sale for arrears of revenue, the Collector in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due. In all such cases, notice of the intention of excluding the share or shares from which no arrear is due, shall be given in the advertisement of sale prescribed in Section 6 of the Act It is only when the whole estate becomes liable to sale under the provisions of Section 14 of the Act that any danger is likely to accrue to the interests of a sharer who has paid up his quota of the revenue. If, under the circumstances stated in Section 14, a sharer, not in default, pay up the balance due by the defaulter, he becomes the purchaser of his share, and will be entitled to a certificate of purchase and delivery of possession of the defaulter's share from the Collector. Looking, therefore, at the terms of Section 13 of Act XI. of 1859, we think that, if a sharer voluntarily come forward and pay a balance due by a defaulting co-sharer who has a separate account, before the share of such defaulter has been put up for sale under the provisions of that Section, the party so paying cannot claim to be re-imbursed by such defaulter, for he was in no way bound to make such

* *Note.*—A Full Bench Ruling, Weekly Reporter, Volume VI., p. 240, 15th September 1866, Civil Rulings, supports our view of this case.

payment, nor were his interests jeopardised by the default of the co-sharer whose share alone was liable for sale in the first instance, nor, consequently, is the defaulter under any legal obligation to re-pay the amount advanced.

It is urged that the Collector sanctioned the separate account without having duly carried out the preliminary forms prescribed by Section 11. Whether he did so or not, is a point which we cannot enquire into in the present case. A suit might, perhaps, lie to set aside the Collector's proceedings on the ground of irregularity. But we pronounce no opinion on this subject. We are satisfied that we cannot dispose of such objections now. We think it unnecessary to refer to the decision of a Division Bench reported in 5 Weekly Reporter, as the grounds upon which that decision was passed are not applicable to this case. We reverse the order of the Lower Court in regard to the appellants before us, who will obtain their costs in all Courts.

The 10th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal (of pro forma Defendants).

Case No. 124 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 22nd November 1866, affirming a decision passed by the Moonsiff of Radhanuggur, dated the 30th July 1866.

Gudadhur Banerjee (one of the Defendants), *Appellant,*

versus

Mussamut Mun Mohunee Dossea and another (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

No one for Respondents.

Pro-formâ defendants, by making the real defendants, who did not appear, respondents as between themselves, cannot open out that portion of the case which, as between the plaintiff and the non-appealing defendants, has not been appealed against.

Kemp, J.—THE decision of the Principal Sudder Ameen is clearly wrong. The plaintiff did not appeal from the decision of the first Court. The appeal of the *pro-formâ* defendants against the other defendants should not have been entertained and adjudicated upon.

The *pro formâ* defendants, by making the real defendants, who did not appeal, respondents as between themselves, were not competent to open out that portion of the case, which, as between the plaintiff and the non-appealing defendants, had not been appealed against.

See Decisions, Volume II., Weekly Reporter, page 227, Volume V., page 106, Volume VII., page 49, Weekly Reporter.

The appeal is decreed, and the decision of the Lower Court, with reference to this portion of the case, reversed with costs and interest.

The 10th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Settlement after resumption—Presumption—Onus probandi.

Case No. 119 of 1867.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of 24-Pergunnahs, dated the 24th September 1866, affirming a decision passed by the Moonsiff of Manicktollah, dated the 15th January 1866.

Gooroo Churn Poddar and others (Defendants), *Appellants,*

versus

Hafeeza Bibee (Plaintiff), *Respondent.*

Baboo Greeja Sunker Muzoomdar for Appellants.

Mr. R. E. Twidale for Respondent.

In the settlement of a talook after resumption by Government with thirteen persons, it is not to be presumed that all thirteen persons had equal rights, simply because the settlement was made with all of them jointly, particularly where the settlement-proceedings show that the question of the extent of the shares was in dispute, and that the settlement was made jointly with the whole without prejudice to title. The *onus* of proving the extent of the plaintiff's vendor's title is on the plaintiff.

Kemp, J.—THIS appeal is confined to the third issue raised by the Court below, *viz.*, what was the extent of Imdad Ali's share, the vendor of the plaintiff.

The plaintiff averred that it was one-thirteenth. The defendant who has purchased the whole of the resumed mehal avers that Imdad Ali had no share at all, but a title to only 8 beegahs in the estate.

The Principal Sudder Ameen observes that, as the settlement after resumption was made with 13 persons, it must be presumed that each of those 13 persons represented equal interests, *viz.*, one-thirteenth each, and that the *onus* of proving Imdad Ali's share not to be one-thirteenth was on the defendant who had not discharged himself of the *onus*.

In appeal it is contended that the Principal Sudder Ameen is wrong in raising any such presumption, and that the *onus* has been thrown on the wrong party.

We think this contention is good. Defendant holds the whole of the talook. Plaintiff derives by purchase from Imdad Ali, whose share, he avers, was one-thirteenth. Defendant, on the contrary, asserts that Imdad Ali had no share at all, but held only 8 beegahs which have been purchased by the defendant.

The Principal Sudder Ameen was clearly wrong in raising the presumption that the 13 persons who engaged with Government after resumption had equal rights, simply because the settlement was made with all of them jointly. The settlement-proceedings clearly show that the question of the extent of the shares was in dispute between the co-parceners, and that the settlement was made jointly with the whole without prejudice to title.

The defendant being admittedly in possession of the whole talook, the *onus* of proving the extent of plaintiff's vendor's title is clearly on the plaintiff, and not on the defendant. The case must be remanded. The Principal Sudder Ameen will throw the *onus* on the plaintiff and decide the suit "de novo." Costs to follow the result.

The 10th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of water—Interruption—Acquiescence.

Case No. 3235 of 1866.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 18th September 1866, reversing a decision passed by Moulvie Ali Hyder, Sudder Ameen of that District, dated the 12th December 1864.

Roy Luchmee Pershad (Plaintiff), *Appellant,*

versus

Mussamut Fuzeelutoonissa Bibee and others (Defendants), *Respondents.*

Mr. W. E. Peacock and *Baboo Umurnath Bose* for Appellant.

Mr. C. Gregory for Respondents.

A wrongful interruption of a right of water does not necessarily destroy the right of user, unless such interruption has been acquiesced in by the party wronged.

Kemp, J.—A NEW ground of special appeal is taken by the learned Counsel for the special appellant, and taking into consideration the importance of the dispute between the parties, which involves the right of user of a channel to permit the egress of the water which may collect during the rains on the surface of the plaintiff's land into the river Pon Kon, we have permitted the new ground to be taken under Section 374 of Act VIII. of 1859.

The learned Counsel, Mr. Peacock, contends that, as the evidence on the part of the plaintiff shows that the user was with the plaintiff until it was interrupted by the act of the defendant, such interruption being a wrongful one, it would not necessarily destroy the plaintiff's right of user. A decision reported in Marshall, Volume I., page 506, is quoted.

There is, in our opinion, much force in the argument of the learned Counsel, and it is certainly supported by the case quoted by him.

We, therefore, remand the case. The Judge will try the question of the nature of the interruption of the plaintiff's right of user, whether it was acquiesced in by the plaintiff, or whether it was simply wrongful, and for what period, and, if wrongful, whether the plaintiff's right of user is lost to him.

Costs to follow the result.

The 10th April 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Account—Dismissal.

Cases Nos. 2272 and 2273 of 1866.

Special Appeals from a decision passed by the Additional Judge of Jessore, dated the 9th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 6th March 1865.

Mr. Thomas Owen (Plaintiff), *Appellant,*

versus

Mr. DeCruze and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellant.

Mr. R. E. Twidale and *Baboo Greeja Sunker Muzoomdar* for Respondents.

The failure by a plaintiff, who sues for an account, to prove the statement made in his plaint that he had sanctioned an estimate up to a certain sum which had been exceeded, does not render his suit liable to dismissal, nor absolve the defendants unless they can show that they were not servants or even contractors for profit and loss.

Pundit, J.—THESE two cases are so far similar that they will be governed by one and the same decision.

The appeal of the special appellant as against Mr. DeCruze, defendant, was dismissed by the Lower Appellate Court, because that Court, on trying the appeals of the other defendants, had dismissed the suits of the special appellant.

We find that the ground upon which the suit of the special appellant is dismissed is not what is pleaded by the defendants whose appeal the Lower Appellate Court has decreed.

Plaintiff sued *for accounts* from his servants, and it is comparatively immaterial whether the alleged estimates are produced by the plaintiff or are not produced. And it may be added that, if anything in defendant's favor depends upon these estimates, the defendant must have copies of the same, but defendant does not produce them.

The plea regarding the estimates is also immaterial, as plaintiff would be entitled to ask for an account even if the expenditure were not shown to have exceeded these estimates, unless the defendants can show that they were not servants, or, as regards the work done, that they were contractors for profit and loss, and this is not shown.

The Court of first instance had released Mr. DeCruze, who is defendant in both the cases, on the ground that it was proved before that Court that Mr. DeCruze had nothing to do with the expenditure of any money, and so was not responsible for any accounts of such expenditure.

The other defendants plead that they have nothing to do with the plaintiff direct; that they had acted under the orders of Mr. DeCruze; and that they had given all accounts to Mr. DeCruze, and that *he* had sent them up to the plaintiff. It is, therefore, clear that the question whether Mr. DeCruze is entitled to a release cannot be tried before it is settled whether the other defendants are liable or not, and this must be shown by their respective accounts.

We, accordingly, remand these cases to the Lower Appellate Court that it may re-try all the appeals pending before it, with reference to the above remarks.

The 19th February 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Execution.

Case No. 693 of 1866.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Patna, dated the 22nd of September 1866.

Lalla Poorihit Lall (Purchaser of the rights and interests of the Decree-holder), *Appellant,*

versus

Mussamut Sabeerun (Judgment-debtor), *Respondent.*

Messrs. R. V. Doyne, C. Gregory, and *R. E. Twidale,* and *Moonshee Ameer Ali Khan Bahadoor* for Appellant.

Mr. R. T. Allan, Baboo Dwarkanath Mitter, and *Moulvie Murhumut Hossein* for Respondent.

Where a person filed a petition in a suit stating that all the interests of the judgment-debtor had been transferred to him, and for several years thereafter opposed all attempts, on the part of the decree-holder, to issue execution—HELD that the person who had so come forward and had so interfered in the suit was liable as a defendant, and that execution could be issued against him.

A stranger to a suit cannot (save with the decree-holder's consent) so deal with a judgment-debtor as to acquire an interest in the suit which will enable him to oppose and prevent the execution of the decree without rendering himself liable to be put upon the record as a judgment-debtor.

Macpherson, J.—WE think that the order of the Lower Court is wrong, and ought to be reversed.

On the 11th of January 1851, a decree was passed in the suit of Mussamut Hanscower *versus* Kooldeep Narain and others, the effect of which was that, on paying to the defendants the sum of Rupees 11,000 with interest, the plaintiff was to be entitled to possession of certain lands which were the subject of the suit, together with mesne-profits. The interests of Kooldeep Narain and others in the suit came afterwards to be vested in one Rugoonath Sahoye, who became substantially the only defendant on the record. The money which had to be paid by the plaintiff before she could

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get possession or mesne-profits not having been paid by her, the position of the parties as regards the disputed property remained, up to 1858, apparently unaltered.

On the 24th of September 1858, Rugoonath Sahoye sold the lands in suit to the respondent Mussamut Sabeerun and one Mussamut Mahmoodun in shares of eight annas to each. The bill of sale is a very long one. It recites in full all the proceedings in Mussamut Hanscower's suit, and that the property has become vested in the vendor Rugoonath, who then proceeds by the bill of sale "absolutely to sell" to the two ladies named in equal shares of eight annas each, "all the entire 16 annas of the milkeeut and mokurruree of mouzah, &c., with all the appurtenances," &c., for the sum of Rupees 19,000. The deed contains a relinquishment to the purchasers by the vendor of all his claims against the property sold, authorizes the purchasers getting their names recorded in the Government serishta as proprietors in lieu of the vendor, and continues to the following effect :—

"If at any time Mussamat Hanscower, "the plaintiff decree-holder, put in any "petition for execution to be put in posses- "sion of the aforesaid mouzah by virtue "of the decree above alluded to, and if, "in the said suit for execution, necessity "requires to file any petition, evidence, and "document, and others, then the vendees are "competent and entitled to do so, agreeably "to this deed of absolute sale. And if the "said plaintiff deposit the principal sum "of purchase-money, together with the inter- "est thereon, and pray for being put in "possession according to the purport of the "aforesaid decree and the proceeding of "the Principal Sudder Ameen, and if order "be passed by the Court to put her (plaint- "iff) in possession, in such a case whatever "title I and my heirs had to what is due by "the said plaintiff, or to the sum of Rupees "11,000, the principal sum of purchase- "money, with interest at one per cent. from "the date of payment of the earnest and "the consideration-money in the treasury "of the Court up to the date of realization "thereof, and all matters agreeably to the "aforesaid decision which devolve on me, "the vendees and their heirs and representa- "tives are and shall be entitled to the same "agreeably to this deed of sale, *i.e.*, they "are and shall be competent to realize and "demand the principal sum of purchase- "money, together with the interest thereon, "raise objections as to the accounts in re- "spect of the money due (*zur-i-afianee*) and "as to others belonging thereto. In future "neither I nor my heirs or representatives "shall have any rights to or claim against "the vendees in respect of the principal "sum of purchase-money and the interest "thereon or the property sold."

It appears to us that the intention of the parties, as evidenced by this bill of sale, was that the purchasers were, as between themselves and the vendor, to take the place of the latter, with all its liabilities and advantages, in the suit of Mussamut Hanscower. The advantages were the having possession of the property and the being entitled to receive Rupees 11,000 with interest before they could be dispossessed. The liabilities were the having to give up possession and to account for the mesne-profits if the Rupees 11,000 and interest were paid. This seems to us to be the reasonable construction to be put on the language used in the deed, although, no doubt, more is said in the deed of the right to receive Rupees 11,000, if they should be paid, than of the liability to account for the mesne-profits. And the conduct of the parties shows, as will presently be seen, that this is the construction which they themselves put upon the transaction.

The construction of the bill of sale, however, is in this case a question of but small importance. Whatever may have been the terms of that document, inasmuch as the vendor and purchasers were alone parties to it, and were alone bound by it, the decree-holder could not have put the purchasers on the record as defendants against their will, and was, on the other hand, in no degree bound to abandon his right to proceed against Rugoonath, and to substitute the purchasers as defendants in his room. The question we have to decide is, whether Mussamut Sabeerun, the respondent, against whom it is now prayed that execution may be issued, is on the record as a defendant, and, as such, liable to have execution issued against her; or whether, although not formally on the record as defendants, she has, by the course she has pursued, placed herself in such a position with reference to the decree-holder that she must be held to have taken upon herself (with reference to the decree-holder) the responsibilities of the original judgment-debtors, and is therefore liable to be proceeded against in the manner prayed. What may be the respective rights and liabilities of the respondent and of Rugoonath as between themselves, we need not stop to enquire. The only question of importance is, What is

the respondent's position with reference to the decree-holder and to the suit? This we can ascertain only by a careful consideration of the various proceedings which have taken place since the execution of the bill of sale of the 24th September 1858.

On the 13th June 1859, Mussamut Hanscower, having applied to execute her decree for mesne-profits, without having, in the first instance, paid the Rupees 11,000 with interest, Rughoonath Sahoye filed a petition opposing her application on various grounds. In the 5th para. of this petition, Rugoonath distinctly pleads that he has sold his whole interest in the property to Mussamut Sabeerun and Mussamut Mahmoodun, and has put them in possession of it; that he has transferred to them whatever advantages or liabilities he had had in the suit, and that, therefore, if the decree-holder desired to execute the decree, she must execute it against the purchasers Sabeerun and Mahmoodun, and not against him Rugoonath, who was no longer in any way liable.

On the 16th July 1859, the purchasers Mussamut Sabeerun and Mussamut Mahmoodun also filed a petition opposing the plaintiff's application for execution. They refer to Rugoonath's petition of the 13th June, and in no way dispute the correctness of the statements made in the 5th para. of it. They state that the entire property had been sold to them, and that they had been put in possession, and were in possession. Then they complain that, notwithstanding this, the plaintiff had applied for execution against Rugoonath Sahoye, "who had now no interest whatever left him in the aforesaid property," and they add that the plaintiff objected to the sale to them by Rugoonath, which objections (they say) were of no weight, as Rugoonath had a perfect right to sell to them if he pleased. The petition then takes various objections to the application for execution, the principal objection being that the plaintiff could not have execution for mesne-profits or costs until she first paid the Rupees 11,000 with interest, and put herself in a position to demand possession.

On the 27th July 1859, the plaintiff's application for execution was rejected, mainly on the ground that it was premature, as the decree-holder could not execute her decree for mesne-profits and costs until she had paid the Rupees 11,000 and interest, and had so become entitled to possession.

A subsequent application for execution was opposed by Mussamut Sabeerun in a petition dated the 17th February 1862. In this petition she objected to execution issuing, as the decree-holder had not deposited such a sum as entitled her to possession, and she stated that the 8-annas share standing in the name of Mussamut Mahmoodun was held by Mahmoodun benamee for Abdool Wahab, the deceased husband of Sabeerun herself. In this petition reference was made to Rugoonath Sahoye's petition of the 13th June 1859, but nothing was said as to the allegations then put forward by Rugoonath being incorrect.

On the 21st March the Court directed the decree-holder to pay into Court a certain sum as the balance of the principal and interest due by her (in order to entitle her to possession, &c.), and, upon paying in this money, the decree-holder was to receive the mesne-profits.

An appeal was subsequently preferred to the High Court in the name of Mussamut Mahmoodun (who, as we have seen, was, in fact, merely benamee for Sabeerun) as to the mode in which interest on the mesne-profits was to be calculated, and the High Court altered an order which had been passed on this subject by the Lower Court.

After this, on the 8th September 1864, Mussamut Sabeerun filed another petition objecting to an application for execution for mesne-profits which had been put in by Torab Ali, to whom the decree of Mussamut Hanscower had been transferred, and who had been substituted on the record as decree-holder. She objected to the application, on the ground that it sought for more than the decree-holder was entitled to under the order which had been passed on appeal by the High Court. Then in the 3rd para. of her petition she contended, this being the first time that any such contention was raised, that Rugoonath alone, and not she, was liable for these mesne-profits, inasmuch as she (Sabeerun) had purchased from Rugoonath *only his right and interest in the money which was to be paid into Court by the decree-holder*, before possession, &c., could be obtained under the decree.

On the 31st December 1864 Mussamut Sabeerun presented a petition reciting a compromise which she had come to with certain members of her family with whom she had been in litigation, and declaring that Mussamut Mahmoodun alone was entitled to withdraw the money which the decree-holder had deposited in Court, and that as to "the decretal money" (mesne-profits and costs) for which execution was issued by

Torab Ali against Mahmoodun, the petitioner Sabeerun and others, she (Sabeerun) was not liable; but all the liabilities were vested in Mahmoodun and the other defendants. Mahmoodun filed a petition consenting to and confirming the statements thus made by Sabeerun. The Court, however, never declared that Sabeerun was thereby discharged from liability.

On the 5th January 1865, Sabeerun filed another petition, saying that, as she had now no interest in the suit, she desired that the petition which she had presented, objecting to the issue of execution and to the mode in which the mesne-profits had been calculated, might be struck off without the same being taken into consideration by the Court. Her petition was accordingly struck off without further enquiry, as she alleged herself to have no further interest in the matter. In the order striking off Sabeerun's petition of objections, the Court goes on to declare that the calculation of mesne-profits and interest (to which Sabeerun had objected) was correct. The amount finally paid by the decree-holder before he was entitled to possession and mesne-profits, was Rs. 27,571-11-8.

It thus appears that, supposing the whole rights and liabilities of the original judgment-debtors were transferred to the purchasers by the bill of sale of the 24th of September 1858, the position of the parties was this, that the purchasers, in return for the Rupees 19,000 which they paid, got actual possession of the property with the right to retain it, until Rupees 27,571-11-8 were paid to them by the decree-holder, but subject always, upon the payment of that sum by the decree-holder, to be turned out of possession, and to an account for mesne-profits.

On the 4th August 1866, Sabeerun files another petition, in opposition to the application for execution out of which the present appeal arises. She urges that it is contrary to the general rule that she should be held liable for mesne-profits for a period during which she was not in possession. Then she says that, under the compromise she had made (referred to in her petition of December 31st, 1864), Moulvie Mahomed Hossein, for whom the name of Mahmoodun was used in the compromise, had admitted and acknowledged that he was solely liable for the mesne-profits, and had absolved her (Sabeerun) from liability in respect thereof, whereupon she, Sabeerun, had withdrawn her claim for her share of the purchase-money, &c. She further alleged that the same Mahomed Hossein had had Mussamut Hanscower's decree transferred to him, Torab Ali's name being only ostensibly put forward, and that he was now trying to make her liable for the mesne-profits. The petition concluded by praying that she, Sabeerun, might be declared not to be liable for the mesne-profits, &c., and that certain property of hers, which had been attached, and was about to be sold, might be released.

It is to be observed that this petition contains no distinct allegation that, in purchasing as she did from Rugoonath, she did not intend to take upon herself his liabilities under the decree, as well as his rights.

The Lower Court granted the prayer of the petition, on the ground that all that Sabeerun had purchased originally from Rugoonath was the right to receive the money which, under the decree, the decree-holder was to pay before he could get possession, &c., and the Court was of opinion that there was nothing to show that Sabeerun had ever, by any petition filed by her, admitted that she was liable for the mesne-profits. The Principal Sudder Ameen says: "She only stated "(in her petition) that she was entitled to "represent the vendor in everything relat-"ing to the refund (by the decree-holder) "of the consideration-money, and no fur-"ther;" but the inaccuracy and unsoundness of the opinion thus expressed are very clearly shown by the various petitions and proceedings to which we have already referred in detail. Whatever doubts may exist as to the legal consequences of the course she has adopted, there can be no possible doubt as to the fact that Sabeerun has treated herself and held herself out as liable for these mesne-profits and as standing in the room of Rugoonath with reference to them. It is true that, in her petition of the 8th September 1864, she denied her liability; but she frequently admitted it subsequently, as she had always done previously.

It is contended for the respondent that she is not liable now, inasmuch as she never intended to take this liability upon herself, and inasmuch as she never has formally been placed upon the record as judgment-debtor in lieu of Rugoonath Sahoye; and it is argued that, if the parties had really believed that the purchasers took upon themselves the responsibilities of Rugoonath, the record would have been altered, and would have shown on the face of it that further proceedings, as regards Rugoonath, were finally abandoned.

No doubt, the proceedings connected with the execution of the decree in this case have been very carelessly and irregularly conducted—as proceedings in execution of decrees too frequently are. The Court had no right to listen to the respondent as an "intervenor" or "objector," or as bearing any other character, without, in the first instance, distinctly ascertaining and recording what her position was. She either was a defendant, or, at any rate, a person liable to be proceeded against as such, or she had no *locus standi* which authorized her objecting or in any way interfering with any application for execution made by the decree-holder against the judgment-debtor. And if she was not a defendant, but only a person liable to be made one, she should have been formally placed on the record as a defendant before she was listened to. It is a novel doctrine that a stranger to a suit can, by dealing with the judgment-debtor, acquire such an interest in the suit that he can interfere with and prevent the execution of the decree, and yet himself avoid all liability under the decree.

Even supposing the respondent not to have been originally liable, we think she cannot now be heard to dispute her liability, because, ever since she filed her petition of July 1859, she has been before the Court as the substantial judgment-debtor, and as the person chiefly interested in all questions as to the execution of the decree. In September 1864, she denied her liability, but her conduct after that amounts to an admission that she considered she had been (if she was not still) liable. Rugoonath's name still remains on the record; but it is many years since any substantial steps have been taken against him—the respondent either in her own name or that of Mussamut Mahmoodun having been the person by whom all attempts to issue execution were opposed. It may be true that it is only in 1864 that she is first called a "judgment-debtor" in the proceedings, and that till then she is always stated to be merely a "petitioner" or "objector;" but in our opinion she is nevertheless liable, having voluntarily come forward and declared that all Rugoonath's interests had been transferred to her, and having for years contested the proceedings taken by the decree-holder in a manner in which she had no possible right to contest them, unless she was in fact a judgment-debtor. She cannot be allowed to blow hot and cold—at one time to appear and dispute the decree-holder's proceedings, and at another to appear and contend she is not liable under the decree, and has no interest in those very proceedings which she has been disputing.

We reverse the order of the Lower Court with costs.

The 11th April 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Execution — Appeal — Decree for land — Demolition of buildings thereon.

Case No. 127 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 31st August 1866, modifying a decision of the Sudder Moonsiff of that District, dated the 7th February 1866.

Radha Gobind Shaha (Plaintiff),

Appellant,

versus

Brojender Coomar Roy Chowdhry (Defendant), *Respondent.*

Baboo Dwarkanath Sein for Appellant.

Baboos Onookool Chunder Mookerjee and *Sreenath Doss* for Respondent.

The plaintiff, in execution of a decree for land, endeavoured to obtain possession of the land and to pull down buildings erected by the defendant upon part of the land alleged by him to be comprised in the decree. The defendant objected that the land in question was not part of the land comprised in the decree, whereupon the plaintiff applied to the Court executing the decree, and was referred by that Court to a fresh suit on the ground that the decree was silent about the demolition of the buildings. HELD that the plaintiff should have appealed against that order as a matter to be determined in execution of decree, and that no fresh suit lay upon it.

Jackson, J.—THESE proceedings are altogether without jurisdiction. Section 11, Act XXIII. of 1861, provides that all questions regarding the amount of mesne-profits and other questions which it proceeds to set forth, "and any other questions "arising between the parties to the suit in "which the decree was passed and relating "to the execution of the decree, shall be "determined by order of the Court execut-"ing the decree, and not by separate suit, "and the order passed by the Court shall "be open to appeal."

In this case the plaintiff got a decree for certain land. In proceeding to execute it, he found that buildings had been erected by the defendant upon part of the land which

he alleged to be comprised in his decree. He endeavoured to get possession of the land and to pull down the buildings. Thereupon the defendant objected that this land was not part of the land comprised in the decree. The decree-holder applied to the Court executing the decree; but the Court stated that, as the decree was silent on the subject of demolishing such buildings, it was necessary for him to institute a fresh suit. He never appealed against this order, but, adopting the course suggested by the Court, brought a fresh suit. It is quite clear that this was a matter which should have been determined in execution of decree, and that no fresh suit could have been brought upon it.

All the proceedings must, therefore, be set aside, and the appeal of the plaintiff must be disallowed. But, under the circumstances, as the parties were misled by the order of the Court, it appears to me that each party should pay his own costs.

Markby, J.—I am of the same opinion.

The 11th April 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Cause of action—Resumption—Special Commissioner—Jurisdiction.

Case No. 126 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 23rd of November 1866, affirming a decree of the Moonsiff of Bistoopore, dated the 31st July 1866.

Shiboosoonduree Debea and another (Plaintiffs), *Appellants,*

versus

The Secretary of State and others (Defendants), *Respondents.*

Baboo Issen Chunder Chuckerbutty for Appellants.

Baboos Kishen Kishore Ghose and *Mohendro Lall Shome* for Respondents.

The property of the plaintiff having been included among the lands to which certain resumption-proceedings between the Government and a third party related, the plaintiff preferred an objection which was disallowed by the Collector. The Special Commissioner on appeal declined, for want of jurisdiction, to entertain the objection. HELD that the order of the Special Commissioner could not constitute any cause of action either against the Government or the third party.

Jackson, J.—It appears to me that it is unnecessary for this Court to come to any decision upon the point which has been raised in the present special appeal, because the plaint, as we have it before us, manifestly discloses no cause of action whatever.

The allegation in the plaint is that certain resumption-proceedings were going on between the Government and a third party, whereupon some lands, which are stated to be the property of the plaintiff, were included in the measurement of a particular *dag* among the lands to which the resumption-proceedings related. The plaintiff thereupon preferred an objection. The objection was dismissed by the Collector. An appeal being preferred against that order of dismissal to the Special Commissioner, that authority declared that he had no jurisdiction, and again rejected the claim. The plaint states that this order of rejection constituted the cause of action of the plaintiff. But, as the Special Commissioner was a Judge of a Court of Justice constituted for a particular purpose by Regulation III. of 1828, it seems quite clear that the order of the Special Commissioner declining for want of jurisdiction to entertain that objection could constitute no cause of action either against the Government or against the third person concerned.

It appears to me, therefore, that this plaint ought to have been rejected, and that to go into any of the other points raised would be superfluous. It is not stated in the plaint that the plaintiff has been at any time dispossessed of the lands in question, although the plaint is superscribed as a plaint for possession by declaration of title, and his vakeel has stated before us that his client is still in possession. If that be so, it is satisfactory to know that the plaintiff is not in any way prejudiced by this order, inasmuch as, if the defendants or any of the defendants proceed to dispossess him of the lands, he can always sue afresh upon that cause of action.

I think, therefore, that this appeal must be rejected with costs.

Markby, J.—I am entirely of the same opinion.

The 11th April 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Section 71, Act X. of 1859—Cancelment of lease —Ejectment.

Case No. 139 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 6th December 1866, reversing a decision of the Deputy Collector of that District, dated the 23rd June 1866.

Sheikh Mahomed Hossein and another (Plaintiffs), *Appellants,*

versus

Boodhun Singh *alias* Roopnarain Singh (Defendant), *Respondent.*

Mr. C. Gregory for Appellants.

Baboos Onookool Chunder Mookerjee and *Kishen Succa Mookerjee* for Respondent.

Section 78, Act X. of 1859, applies equally whether the ryot's liability to be ejected arises under Section 21 of that Act, or under special stipulation in the contract between him and his landlord.

Jackson, J.—In this case the plaintiff, a zemindar, sued to cancel a lease which he had granted to the defendant. He had previously recovered a decree against the same defendant for an earlier arrear of rent; and, at the same time, with the present suit for cancelment of the lease, he had instituted a separate suit on account of a further arrear which he alleged to have then accrued. The earlier decree for the arrear of rent was, it appears, at the time of the institution of this suit, unsatisfied. But, while the suit was pending before judgment, the amount of that earlier decree was paid into Court. A decree for the second arrear of rent was passed on the 26th June 1836, after the present case was decided. Consequently, there was not, at the time of the passing of the decree in this case on the 23rd, any unsatisfied decree for an arrear of rent, nor was there in the present case an adjudication that the rent was due. The decree consequently did not and could not contain any specification of an arrear of rent due at the time when it was passed, and the ryot for this reason was deprived of the benefit of the concluding Clause of Section 78, Act X. of 1859, which would enable him to pay in the amount of the arrear so specified within 15 days of the passing of the decree, and thereupon the execution would have been stayed.

Mr. Gregory, the vakeel for the plaintiff, who specially appeals in this case, contends that the Judge who has reversed the Deputy Collector's decree for cancelment of the lease is in error, and that the plaintiff is entitled to have his lease cancelled, because he sued, not under the provisions of Section 21, Act X. of 1859, which provides for the cancelment of a lease, but under a special stipulation in the contract between himself and the ryot, that, on failure to pay the rent at any time, the lease should be liable to be cancelled.

It appears to me that both these classes of cases are provided for in Section 78. That Section says:—

"Any person desiring to eject a ryot, or "to cancel a lease on account of non-payment "of arrears of rent, may sue for such eject- "ment or cancelment and for recovery of "the arrear in the same action, or may "adduce any unexecuted decree for arrears "of rent as evidence of the existence of "such arrear in a suit for such ejectment "or cancelment."

It appears, therefore, that the landlord has two courses provided for him—one, in case of his having already obtained a decree for rent against the ryot, which decree is still unsatisfied—the other, in case of an existing arrear of rent for which he has not previously sued.

In the first case he may sue separately for cancelment and adduce the unsatisfied decree in evidence of the existence of an arrear. In the other case he may sue simultaneously for the arrear of rent and for the cancelment of the lease, and the Court will be able to adjudicate upon the arrear, and at the same time to declare that the ryot may be ejected. But in either of these cases, the Section provides that the arrear due shall be specified in the decree, and, out of tenderness for the ryot, it is provided that, having that amount specifically set out and manifest to him, he shall be able to come into Court within 15 days after the decree is passed and pay the arrear, and thereupon execution shall be stayed.

It appears to me that that provision applies equally whether the ryot's liability to be ejected arises under Section 21, Act X. of 1859, or under any special stipulation which may be found in the contract between him and the landlord.

I think, therefore, that the Judge's decision is quite right, and that the appeal must be dismissed with costs.

Markby, J.—I am of the same opinion.

With regard to the last point, namely, whether Section 78 applies when the right

to eject is reserved in the lease, it may, perhaps, be as well to mention that the same view was taken of this Section in the case reported in the 6th Volume of the Weekly Reporter, Act X. Rulings, page 64.

The 11th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Section 119, Act VIII. of 1859—Ex-parte decree.

Cases Nos. 831 and 868 of 1866.

Miscellaneous Appeals from an order passed by the Judge of Bhaugulpore, dated the 20th August 1866, reversing an order passed by the Sudder Ameen of that District, dated the 21st June 1866.

Shaikh Gholam Ahyah (Decree-holder), *Appellant,*

versus

Sham Soondur Koonwaree (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Kalee Kishen Sein and *Kalee Prosunno Dutt* for Respondent.

The object of Section 119, Act VIII. of 1859, is to make it imperative on a defendant, against whom an *ex-parte* decree has been passed, and who desires to come in and set aside that decree, to apply to the Court as soon as possible after he has notice of the passing of the decree, *i.e.*, within a reasonable time not exceeding 30 days from the first actual execution of process to enforce the judgment.

Macpherson, J.—THESE cases are remanded in order that they may be re-heard by the Lower Appellate Court. Under Section 119 of Act VIII. of 1859, a defendant, against whom an *ex-parte* decree has been passed, and who desires to be allowed to come in and set aside that decree, must apply for that purpose to the Court "within "a reasonable time not exceeding thirty days "after any process for enforcing the judg- "ment has been executed." The object of the Section is to make it imperative on the defendant to apply to the Court as soon as possible after he has got notice of the decree having been passed—for the direction is that he shall apply within a *reasonable* time not exceeding thirty days, showing that he is not entitled to the thirty days if he could reasonably have appeared earlier.

Then, in order to obviate all questions as to whether the defendant did or did not have notice, it is enacted that he shall come in within thirty days at furthest of the *execution* of *any* process against him. It appears to us that the word "any" here must be read as "first." It is quite open to that interpretation, and it would be absurd to suppose that the Legislature intended to allow a defendant to come in at any time, however often execution had issued against him, and however long he had been avowedly aware of the existence of the decree, provided only that some process had been executed within thirty days of the application. It is clear that it is from the first actual execution that the time is to count. But the time counts from *actual* execution, *i.e.*, actual arrest of the person of the defendant, or attachment or seizure of his property, and not merely from the date of issuing warrants of attachment, or of putting them in the hands of the Officer of the Court for execution.

In the present case, the Court must determine whether the defendant's application was made within a reasonable time not exceeding thirty days from the first *actual execution* of process to enforce the judgment.

If it was, he is entitled to the benefit of Section 119. If it was not, he cannot now set aside the judgment. It is impossible from the judgment of the Lower Court to say what precisely was the nature of the process executed, *i.e.*, whether it was a mere issue of an attachment, or an actual seizure or arrest under a writ duly issued: nor does it appear for what reason in particular the Court deemed the application to have been made in time.

Remand accordingly.

The 11th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Interest.

Case No. 32 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Gya, dated the 18th January 1867.

Mussamut Soobudra Bebee, *Appellant,*

versus

Sheo Churn Lall, *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

No one for Respondent.

Where a decree did not specify the rate of interest—HELD that the Court ought not to have allowed a higher than the usual Court rate, namely 12 per cent.

Macpherson, J.—As the decree does not specify the *rate* of interest, we think the Court ought to have allowed interest at 12 per cent, the usual Court rate, and that it was wrong to allow a higher rate.

We amend the order of the Lower Court accordingly.

The 11th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Sections 223 and 224, Act VIII. of 1859—Execution—Khas possession—Co-sharers.

Case No. 634 of 1866.

Review of a judgment passed by the Hon'ble Justices Loch and Macpherson on the 13th of August 1866, in Miscellaneous Appeal No. 368 of 1866.

Ranee Shama Soonderee Debea (Decree-holder), *Petitioner,*

versus

Messrs. Jardine, Skinner, and Co. (Judgment-debtors), *Opposite Party.*

Mr. R. V. Doyne and *Baboos Sreenath Doss* and *Mohinee Mohun Roy* for Petitioner.

Messrs. R. T. Allan and *J. Rochfort* for the Opposite Party.

Where a decree is partly for a share of land in the occupancy or khas possession of the defendants, and partly for a share of land in the occupancy of ryots, the decree as to the former can only be executed according to Section 223, Act VIII. of 1859, and, as to the latter, according to Section 224.

Macpherson, J.—CAUSE has been shown against the application for review of our judgment in this matter, and we have thought it right to grant the application for review and to re-hear the appeal.

It appears to us, on further consideration of our order of the 13th of August 1866 (which will be found reported in 6 Weekly Reporter 59, Miscellaneous), that it is wrong, and must be amended. So far as the decree is for a 2-annas 15-gundahs share of land or other immoveable property in the occupancy or khas possession of the defendants, or of any person claiming under a title created by them subsequently to the institution of the suit, the decree ought to be carried into execution by putting the plaintiffs in possession of a 2-annas 15-gundahs share thereof, as provided by Section 223 of Act VIII. of 1859. So far as the decree is for a share of lands, &c., in the occupancy of ryots or other persons entitled to occupy the same, it must be executed in the manner prescribed in Section 224.

In no other way can full effect be given to the original decree passed in this suit (reported in 3 Weekly Reporter 144). The case of Brohomoye Dabee *versus* Rajchunder Roy (5 Weekly Reporter 15, Miscellaneous) is much in point.

We amend our former order, and dismiss the appellant's appeal with costs (including those of the review).

The 12th April 1867.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Decree for rent (under the old law).

Case No. 3276 of 1866.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 27th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th November 1865.

Indur Chundra Doogur (Plaintiff), *Appellant,*

versus

Ruttun Coomaree Bibee (Defendant), *Respondent.*

Baboos Khettur Mohun Mookerjee and *Mohesh Chunder Chowdhry* for Appellant.

Mr. R. E. Twidale and *Baboo Sreenath Doss* for Respondent.

A decree for rent under the old law was held to be a simple money-decree, and as not burdening the tenure after it had *bonâ fide* passed by private purchase out of the hands of the debtor.

Seton-Karr, J.—THE facts of this case, proved or admitted, are as follows: The plaintiff, on the 22nd of April 1856, obtained a decree for rent in a civil suit against the predecessors of the defendant, holder of a mourosee jumma. About the same time, or in 1262, the tenure passed into the hands of the present defendant by private purchase. The plaintiff, holder of the decree of 1856 against the former tenants, now sues to put up to sale the

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mourosee tenure which passed from the hands of the said tenants to the present defendants.

Both Courts have held that the plaintiff is not entitled to hold the tenure liable for the arrears which accrued on it previous to 1856, and when it was held by the vendors of the defendants.

The contention before us is that the Courts are wrong in law; that the tenure is burdened with the arrears, or at least with the arrears of the year in which the decree was obtained, and that the tenure can be sold for the said arrears judicially decreed.

In support of this, the following decisions are quoted: Wyman's Revenue and Police Journal, Volume II., page 213; ditto Volume III., page 19; ditto Volume III., page 131; and against it, Weekly Reporter, Volume VII., page 260, and Sudder Dewanny Adawlut for 1856, page 1019.

The decree gained by the plaintiff in 1856 was against two persons, predecessors of the defendants, and it simply declared them liable to pay the money due as rents. The decisions quoted by the pleader for the appellant all refer to cases decided under the rent-laws, and they appear to me to have no application to the case before us. I cannot hold that the decree of 1856 burdened the land. That decree might be executed against the persons of the debtors or against any property which they still hold. But it appears to me to give the plaintiff no right whatever to follow the land which has passed away from the defendants by a transaction the character of which is not in any way impeached. Had the plaintiff chosen the summary remedy for recovery of arrears of rent, the case might have been different. But it seems to me clear, after the full discussion which we have heard on the subject, that the plaintiff is not entitled to say that his decree of 1856 can bind the tenure and make it liable for the arrears due either previous to or in that year. It is in all respects a simple money-decree.

The cases quoted by the respondent, especially that of the Sudder Dewanny Adawlut, 1856, seem in point. This case is not likely to form a precedent, as a similar suit cannot be brought under the present law.

I would affirm the decision of the Lower Court, and dismiss the appeal with costs.

Glover, J.—I am of the same opinion.

The 15th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Jurisdiction—Contribution—Small Cause Courts—Mofussil Law—Co-sharers—Government Revenue.

Reference to the High Court by Mr. H. Bell, Judge of the Principal Court of Small Causes of Kishnaghur, dated the 11th January 1867.

Rambux Chittangeo and another,
Plaintiffs,

versus

Modhoosoodun Paul Chowdhry and others,
Defendants.

A co-sharer in an estate paying revenue to Government, who has paid the revenue due upon the whole estate, cannot sue in a Small Cause Court his co-sharers for contribution.

The Small Cause Courts are bound to adjudicate according to the law which is administered in the other Courts of the Mofussil.

According to the law administered in the Mofussil, the obligation to contribute is not founded upon contract in the absence of an express contract. No contract can be implied on the part of co-sharers of an estate to contribute towards the payment of the Government revenue. There is no implied contract for contribution on the part of sureties, any more than there is on the part of persons who are liable by law to contribute to general average.

Distinction between cases of convention and agreement.

Case.—PLAINTIFF, a co-sharer in an estate paying revenue to Government, deposited, under Section 9, Act XI. of 1859, the revenue due upon the whole estate to save the property being put up for sale. He now sues his co-sharers for contribution. Upon a reference to the High Court by the Judge of the Small Cause Court of Hooghly, it was ruled in September last that, in claims of this sort, the Small Cause Court had no jurisdiction. The case No. 617 of 1866, Modhoosoodun Mozoomdar *vs.* Bindoo Bashinee, is quoted at page 15, Civil References, of the 6th Weekly Reporter.

I have ventured, however, to refer the matter again for the High Court's decision, and I hope the following reasons may be considered sufficient to justify me in adopting the unusual course of submitting a second reference upon a point which has once been decided.

It appears from the printed report that Counsel were not employed in the case, and the learned Judges had therefore merely before them the letter of the Small Cause

Court Judge upon which to base their decision, and it is not improbable to suppose that, if the case had been fully argued before them, they might have arrived at a different conclusion. I propose, therefore, to set briefly before the Court the reasons which induce me to think that I have jurisdiction to entertain the present suit.

The plaintiff is a co-sharer in an estate paying revenue to Government, and under Section 9, Act XI. of 1859, he was authorized to deposit in the Collectorate the amount which his co-sharers had neglected to pay. The payment was not an officious payment, but was made to save his own interest in the estate. Of this payment, the defendants, his co-sharers, have reaped the benefit; for, in consequence of the payment of the revenue by the plaintiff, the entire estate was preserved from sale. Now, under Section 6, Act XI. of 1865, Small Cause Courts can take cognizance of claims for money due whether on bond or other contract, and the question is whether the word "contract" is sufficiently wide to admit of the present claim being included within it. I think it is. There are many cases in which no express contract is made. But where the law, from the relation in which the individuals stand to one another, implies a contract—where, for instance, the surety pays the debt of his principal—the law implies a contract that the principal will re-imburse the surety; or again, where a joint contractor has satisfied the whole demand, the law implies a contract on the part of his fellow contractors to contribute the respective *quotas* of the joint liability. Upon the same principle it is laid down that, where one of two sharers in a farming lease takes upon himself to collect the rents, the law implies a contract on his part to pay to his co-sharer the amount that is due (Macpherson on Contracts III.). Now, cases of this description are daily tried by Small Cause Courts. For instance, in Joynarain Manjee *vs.* Moodhoosoodun Gurait, 2 Weekly Reporter 134, it was held that plaintiff, who with the defendant was jointly entitled to the profits of certain lands, could sue in the Small Cause Court for the recovery of the excess profits appropriated by the defendant. An exactly similar decision was given in the case of Kandaree Joardar *vs.* Manick, Sutherland's Small Cause Court Cases, page 23. Now, upon what principle were these cases held to be cognizable by the Small Cause Courts? They must fall under the head of money due on bond or other contract, for there is no other Clause in the Small Cause Court Act under which they could fall. But in none of the cases quoted was there any express contract, but such was the relation of the parties to each other that the law, without the existence of a contract, implied a contract. The present case, it appears to me, is of exactly an analogous nature. Under Section 9, Act XI. of 1859, a co-sharer in a joint estate is permitted to protect his own interest in the joint property by paying the revenue due upon the whole estate, and the law enacts that such a payment is to be considered a debt recoverable from the joint sharers in the estate; in other words, the law implies a contract on the part of the joint sharers to re-pay the sum which a joint sharer has paid on their account and for their benefit. And, as the money paid is recoverable under this implied contract, the Small Cause Courts have, in my opinion, jurisdiction to entertain the claim. Indeed, the case of Bykunt Nauth Bhooya *vs.* Ram Nauth Bhooya, 4 Weekly Reporter, Small Cause Court References, page 9, is exactly similar to the present case. In that case the plaintiff sued his co-sharers for contribution, and, though the reference was made merely on a question of limitation, yet it is but reasonable to suppose that, if the learned Judges who decided that reference had been of opinion that the Small Cause Court had no jurisdiction in the matter, they would have pointed out to the Small Cause Court Judge that he was entertaining a case which, under the law, he had no jurisdiction to try.

The question, therefore, which is now respectfully submitted for the High Court's consideration is whether a joint sharer in an estate paying revenue to Government, who has paid the revenue due upon the whole estate, can sue, in a Small Cause Court, his co-sharers for contribution.

The case was referred by Peacock, C. J., to a Full Bench for decision as to whether a suit for contribution will lie in a Small Cause Court with reference to the cases published in 6 Weekly Reporter, Civil References, p. 15; 7 Weekly Reporter, Civil Ruling, p. 17; and 6 Weekly Reporter, Civil Rulings, p. 325.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The question which has been referred by the Small Cause Court Judge in this case is whether a co-sharer in an estate paying revenue to Government, who has paid the revenue due upon the

whole estate, can sue in a Small Cause Court his co-sharers for contribution.

It is stated that the plaintiff, a co-sharer, deposited the revenue payable upon the whole estate under Section 9, Act XI. of 1859. Probably this is a mistake, and Section 15 was the Section intended. Section 9 applies only to deposits made by a person not being a proprietor of the estate or share of an estate in arrear; and it gives an action to the depositor in certain cases. It is clear that an action founded upon that Section could not be brought in the Small Cause Court. It is founded on the Statute, and not upon contract, express or implied. We will, therefore, consider the question propounded without reference to the fact alleged that the money was deposited under Section 9.

No apology was due from the Judge of the Small Cause Court for respectfully laying before the High Court the reasons which induced him to think that he had jurisdiction to entertain the suit, notwithstanding a contrary decision of the High Court which is referred to in his judgment; but we think that the Judge ought not to have assumed that, if that case had been argued by Counsel, the Court would probably have arrived at a different conclusion.

There can be no doubt that the Court derives great assistance from a careful and well-considered argument of a learned and experienced Counsel; but it ought not to be assumed that such arguments are necessary to enable the Court to arrive at a sound conclusion. When a case comes before the Court for adjudication, whether it is argued by Counsel or not, the Court ought to give it full and careful consideration. They ought to ascertain accurately what are the facts of the case, and to apply their own knowledge of the law to the facts so ascertained; and, if the law is doubtful, to search, if necessary, into the authorities before they pronounce a decision.

We think that the decision referred to by the Judge of the Small Cause Court (Modhoosoodun Muzoomdar *vs.* Bindoo Bashinee) reported in 6 Weekly Reporter, Civil References, p. 15, is correct, *viz.*, that a suit for contribution under the circumstances is not maintainable in the Small Cause Court.

That decision was brought to the notice of the First Bench in another similar case, and after full consideration it was upheld and acted upon, *see* Bromoroop Gooswamee *vs.* Prannath Chowdhry and others (7 Weekly Reporter, Civil Rulings, p. 17).

At the time when the last-mentioned case was determined, I was not aware of a case in which a different opinion had been acted upon by another Bench. The case had not then been reported. It is to be found in the 6th Weekly Reporter, p. 325, Civil Rulings. In like manner, when that case was decided, the Judges who determined it were not aware of the previous decision of Modhoosoodun Muzoomdar *vs.* Bindoo Bashinee above mentioned. The case had probably not been reported at that time.

In the last-mentioned case it was held that a claim for money not exceeding 500 rupees as contribution on account of revenue paid by one shareholder for the whole estate, in order to save the estate from sale for arrears, is a claim for money-decree under an implied contract, and is, therefore, cognizable by a Small Cause Court.

In consequence of the above conflicting decisions, the question has now been referred to a Full Bench.

By Section 6, Act XI. of 1865 (the Small Cause Court Act), claims for money due on bond or other contract, or for damages. when the debt or damage does not exceed in amount the sum of 500 rupees, are, subject to certain exceptions, cognizable in the Courts of Small Causes; and by Section 12 no suit cognizable by such Court can be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes.

This suit is not one for damages within the meaning of the Section above referred to. We must assume that there was no express contract, as there is no mention of one; and the only question is whether there was an implied contract for contribution.

It has been held by some of the Common Law Courts in England that a suit for contribution amongst sureties is founded upon implied contract, *see* the case of Kemp and Finden, 12 Meeson and Welby's Reports, p. 421; but it must be remarked that the Small Cause Courts in the Mofussil are bound to adjudicate according to the law which is administered in the other Courts of the Mofussil. In those Courts the rights of parties are to be determined according to the general principles of equity and justice without any distinction, as in England,

between that partial justice which is administered in the Courts of Law, and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. The rules and, I may add, the fictions which have been in many cases adopted by the Common Law Courts in England, for the purpose of obtaining jurisdiction, in cases which would otherwise have been cognizable only by the Courts of Equity, are not necessary to be followed in this country, where our aim is to do complete justice in one suit. It is not necessary for us to imply promises or requests, merely because they would be implied under similar circumstances by the Common Law Courts in England, in cases in which, but for such implication, they would probably have no jurisdiction, and especially where we find that the Courts of Equity and the Courts of Law are in conflict upon the subject of such implications. I have generally found that, where fictions are resorted to, uncertainty and confusion are the consequence.

In Deering and the Earl of Winchelsea, reported in 2 Bousanquet and Puller 270, it was held that, where several sureties are bound by different instruments but for the same principal and for the performance of the same engagement, and one of the sureties is compelled to pay the whole amount, he may recover contribution from the others. It was admitted that, if the sureties had been bound by one bond, there must have been contribution; but it was contended that, in the case of one bond, the liability depended upon contract and privity amonst the sureties, which did not exist in the case of separate bonds; that, where there were separate bonds, the case admitted of the supposition that the sureties were perfect strangers to each other, and that each of them might be ignorant of the others and of their engagements; that the undertakings were perfectly distinct and without any connection with each other, and that no contract amongst the sureties could be implied; but Lord Chief Baron Eyre held that the obligation to contribute did not depend upon contract. He said: "If "we take a view of the cases both in law "and equity, we shall find that contribution "is bottomed and fixed on general principles "of justice, and does not spring from con-"tract, though contract may qualify it." "Again," he says, "in Sir William Harbert's "case, 3 Co. 11b, many cases of contribu-"tion are put, and the reason given in the "books is that *in æquali jure*, the law requires "equality; one shall not bear the burden "in case of the rest. The law is grounded "in great equity; contract is never men-"tioned."

In Sterling and Forrester, House of Lords, 3 Bligh's Reports, p. 590, Lord Redesdale says: "The principle established in the case "of Deering and Earl of Winchelsea is uni-"versal, that the right and duty of contribu-"tion is founded on doctrines of equity. It "does not depend upon contract." "Cases "of average rest upon the same principle." "So in the case of land descending to "several co-parceners subject to a debt, if "the creditor proceeds against one of the "co-parceners, the others must contribute."

As regards contribution, the obligation at law is in many cases very different from what it is in equity.

If there are several sureties, and one of them becomes insolvent, and another pays the debt, the surety who pays cannot at law recover more from the solvent sureties than the shares which he would have recovered if all the sureties were solvent.

Thus, if there are four sureties and one insolvent, a solvent surety who pays the whole debt can recover only one-fourth part thereof, and not third part from each of the two solvent sureties; but in a Court of Equity, he would be entitled to recover one-third part of the debt against each of them, for in equity the insolvent's share is apportioned among all the other solvent sureties. A similar rule applies to other cases of contribution.

So, if one of the sureties dies, the remedy at law is only against the surviving parties for their respective proportions; whereas, in equity, contribution may be enforced against the representatives of the deceased surety, *see* Story's Equity Jurisprudence, Sections 496 and 497.

We think that, according to the law administered in the Mofussil, the obligation to contribute is not founded upon contract in the absence of an express contract; and that no contract can be implied on the part of co-sharers of an estate to contribute towards the payment of the Government revenue. Further, we are of opinion that there is no implied contract for contribution on the part of sureties, any more than there is on the part of persons who are liable by law to contribute to general average.

Imagine the difficulties which would arise if every person liable to contribute to general average in respect of goods thrown overboard at sea were liable to be sued in a

Small Cause Court in the Mofussil within whose jurisdiction he might be residing. Similar difficulties might arise in cases of contribution claimed against sureties (*see* Story's Equity Jurisprudence, Sections 490, 491, 492, 493, 498), or amongst co-shareholders in an estate.

For instance, in a case in which the estate of a Mahomedan has, upon his death, descended to numerous relations. Is each person, said to be entitled to a share, to be sued separately in the Small Cause Court, and compelled to pay contribution in respect of a share which may ultimately, in a suit in the Civil Court between the claimants to the estate, turn out not to be his; and this from time to time as often as the Government revenue falls due pending the suit in the Civil Court for the adjustment of the shares? Cases may be supposed in which it might be necessary amongst Hindoos to try a question of adoption before it could be ascertained whether a particular individual was a shareholder or not, or what share he was entitled to. Are all these questions to be tried by a Small Cause Court deriving its jurisdiction from the implication by law of a promise which never existed in fact, and was never in the contemplation of the parties concerned; and is this jurisdiction of the Small Cause Court to oust the jurisdiction of the ordinary Civil Court having jurisdiction within the local limits of the Small Cause Court, although it may be necessary to resort to such Civil Court for the purpose of obtaining complete justice?

In Couch *vs.* Edwards, 2 Bos. and Pull. 268, Lord Eldon said it was too late to hold that an action for contribution could not be maintained at law, though neither the insolvency of the principals, nor of any of the sureties, was proved; but in that case, in which there were six sureties, he held that, at all events, the plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid. He said that he had conversed with Lord Kenyon upon the subject, who was also of opinion that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law, though, if the insolvency of all the other parties were made out, a larger proportion might be recovered in a Court of Equity.

In the note to that case it is said that Lord Eldon also added a doubt of his own whether a distinction might not be made between holding that an action at law is maintainable in the simple case where there are but two sureties, or where the insolvency of all the parties but two is admitted, and the insolvency of the principal is admitted, and holding it to be maintainable in a complicated case like the case then before the Court, the insolvency of some of the sureties being neither admitted nor proved, and where the defendant, after a verdict against him at law, might still remain liable to various suits in equity with each of his other co-sureties, and where the event of the action could not deliver him from being liable to a multiplicity of other suits founded upon his character as a co-surety.

If a contract is to be implied, it is necessary to ascertain what is the contract; what is to be implied; and is a contract to be also implied if the co-sharer expressly request the other not to pay his proportion of the revenue. Is the contract which is to be implied a contract such as the Common Law in England would have implied, or a contract which would create an obligation equal to that which the Courts of Equity in England would enforce? That is to say, is it a contract by each contributory that he will pay his proportion only, or that he, and, in case of his death, his representatives, will make good his own share, and will also bear his proportion of any loss which the insolvency of any other co-contributory may occasion. If we are to follow the Law of England as laid down by the Common Law Courts, the contract in the case of sureties would be limited to the surety and to his own share. But still, if the general principles of justice and equity as administered in England are to be enforced, the representative of a deceased surety must make good the proportion of the deceased, and in case of the insolvency of one or more sureties, those who are solvent must make good their proportions of the shares of those who are insolvent. If we are to hold that there is a contract such as would be implied in England and nothing more, complete justice cannot be done by a Small Cause Court in the case of death or insolvency, but further proceedings will be necessary in the ordinary Civil Court in order to compel the representative to pay the proportion which the deceased ought to have paid, or to make a solvent surety bear his proportion of an insolvent surety's share.

Again, if there are several contributories, are they to be sued in the Small Cause Court jointly or separately upon the contract which is to be implied? Lord Eldon in

one case says they may be sued separately. I would go farther, and say that they cannot be sued jointly. If there is a contract at all, it cannot be a joint contract; for, if there is a joint contract, each of the contributories would be liable, not only for his own share, but for the shares of the other co-contractors. They cannot be sued in the Small Cause Court unless the contract is joint, for the jurisdiction depends upon there being a contract. They may be sued jointly in the ordinary Civil Court, for in that Court the obligation is held to arise, not from contract, but from general principles of equity, and in such suit the shares in which they are to contribute can be adjusted, and the several amounts for which they are liable can be decreed against them separately according to their several liabilities (*see* 3 Weekly Reporter, Civil Rulings, p. 170). In that case it was held, in accordance with former rulings of the Court, that a decree for contribution cannot pass against the contributories jointly.

In one of the cases which has been referred to us,* 23 persons were sued for wrongfully constructing a bandel and catching fish. A decree was obtained against them for Rupees 204-8, and the amount was levied upon one of them. He, after deducting Rupees 8-14-6 as his $\frac{1}{23}$ share of the amount decreed, sued the other 22 in the Small Cause Court for Rupees 195-9-6, being the remaining $\frac{22}{23}$ of the amount decreed. If he is entitled to contribution by virtue of an implied contract, it would be necessary in such a case to determine whether the 22 sureties contracted with the one who paid the decree to pay him $\frac{22}{23}$ of the amount which he paid, or whether each surety promised to pay $\frac{1}{23}$. If the joint action can be maintained upon the ground that there was a joint contract, the decree in that suit will be against the 22 defendants jointly, and the amount decreed in that suit for contribution may be levied against the property of any one of the 22 defendants. Suppose it be levied against one only, he will have to sue the others, and, if he can deduct his $\frac{1}{23}$ share and sue the other 21 jointly for the remaining $\frac{21}{23}$ as he and the others were sued for the $\frac{22}{23}$, he will recover the $\frac{21}{23}$ against the defendants jointly. The amount may be levied upon one of them, and he in his turn may sue the remaining 20 to recover $\frac{20}{23}$ and so on; and fresh suits may be brought until each of the 23 defendants in the original suit has paid his proportion; and thus, before the last suit is at an end, the last defendant may have been a co-defendant in 22 different actions for contribution arising out of one payment of a joint decree. It may so happen that, of the 22 defendants in the first action for contribution, 10 may be insolvent. In that case, if the amount of the joint decree against the 22 for the $\frac{22}{23}$ be levied upon one of them only, he will be unable, in consequence of the insolvency of the others, to get back more than 11 shares. Thus, the plaintiff who first satisfied the decree will, in effect, pay only one share, *i. e*, 23 shares *minus* 22 shares received back; whilst the defendant, who satisfies the decree in the first suit for contribution, will, in effect, pay 11 shares, *viz.*, his own share and those of the 10 insolvent contributories from whom he may be unable to receive any portion of the amount paid. Is he, then, to resort to the Civil Court against the defendant who first sued for contribution, in order to compel him to contribute his proportion of the amount due from the insolvent contributories?

It would be a violation of every principle of equity and justice that, of two solvent defendents, one should pay only $\frac{1}{23}$, and the other $\frac{11}{23}$ of the whole amount; but this will be the effect of implying a joint contract.

On the other hand, if separate contracts only be implied, the defendant, who satisfied the first decree, will, in effect, have to pay $\frac{11}{23}$, and each of the other solvent defendants only $\frac{1}{23}$, for he will be unable to recover back the $\frac{10}{23}$ paid for the 10 insolvent defendants.

Besides this, if separate suits are to be brought on separate implied contracts, the evil pointed out by Lord Eldon in Craythorne *versus* Swinburne, 14 Ves. 160, will arise, *viz.*, the multiplicity of suits which will be necessary every time a fresh payment of Government revenue is made.

The truth is, there is no implied contract, either joint or several, for contribution. The payment of revenue by one shareholder is made, not at the instance or at the request of the others or with their consent, but to save the estate from being brought to sale for the arrears. In some instances it may be made contrary to express directions. In such cases there is an obligation to contribute, but surely not arising from an implied contract. The duty of contributing is caused, not by any convention or agreement between the shareholders, but arises from the principles of justice, which require that one shall not bear the whole burden in case of the rest, and that all the co-sharers shall bear

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* *See* the next case, p. 384.

the burden in proportion to their respective shares. These shares and the amounts to be contributed may be ascertained in one suit in the ordinary Civil Courts, but not in the Small Cause Courts; and in the case of sureties the principal may be joined as a co-defendant, and ordered to indemnify the sureties; and, in case of the insolvency of any of the sureties, the shares to be contributed by those who are solvent may be equitably adjusted.

The obligation arises from what in the Civil Law was described as a *quasi* contract.

Pothier in his Treatise on Obligations, Part I., Cap. I., Section 2, says: "In contracts it "is the consent of the contracting parties "which produces the obligation; in *quasi* "contracts there is not any consent. The "law alone, or natural equity, produces the "obligation. They are called *quasi* contracts, "because without being contracts, and being "in their nature still further from injuries, "they produce obligations in the same man-"ner as actual contracts."

In Austin on Jurisprudence it is said: "Strictly, *quasi* contracts are acts done by "one man to his own in-"convenience for the *ad-"vantage* of another, but without the "authority of the other, and, consequently, "without any promise on the part of the "other to indemnify him or reward him for "his trouble." Vol. 3, p. 133.

"An obligation arises, such as *would "have arisen*, had the one party contracted "to do the act, and the other to indemnify. "Hence the incident is called a *quasi* con-"tract, *i. e.*, an incident in consequence of "which one person is obliged to another, *as "if* a contract had been made between "them."

"But *quasi* contract seems to have a "larger import, denoting any incident by "which one party obtains an *advantage* he "ought not to retain, because the retention "would damage another, or by reason of "which he ought to indemnify the other. "The prominent idea in *quasi* contract "seems to be an *undue* advantage which "would be acquired by the obligor, if he "were not compelled to relinquish it or to "indemnify."

Again, at page 138, under the heading, *Tendency to confound tacit contracts with quasi contracts*, Mr. Austin says: "This "confusion is more likely to arise amongst "English lawyers than others, on account "of their wanting a generic name (which, "bad as it is, the Romans have) for mark-"ing this sort of obligatory incidents."

The learned author of Ancient Law has also pointed out very clearly the distinction between implied contracts and *quasi* contracts, and has shown that a *quasi* contract is not a contract at all.

He says: "The part of Roman Law which "has had most extensive influence on foreign "subjects of enquiry has "been the Law of Obliga-"tion, or, what comes nearly to the same "thing, of Contract and Delict. The Ro-"mans themselves were not unaware of the "offices which the copious and malleable "terminology belonging to this part of their "system might be made to discharge, and "this is proved by their employment of the "peculiar adjunct *quasi* in such expressions "as *quasi* contract and *quasi* delict. '*Quasi*' "so used is exclusively a term of classifica-"tion. It has been usual with English "critics to identify the *quasi* contracts "with *implied* contracts; but this is "an error, for implied contracts are true "contracts, which *quasi* contracts are not. "In implied contracts acts and circum-"stances are the symbols of the same in-"gredients which are symbolised in ex-"press contracts by words; and whether "a man employs one set of symbols or the "other must be a matter of indifference, so "far as concerns the theory of agreement. "But a *quasi* contract is not a contract at "all. The commonest sample of the class "is the relation subsisting between two per-"sons, one of whom has paid money to the "other through mistake. The law, con-"sulting the interests of morality, imposes "an obligation on the receiver to refund, "but the very nature of the transaction in-"dicates that it is not a contract, inasmuch "as the convention, the most essential in-"gredients of contract, is wanting." pp. 343-4.

The word contract used in Section 6 of the Small Cause Court Act refers to true contracts, whether express or implied. The question, therefore, which has been referred to us, must be answered in the negative, and the Judge of the Small Cause Court informed that a co-sharer in an estate paying revenue to Government, who has paid the revenue due upon the whole estate, cannot sue in a Small Cause Court his co-sharers for contribution.

We may remark that, in the case reported at page 9, 4 Weekly Reporter, it was held that a suit against a co-sharer for contribution in respect of revenue paid by another

was not a suit for breach of contract within Section 1, Clause 9, of the Limitation Act, XIV. of 1859; and a similar decision was come to in respect of a suit for contribution brought against one judgment-debtor by another judgment-debtor who had satisfied the decree, *see* 2 Weekly Reporter, Civil Rulings, p. 266.

Care must be taken not to confound cases like the present with cases in which there is a convention.

If a man buys goods, and they are delivered to him, there is a contract of sale, and an implied promise to pay the price, though there may be no contract in words to do so.

So, if a man hire at certain wages another who serves him under the hiring, there is an implied contract to pay the wages.

If one man borrows money from another, there is a contract of loan, and an implied promise to re-pay the money lent.

If one man pays money for the use of another at his request, there is, in the absence of circumstances showing that the money was advanced as a gift, an implied promise for re-payment by the person on whose account the money is paid.

We have thought it right in order to prevent misconception to point out the distinction between cases in which there is and those in which there is not a convention.

Macpherson, J.—I concur in the answer given to the question referred to us, and generally in the reasons assigned.

The 15th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Jurisdiction—Contribution.

Reference to the High Court by Mr. H. Bell, Judge of the Principal Court of Small Causes of Kishnaghur, dated the 28th December 1866.

Sreeputty Roy, *Plaintiff*,

versus

Loharam Roy and others, *Defendants*.

Baboo Issur Chunder Chuckerbutty for Plaintiff.

Mr. R. E. Twidale for Defendants.

A suit for contribution will not lie in the Small Cause Court in the absence of an implied joint contract for contribution.

Case.—THE plaintiff Sreeputty Roy and the present defendants were sued in the Civil Court by Brindabun Chunder Sircar for damages sustained by the defendants having wrongfully constructed a bandel and caught fish within the limits of his julkur. A decree was given against all the defendants, and the plaintiff, whose property had been attached in execution, paid the amount of the decree. The amount of the decree was Rupees 204-8-0, and as there were 23 defendants in the case, including the plaintiff, the plaintiff deducts Rupees 8-14-6 as his $\frac{1}{23}$rd share of the decree, and now sues the remaining defendants for Rupees 195-9-6, being the remaining $\frac{22}{23}$rd part of the decree.

The defendants pleaded that the action would not lie, quoting the following passage from Macpherson on Contracts, page 31: "Nor can an action for contribution be maintained by one of several joint wrong-doers against another, although the one who claims contribution may have been compelled to pay the entire damages recovered as a compensation for the wrongful act; for it is held that men will be less ready to do wrong if they are left to bear all the consequences themselves."

The plaintiff replied that such actions were common in Indian Courts, and quoted the case of Bamasoondory Dabea *vs.* Anundmoyee Dabea, Weekly Reporter, Vol. III., 171, which he maintains was a suit for contribution instituted under very similar circumstances to the present.

The question which is now most respectfully submitted for the High Court's decision is, whether this present action will lie or not.

In the case of Bamasoondory Dabea *vs.* Anundmoyee Dabea, the only point decided was that, in a suit for contribution, the decree must specify the particular sums to be paid by each defaulter and could not be given jointly against them all. No issue was in that case raised as to whether a wrong-doer could maintain an action for contribution against a joint wrong-doer. I put therefore that case altogether upon one side as not bearing upon the point at issue.

It is admitted that the plaintiff and defendants illegally erected a bandel within the julkar of Brindabun Chunder Sirkar. Now, if, before committing this illegal trespass, they had entered into a covenant of mutual indemnification, in case any member of the party should be subjected to pecuniary loss in consequence of their joint illegal act, such

a covenant would be void, as having been entered into by the contracting parties for the express purpose of doing that which was prohibited by the law of the land. And if an express covenant of indemnity would, under such circumstances, be void, upon what foundation can the plaintiff's present claim rest? In deciding such cases, it appears to me that the only point necessary for consideration is, whether the original act out of which the suit arises was wrong or not.

In the present case, the original act, the construction of bandels within Brindabun Chunder Sirkar's julkur, was pronounced by the Civil Court to be an act of illegal trespass, and no person implicated therein can therefore have any claim for indemnity for any loss sustained by him in the prosecution of his illegal design. For these reasons I was of opinion that the plaintiff's action for contribution against his joint wrong-doers could not be maintained, and, subject to the orders of the High Court, I dismissed the case—(*vide* note to Lampleigh *vs.* Brathwait) Smith's Leading Cases, 5th Edition, 148.

This case was referred by Peacock, C. J., to a Full Bench for decision as to whether a suit for contribution, when there is no express promise, can be heard by a Small Cause Court, with reference to the cases published in 6 Weekly Reporter, Civil References, p. 215; 7 Weekly Reporter, Civil Rulings, p. 17; and 6 Weekly Reporter, Civil Rulings, p. 325.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—According to the case stated by the Judge, a suit was brought against 23 defendants, of whom the present plaintiff was one, for having wrongfully constructed a bandel and caught fish within the limits of a julkur belonging to the plaintiff in that suit. A decree was given against them all jointly for the sum of Rupees 204-8, and, the plaintiff's property having been attached in execution of that decree, he paid the whole amount. He now sues all the other defendants for contribution, deducting his own share, namely, Rupees 8-14-6, being a $\frac{1}{23}$rd share.

One question is whether the plaintiff is entitled to sue those defendants for contribution or not. The Judge of the Small Cause Court has expressed his opinion that the plaintiff cannot maintain a suit for contribution, and has dismissed the suit subject to the orders of the High Court, and he has referred the question whether the action will lie or not. He says: "In the present "case, the original act, the construction of "bandels within Brindabun Chunder Sircar's "julkur, was pronounced by the Civil Court "to be an act of illegal trespass, and no "person implicated therein can therefore "have any claim for indemnity for any loss "sustained by him in the prosecution of his "illegal design."

The case has been referred to a Full Bench in consequence of conflicting decisions as to whether a suit for contribution can be maintained in a Small Cause Court.

For the reasons given this day in our judgment in the case of Ram Bux Chittangeo *vs.* Modhoosoodun Paul Chowdhry and others, we are of opinion that there was no implied contract for contribution, and most certainly that there was no joint contract on the part of the 22 defendants. Consequently, the Small Cause Court had no jurisdiction, and the Judge was right in dismissing the case.

It has not, however, been found by the Judge of the Small Cause Court that the 23 defendants were committing an act which they knew to be illegal, or that they were doing an immoral act, or that they were attempting to catch fish in the water, knowing that they had no right to fish in it. Under these circumstances they were not doing a wrong in the moral sense of the word, although they were doing an act which, according to the decision of the Court, infringed the plaintiff's rights. If they acted under a fair claim of right, there is no reason why one of the defendants should have to pay the whole of the damages, and not have a right of contribution against the others. But it does not necessarily follow that, because there were 23 defendants, each of them ought to pay $\frac{1}{23}$rd of the whole amount of the decree. It may be that the plaintiff in this action derived no benefit from the erection of the bandel; or it may be that he employed the others to erect it, and derived the whole benefit of it. If the plaintiff was merely a servant carrying out the directions of the other defendants, he ought not, as between him and the other defendants, to be liable for any portion of the damages. If, on the other hand, all the other defendants were acting as his servants and under his directions, and he was the person who claimed the right of fishing, and

derived all the benefit of the trespass, he ought to pay the whole of the damages.

We cannot say upon the finding in this case whether the plaintiff was entitled to contribution or not. All that we can say is that the plaintiff was not necessarily precluded from recovering contribution, merely because the damages for which the decree was given were caused by a wrong, in the legal sense of the word, done to the plaintiff. If the Judge had jurisdiction in the case, we should inform him that he ought to try the case upon the merits, and to ascertain whether, having reference to the circumstances under which the trespass was committed, the parts which the defendants respectively took in it, and the benefits, if any, which they respectively derived from it, they ought to contribute any and what portions of the damages recovered against them. If they were all jointly concerned in committing an act which they knew to be illegal, the plaintiff is not entitled to contribution.

It has been stated to us that only five of the defendants committed the trespass; that they alone were sued; and that the others intervened, because they claimed an interest in the fishery. If such were the case, those defendants who intervened did not merely by their intervention render themselves liable for the damages which had been previously sustained, nor did they thereby become liable to contribute.

In Merriwether and Nixon, 8 Term Reports 186, it was held that no action for contribution was maintainable by one wrong-doer against another, although the one who seeks contribution may have been compelled to satisfy the whole damages. But Lord Kenyon laid it down as a general principle that the decision would not affect cases of indemnity in which one person may employ another to do an act not unlawful in itself.

The general rule has been greatly modified in later cases. The true principle was laid down by Chief Justice Best, in Adamson *versus* Jervis, 4 Bligh 72, in which he said that the rule was confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

The Judge of the Small Cause Court seems to have considered that the parties were bound by the judgment of the Court which pronounced the decree that the act was an illegal act of trespass.

But that judgment had reference to the case between the plaintiff and defendants in that suit. It does not show that the parties to the present suit knew that the act was illegal. It was sufficient in that suit that it was illegal or unjustifiable; it was not necessary to determine whether the parties knew it to be illegal, and that point was not determined.

The 15th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Jurisdiction—Suit upon implied contract—Contribution.

References to the High Court by Baboo Obhoy Coomar Dutt, Judge of the Small Cause Court of Dacca, dated the 29th December 1866.

Case No. 1042 of 1866.

Shaboo Mijee, *Plaintiff*,

versus

Noorai Mollah and wife of Eyenuddeen Mijee (deceased), *Defendants*,

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Case No. 1056 of 1866.

Shaik Joreep

versus

Shaik Nubboo and others.

Case No. 1020 of 1866.

Bharut Chunder Dutt

versus

Dengur Gope and Radhakisto Gope.

If a man request another to pay money for him, there is an implied contract to re-pay the amount, for which an action will lie in the Small Cause Court, if it does not exceed 500 rupees.

A suit for contribution not founded on any contract is not cognizable by the Small Cause Court.

Case.—Of these cases two (Nos. 1042 and 1056) are exactly of the same nature, the claim in both of them being for money paid by plaintiff for defendants and in excess of his own quota, in satisfaction of a previous decree in a bond-case passed jointly against the defendants as well as the plaintiff himself.

The third (No. 1020) is an action for money paid as value of milk alleged to have been supplied to the defendant on plaintiff's security.

Of the two cases first mentioned, suit No. 1056 is yet an *ex-parte* case. In No. 1042, the defendant Noorai Mollah enters appearance, and denies liability, on the ground that the original amount due upon the bond (satisfaction whereof by the plaintiff under the decree alluded to forms the basis of the present claim) was received by the plaintiff for his own use only; and that he (defendant Noorai) and the husband of the other defendant were merely sureties, though they signed the bond with plaintiff as debtors.

In case No. 1020, the one mentioned last, defendant pleads direct payment to the parties who supplied him with milk, and denies at once plaintiff's having ever stood a security for him in the transaction.

Now, all these three cases being in fact for *contributions in respect of debts due by others*, the question that arises is, whether the Court's ruling of the 12th September last, noted in the margin, bars the jurisdiction of Small Cause Courts in these cases.

Modhoosoodun Mozoomdar and others *versus* Bindoo Basheeny Dassee and others, Sutherland's Weekly Reporter, Vol. 6, No. 17, pages 15 and 16.

As regards the milk case (No. 1020), the defendant being bound to plaintiff, his surety, to the extent the latter was to the original creditors, the liability, I think, may rightly be considered as one founded on a *contract*, though but implied, thus bringing the case within the purview of Section 6 of Act XI. of 1865. But not so in the other two cases, which, in fact, are for contribution on account of others (co-debtors), and, in the words of the precedent, "not founded on any contract" whatever, express or understood, and, as such, not cognizable by Small Cause Courts.

I beg to state here that in case No. 1042 (one of the two mentioned first) the defendant endeavours to represent himself to have been merely a surety for the plaintiff in the original loan transaction, and not a co-debtor. But this statement of his is opposed to the decree in the previous suit, which binds him as well as the plaintiff (both defendants in that suit) equally as debtors. It does not, in point of fact, make the suit, as the Court may observe, analogous to the milk case which I hold cognizable, nor is it sufficient to alter the nature of the case, as plaintiff has made it out one avowedly for contribution on account of others.

As cases of the description are common in the Mofussil, I think it my duty to approach the Hon'ble Court for their opinion, how far I am right in my view of the cases as expressed above, and if I have correctly understood the decision quoted.

These cases were referred by Peacock, C.J., to a Full Bench for decision as to whether a suit for contribution will lie in a Small Cause Court. The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—We are of opinion that the view taken by the Judge of the Small Cause Court was correct.

In No. 1020 the plaintiff was a surety, upon whose security milk was supplied to the defendant. The surety having paid the debt, he sued defendant for the amount.

If a man request another to pay money for him, there is an implied contract to repay the amount. If he request another to become surety for him, and that other becomes surety, and is obliged to pay, the person at whose request he becomes surety is bound by an implied contract to indemnify him, and to re-pay him any amount which, as such surety, he is obliged to pay.

An action lies in the Small Cause Court if the amount of it does not exceed 500 rupees.

In Nos. 1042 and 1056 nothing appears except the mere fact that a decree was recovered against the plaintiff and defendant jointly, which the plaintiff paid. The cases are governed by the case of Ram Bux Chittangeo *vs* Modhoosoodun Paul Chowdhry and others decided to-day. There is nothing to show that there was an implied contract on the part of defendant to indemnify or to re-pay him the amount which he was obliged to pay.

The Judge of the Small Cause Court was wrong in supposing that the law would not have allowed the defendant to prove (if it had been necessary) that he was a mere surety for the plaintiff in the bond upon which the decree was obtained.

If the plaintiff had been endeavouring to show that he was the surety, and the defendant the principal at whose request he became surety, the evidence would have been admissible for the purpose of showing that there was an implied contract of indemnity.

So, if the suit had been brought against the defendant in the Civil Court upon the

primâ facie obligation on the part of the defendant as a co-debtor to contribute, he would have had a right to prove that he was merely a surety for the plaintiff, and that the plaintiff was bound to indemnify him.

The 15th April 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Indigo-contract—Closing of Factory—Refund of advances.

Reference to the High Court by Baboo Banee Madub Shome, Judge of the Court of Small Causes at Pubna.

R. Watson and Co., *Plaintiffs*,

versus

Hurry Nauth Sirkar, *Defendant.*

Messrs. R. T. Allan and *J. S. Rochfort* for Plaintiffs.

No one for Defendant.

A ryot took advances from an indigo-factory, on condition that he was not to re-pay any portion of the same until the expiration of the agreement, and even then he was not to be bound to re-pay the money in cash, but had the option either to pay the same in cash or to continue to cultivate the land with indigo, and deliver the plants grown thereon until the whole of the advances were satisfied. HELD that an action would not lie for a refund of the balance in consequence of the plaintiff closing the factory before the expiration of the contract.

Case.—IN this case the plaint runs thus: "On the 25th February 1863, defendant, having executed an agreement, received advances from our Hulloodghur factory in the Dhoolaoory concern, and carried on indigo-dealings with the factory by the delivery of indigo-plants up to September 1865, at the end of which defendant's accounts were adjusted, and the balance due from him, after giving credit for what was paid by the indigo-plants, was struck at Rupees 39-13-10, which amount is still due. Our said concern is now closed owing to failure and deficiency of gain ; but the defendant has not yet paid us the aforesaid balance, though it has been demanded from him several times. We have, therefore, brought this action for its recovery."

It is to be regretted that the defendant has not appeared to answer, though summons has been duly served upon him, as proved by the evidence of the serving peon. The point on which I entertain doubts is, whether, under the contract, plaintiffs are entitled to recover the amount sued for, the term of the contract not having yet expired, on the ground of their business of the Dhoolaoory concern having been closed.

It appears that plaintiffs, under the contract, advanced to defendant a certain sum of money for the cultivation of indigo ; that, at the end of every year from the time of the contract up to 1865, the accounts were, agreeably to the terms of the agreement, adjusted ; and the amount claimed in this suit as balance due on khatta of the year 1865 appears to have been therein entered as last balance due at the end of the aforesaid year, and the plaintiffs allege that they closed the business of the factory in consequence of heavy losses suffered, and that this advance was made for the cultivation of indigo from 1863 to 1867. It may, therefore, be argued that, as the term of the agreement has not yet expired, plaintiffs are not, under the term of the contract, entitled to come to Court. But, as the plaintiffs do not claim to get any advantage under the contract, and state to have closed the factory-business of the concern, equitably there does not appear any impediment to plaintiffs' recovering the balance of the money advanced to defendant for cultivation of indigo which is now no longer required. I mean such balance as has been adjusted to be due on the statement of the accounts of the year 1865, in which credit has been given for what was received from the dealings, for it seems to me to be very hard to require the plaintiffs to carry on this dealing with the defendant, suffering at the same time heavy losses on account of the whole concern. Further, if the plaintiffs cannot now come to Court, I see no reason why they will be entitled to sue the defendant at the expiration of the term of the agreement. If this be the case, plaintiffs are never to recover the amount of this suit from the defendant, and thus to suffer a loss owing to no fault of their own, but to accident. This, I consider, is not just and equitable, because the plaintiffs did not willingly fail to observe the stipulation of the agreement, but some unforeseen event over which they had no control compelled them to do so ; and, moreover, the defendant is losing nothing by plaintiffs' closing the business, and demanding the balance of the advance given him.

Under these circumstances, as the plaintiffs' claim is satisfactorily borne out by the aforesaid contract and the khattas, as well as by the evidence of the witnesses examined in the case, I decree the same contingent on the opinion of the High Court.

The suits Nos. 173 and 174 being similar to the present one, decrees in them have also been passed contingent on the opinion of the High Court in this case.

Terms of the contract referred to in the above.

To Messrs. Robert Watson and Co.

I, Hurry Nauth Sirkar, do hereby execute this indigo-contract in the year 1863 to the following effect: That the balance struck against me on adjustment of my accounts of indigo-advances taken from your Hullood-ghur factory at the close of the year 1862 is Rupees 41-3-11, and the sum now paid to me in cash is Rupees 0-8-0. In all, the sum of Rupees 41-11-11 having been received by me as advance on account of cultivating 1¾ beegahs of land with indigo from 1863 to 1867, I do hereby willingly agree that I will from year to year cultivate the above-mentioned quantity of land with indigo, and will deliver the plants at the said factory.

2nd.—I do agree that I will every year point out such lands as are fertile and fit to be sown with indigo, and you will measure and mark the same. I also agree that the said land will be measured with a chain of 80 cubits of 20 inches each.

3rd.—I agree that I will every year cultivate the aforesaid land at proper time for sowing indigo in it, or, in other words, I will cultivate the land, and bring it in a fit state to receive indigo-seeds from Kartick to 15th Bysack, or at any other time you shall order me to do the same. I will receive from you such quantity of indigo-seeds as will be required, and the costs of which you shall now have to pay, it having hitherto been borne by me notwithstanding. On the first shower of rain, or at any other time you shall order, I will sow the lands measured and marked.

4th.—At the shooting out of the plants I will cause the same to be weeded, and do all other things necessary for their growth, and agree that there will be no laches on my part in this respect.

5th.—I shall every day up to the 30th September in each year cut such portion of the indigo-plants as I shall receive order to cut, and I shall myself bear all the expenses that will be incurred on this occasion.

6th.—If I shall either neglect or delay in cultivating, sowing, weeding, or cutting the plants, you will be at liberty to do the same yourselves on my account, and I shall pay all costs that you may incur in this respect.

7th.—I agree I shall carry the plants to your factory, but all conveyance-charges on account of boat and cart-hire are to be paid by you.

8th.—I shall myself go to your factory with the indigo-plants, and cause the same to be measured with a chain of six feet by your servants in the presence of your mohurrir, and shall every day take down the number of bundles on my *hat-chitta*. I shall receive value of indigo plants at the rate of 5 bundles per rupee.

9th.—I shall every year, at the close of the manufacturing season, attend at the factory, and adjust my accounts. If any money be taken by me on account of weeding charges, I shall give credit for the same in my accounts. I shall receive in cash if anything is found due to me on the adjustment of the accounts; but, if any amount be found to be due by me, I shall reckon the same as advance taken by me on account of the succeeding year. If, at the expiration of the term of this contract, any sum is due by me, I shall either pay the same in cash, or continue to cultivate land to the extent above mentioned with indigo, and to deliver to you the plants grown thereupon, at the rate fixed above, till the whole of the balance is satisfied.

10th.—I shall sell to you at the bazaar rate all the seeds that will be produced from the indigo-plants sown by me.

11th.—I do further agree and consent that, till the expiration of the term of this contract, if any year after the land has been marked, chosen, and measured by you, I neglect to cultivate or do not at all cultivate the entire quantity of 1¾ beegahs of land at any time from Kartick to 15th Bysack, or at any time agreeably to your orders, or if I fail to sow the whole 1¾ beegahs of land with indigo-seed at the stated or exact time, I shall pay you Rupees 25 as damages under either of these two circumstances; that, in compensation of any loss that you may incur owing to my non-observance of the terms of this agreement, I fix the above-mentioned amount as the estimated damage; and that I shall be barred to raise any objection to any claim that you may bring against me for the recovery of the aforesaid amount, and you shall be at liberty to bring any action against me for

any loss arising out of my non-observance of any particular stipulation of this agreement. Dated the 25th February.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—It seems clear that, under the 11th Clause of the contract, the defendant is not liable to be sued for the balance which was found due from him upon a settlement of the accounts up to the end of 1865. The contract was to continue up to the end of 1867, and the accounts were to be adjusted every year. If a balance were found against the defendant, that balance was to be carried on as if it were an advance.

This suit is not brought against the defendant under the 11th Article of the contract, but for the non-payment to the plaintiffs of the balance which was found due against the defendant at the end of 1865. Whether the plaintiffs are entitled to sue for that balance or not, depends upon the 9th Clause of the agreement, which says: "I shall every year, at the close of the "manufacturing season, attend at the factory "and adjust my accounts. If any money "be taken by me on account of weeding "charges, I shall give credit for the same "in my accounts. I shall receive in cash if "anything is due to me on the adjustment "of the accounts; but, if any amount be "found to be due by me, I shall reckon the "same as advance taken by me on account "of the succeeding year. If, at the expiration of the term of this contract, any sum "is due by me, I shall either pay the same in "cash or continue to cultivate land to the "extent above mentioned with indigo, and "to deliver you the plants grown thereupon, "at the rate fixed above, till the whole of "the balance is satisfied."

It is clear, therefore, that, according to the terms of this agreement, the ryot was not to re-pay to the plaintiffs any portion of the balance which was made to him until the expiration of the agreement, that is to say, until the end of 1867, and even then he was not bound to re-pay the money in cash, but he had the option reserved to him, either to pay the same in cash, or to continue to cultivate the land with indigo and deliver the plants grown thereupon, until the whole of the balance should be satisfied.

It was unfortunate, no doubt, for the plaintiffs that they were obliged to close the factory. But it would be exceedingly hard upon the defendant, if, in consequence of the plaintiffs' closing the factory, he should be obliged to re-pay the advances in cash, instead of satisfying the amount in the manner agreed upon. It is clear that the action will not lie.

The 15th April 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Section 18, Act XXI. of 1863—Suit for Advocate's Fees.

Reference to the High Court under Act XXI. of 1863 by Dr. Clarke, Recorder of Rangoon.

Donald Macleod, *Plaintiff*,

versus

Mah Mah Yet, *Defendant*.

Mr. R. V. Doyne for Plaintiff.

With reference to Section 18, Act XXI. of 1863, an Advocate cannot sue upon a promissory note given by anticipation for fees not taxed; nor can the Court in such suit award to the plaintiff a *quantum meruit* for his services.

Case.—I HAVE the honor to forward, for the consideration of their Lordships the Judges of the High Court at Fort William, the case No. 45 of 1867 of this Court, wherein Mr. Donald Macleod, an Advocate of this Court, but not a Barrister-at-law, is plaintiff, and a native Burmese female is defendant. I make this reference under the 37th Section of Act XXI. of 1863.

From the pleadings filed, it will appear that the plaintiff, Mr. Donald Macleod, was retained by the defendant to conduct in his professional character certain proceedings in my Court in reference to a review of judgment, and that Mr. Macleod, on the 8th January 1866, accepted as remuneration from the defendant the note for Rs. 1,600 upon which he now sues. This note was discounted at the Bank of Bengal, and treated as an ordinary note of hand.

The defendant has filed an answer in the case, denying entirely all liability to pay the note, on the ground that plaintiff rendered no value for the same, and did not apply for the review or new trial, but wholly abandoned defendant's interests.

As the plaintiff in the case holds the high and responsible position of Government Advocate, and as I think that in the organ-

ization of a new Court, such as mine virtually is, it is necessary to define, as soon as possible, what professional rules should govern transactions of this nature, I have the honor to solicit the opinion of their Lordships on the following points, at the same time avowing my opinion, *first*, that an Advocate not being a Barrister is not bound by the same professional etiquette in reference to fees which governs the Bar at home; and, *secondly*, that it may have been an exercise of wise discretion on Mr. Macleod's part to abstain as *dominus litis* from taking any steps on the defendant's behalf.

The questions I respectfully submit are as follows:—

1st.—Is the plaintiff, as an Advocate of the Court, but not a Barrister by profession, warranted in taking a promissory note for value received in professional services in anticipation of the said services?

2nd.—Is it a good defence to an action upon the said note that the said stipulated services were not rendered; is it open to the defendant to show that they were not so rendered? and

3rd.—Is it competent to the Court to award to the plaintiff, irrespective of the note, what it may consider to be in justice a *quantum meruit* for his services?

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—The Recorder states that he sends up this case under Section 37, Act XXI. of 1863. In doing so, he has made a mistake. Section 37 authorizes the Registrar of the Court to state a case for the opinion of the Recorder in like manner as the Recorder might, under Section 22 of the Act, state a case for the opinion of the High Court. We must assume, therefore, that this case has been sent up to us under Section 22 of the Act.

That Section provides as follows:—

"If in any suit any question of law or usage having the force of law or the construction of a document affecting the merits of the decision shall arise on which the Recorder shall entertain any doubt, the Recorder may, either of his own motion or on the application of either of the parties to the suit, draw up a statement of the case, and submit such statement with his own opinion for the decision of the High Court of Judicature at Fort William in Bengal."

In this case the Recorder has stated three questions for the opinion of the Court, but he has not stated his own opinion upon any of them. He has stated his opinion upon a subject with which we have nothing to do, namely, whether an Advocate, not being a Barrister, is or is not bound by the same professional etiquette with reference to fees which governs the Bar at home. He says: "As the plaintiff in the case holds the high "and responsible position of Government "Advocate, and as I think that, in the or- "ganization of a new Court, such as mine "virtually is, it is necessary to define, as "soon as possible, what professional rules "shall govern transactions of this nature, "I have the honor to solicit the opinion of "their Lordships on the following points, "at the same time avowing my opinion, *first*, "that an Advocate, not being a Barrister, "is not bound by the same professional "etiquette in reference to fees which go- "verns the Bar at home; and, *secondly*, that "it may have been an exercise of wise dis- "cretion on Mr. Macleod's part to obtain as "*dominus litis* from taking any steps on "the defendant's behalf."

The first question asked is—Is the plaintiff as an Advocate of the Court, but not a Barrister by profession, warranted in taking a promissory note for value received in professional services in anticipation of the said services? The question, we suppose, which was really intended is, whether such an Advocate, taking such a promissory note, can sue upon it.

The answer to that question depends upon the construction to be put upon Section 18, Act XXI. of 1863. That Section says: "The "fees to be received by any Advocate, whether "general or special, licensed under this Act "or entitled to act as an Advocate for an- "other person in any of the said Courts with- "out a license under Section 16 of this Act, "shall at all times be subject to the control "and taxation of the Recorder of the Court "having jurisdiction in the case in respect "of which such fees are payable, and no "fees shall be recoverable by any Advocates, "except such fees as shall have been allow- "ed by the Recorder on taxation."

It appears to us that an Advocate is not entitled to sue upon a promissory note given by anticipation for fees not taxed. The first question, therefore, must be answered in the negative.

The answer to the first question renders it unnecessary to answer the second question, namely, is it a good defence to an

action upon the said note that the said stipulated services were not rendered, and is it open to the defendant to show that they were not so rendered? If it were necessary to answer that question, I think it clear that it ought to be answered in the affirmative.

The third question is—Is it competent to the Court to award to the plaintiff, irrespective of the note, what it may consider to be in justice a *quantum meruit* for his services?

The answer to this question also depends upon Section 18. This suit has been brought before the fees payable to the Advocate have been taxed by the Recorder, and nothing, at the time when this suit was commenced, had been allowed by the Recorder upon taxation. Therefore, at the time when this suit was commenced, the plaintiff was not entitled to recover by law any fees. Consequently, it was not competent to the Court in this suit to award to the plaintiff a *quantum meruit* for his services. All that the Advocate can do is to make out his bill, and get his fees taxed by the Recorder; and, if the defendant refuse to pay the fees allowed upon such taxation, he can be sued upon them.

The 15th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Hindoo Widow—Adoption—Inheritance.

Case No. 3045 of 1866.

Special Appeal from a decision of the Judge of Dacca, dated the 5th September 1866, affirming a decision of the Moonsiff of Manickgunge, dated the 18th December 1865.

Bykant Monee Roy (Plaintiff), *Appellant,*

versus

Kisto Soonderee Roy (Defendant), *Respondent.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboo Sreenath Doss for Respondent.

A widow, succeeding as heir to her own son, does not lose the right to exercise the power of adoption. By making an adoption, she divests her own estate only.

Loch, J.—The plaintiff sued to recover possession of ancestral property, and to set aside the adoption of the defendant, on the ground that Surbomungola, the adopting mother, had received no authority from her husband Brijoo Soonder to adopt, and that the *onoomutlee potro* (permission to adopt), under which the adoption had taken place, was spurious. The Lower Courts have found in favor of the defendant, and hold that the *onoomutlee potro* is genuine, and the adoption valid.

In special appeal the plaintiff, accepting the finding of the Judge on these facts, urges that, even admitting the adoption to be valid, it does not entitle the defendant to succeed to the ancestral property, as he cannot, under any circumstances, be looked upon as an heir. He states that Ram Manik and Gujender were uterine brothers. Plaintiff is a descendant of Gujender. Ram Manik had a son called Ram Kishen, who had a son Brijoo Soonder, the husband of Surbomungola, who died before his father, leaving a son, Hur Soonder. Brijoo Soonder with his father's consent gave his wife permission to adopt a son in the event of Hur Soonder's death. On the death of Ram Kishen, his grandson Hur Soonder succeeded to the ancestral estate, and died leaving a widow, Huro Soondery, who held possession till her death, when the property reverted to Surbomungola as the mother and next legal heir of Hur Soonder. Surbomungola then took advantage of the permission given her by her husband, and adopted the defendant, who succeeded to the ancestral property, not as the son of Brijoo Soonder, but, as contended before us, as the brother of Hur Soonder, and the next legal heir after his mother. It is contended that in no capacity can the defendant succeed, for, the property having vested in Hur Soonder on the death of his grandfather, defendant cannot succeed to it as the adopted son of Brijoo Soonder; nor can he be looked upon as a brother and legal heir of Hur Soonder, as his adoption did not take place till after the death of Hur Soonder at a time when Surbomungola held possession of the property, not as widow of Brijoo Soonder, but as heir of her son Hur Soonder; and, in support of this view of the law, the pleader for the special appellant refers to a case reported in 3 Weekly Reporter, p. 15, Privy Council Rulings, Bhoobun Moyee Debea *vs.* Ramkishore Acharjé, in which it was held that, "when the estate of a son "is unlimited, and that son marries and "leaves a widow his heir, she acquires a "vested interest in her husband's property "as widow, and a new heir cannot be sub-

"stituted by adoption to defeat the estate, "and take as an adopted son what a natural-"born son would not have taken; and that, "by the mere gift of a power of adoption "to a widow, the estate of the heir of a "deceased son vested in possession cannot "be defeated and divested; that the rule "of Hindoo Law is that, in the case of inherit-"ance, the person to succeed must be the "heir of the last full owner. On the death "of the last full owner, his wife succeeds "as his heir to a widow's estate, and on her "death the person to succeed is the heir at "that time of the last owner."

This case is not quite the same as the present, but the conclusion come to in the latter part of the judgment of the Privy Council is applicable to the case before us. In the case we have quoted, Gourkishore died leaving a widow Chundrabully and a son Bhowanny, who married Bhoobunmoyee, and died leaving no children. Chundrabully had a power of adoption from her husband. Bhoobunmoyee also claimed a similar authority from her husband, and adopted Rajender Kishore. Chundrabully adopted Ram Kishore. The Sudder Court held that the power to adopt set forth by Bhoobunmoyee was a forgery, and set aside her adoption; that the power given to Chundrabully was genuine; and that the adoption of Ram Kishore was valid, and he was entitled to the estate. The Privy Council held that, though the adoption by Chundrabully was good, her adopted son could not divest the widow of Bhowanny, the late full owner of the estate. "But," their Lordships remark, "if Bhowanny had died unmarried, "his mother Chundrabully would have been "*his* heir, and the question of adoption "would have stood upon quite different "grounds. By exercising the power of "adoption, she would have divested *no* estate "but her own, and this would have brought "the case within the ordinary rule."

In the case supposed by the Privy Council, their Lordships carefully point out that, in the event of Bhowanny dying unmarried, Chundrabully would have succeeded as *his* heir; and that, if she had adopted, such adoption would have brought the case under the ordinary rule. What, then, would have been the position of Chundrabully's adopted son? He would have been the son of her husband Gour Kishore, and would succeed, as brother of Bhowanny, to the ancestral property, if he succeeded at all. The inference to be drawn from what is said by the Privy Council is that, in the event of Chundrabully succeeding as heir to her own son, and exercising the power of adoption, the son so adopted would obtain the rights of a natural-born son.

Now, in the case before us, Surbomungola was, when she made the adoption, in the very position in which Chundrabully might have been in, *viz.*, she was in possession of her son Hur Soonder's property as *his* heir; and, by making the adoption, she divested only her own estate. It is immaterial that Brijoo Soonder, the father of Hur Soonder, died before his father Ram Kishore, for Surbomungola held, not as his heir, but as heir of her son, and her adoption of the defendant placed him in the position of a mother to Hur Soonder, and, as such, entitled him, after Surbomungola, to succeed to Hur Soonder's estate.

No texts or precedents have been quoted by either party in support of or against the allegation made by the special appellant; but, looking to the judgment of the Privy Council in the case of Bhoobunmoyee, we think that Surbomungola had not lost the right to exercise the power of adoption; and, if so, that the defendant, her adopted son, is entitled to succeed to the property in dispute.

Under this view of the case, we dismiss the appeal with costs.

The 15th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Section 208, Act VIII. of 1859—Execution—Certificate.

Case No. 874 of 1866.

Miscellaneous Appeal from an order of the Judge of West Burdwan, dated the 7th September 1866, affirming an order of the Principal Sudder Ameen of that District, dated the 23rd February 1866.

Rajah Gopal Singh Deb (Judgment-debtor), *Appellant,*

versus

Gopal Chunder Chuckerbutty and another (Decree-holders), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Mohesh Chunder Bose for Respondents.

Under Section 208, Act VIII. of 1859, it is not essential that a certificate should in every instance be obtained by a representative before he can be allowed to apply for execution.

Macpherson, J.—In this case it is contended that the persons who have applied for execution are not entitled to it, because they have not obtained a certificate authorizing them to collect the debts due to the estate of the original decree-holder who is now deceased. We think that the decision of the Lower Appellate Court is right, if the Court is satisfied that the applicants are what they profess to be, *i. e.*, the representatives of the deceased decree-holder. Under Section 208 of Act VIII. of 1859, it is not essential that a certificate should, in every instance, be obtained by a representative before he can be allowed to apply for execution.

As regards the question of limitation, the decision of the Lower Appellate Court is on the face of it defective. The proceedings in 1864 were taken, no doubt, within three years of the application, out of which the present appeal arises. But the decree is dated so far back as 1847; and, under Sections 20 and 21 of Act XIV. of 1859, no execution could properly be issued in 1865, unless some proceeding within the meaning of Section 20 was taken within three years after the passing of that Act, and was followed by other proceedings from time to time at intervals, no one of which amounted to three years. The Lower Appellate Court must decide whether such *bond-fide* proceedings (*see* 6 Weekly Reporter 98, Miscellaneous) have from time to time been taken as have kept the decree in force.

As regards the question of the property being *debutter*, we think the Court was right in holding that, under Section 247 of Act VIII. of 1859, the decision of the Principal Sudder Ameen was not open to appeal.

We remand the case that it may be re-tried with reference to the above remarks.

The 15th April 1867.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Mokurruree Lease—Power of Naib to grant.

Case No. 2967 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 31st August 1866, reversing a decision passed by the Collector of that District, dated the 18th May 1866.

Unnoda Pershad Banerjee (Plaintiff), *Appellant,*

versus

Chunder Sekhur Deb (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Greesh Chunder Ghose, Khetturnath Bose,* and *Gopal Lal Mitter* for Appellant.

Mr. W. A. Montriou and *Baboo Chunder Madhub Ghose* for Respondent.

It is not absolutely necessary that any particular form of words should be used in conveying rights to hold at fixed rates.

The grant of a mokurruree lease is beyond the scope of a naib's general authority. To enable him to give such a lease, his principal's special consent or approval is necessary.

Glover, J.—This was a suit for a kubooleut at enhanced rates of rent, after notice. The defendant pleaded a "mokurruree" pottah granted to him in 1269 by Bissambur Ghossal, the plaintiff's naib; and the issues were whether or no the pottah, the grant of which was not denied, conveyed the right of holding at fixed rates, and whether the plaintiff's naib had authority to grant such a pottah.

The Deputy Collector, on remand, found for the plaintiff; but the Judge, on appeal, decided both issues in favor of the tenant, adding that the landlord himself had ratified the acts of his agent.

The points raised in special appeal are the same as those argued below:—

(1.) Does plaintiff's pottah convey mokurruree rights?

(2.) Had the naib any power to grant it? and

(3.) Did the special appellant ratify his agent's act?

The last point becomes an issue of law in this way. The special appellant contends that there is no evidence whatever on the record to support the Judge's finding, and that therefore his decision is wrong in law.

With regard to the first objection, we cannot say that the Judge was wrong in law in construing the pottah as he has done. We have read that document; it purports to be a lease of 4½ beegahs of land for *building purposes*, to be enjoyed by the lessee, his sons, and sons' sons at a rental of Rupees 9-9. The word "mokurruree" does not occur in the pottah, but it is not absolutely necessary that any particular form of words should be used in conveying rights to hold at fixed rates; and, taking the nature of the lease, the position of the parties, and the circumstances under which the contract was made, into consideration, we cannot say that the Judge has placed on the pottah a construction that it cannot legally bear, and, that being so, his decision as to the nature of the rights conveyed becomes one of fact on evidence with which we cannot, in special appeal, interfere.

On the second point taken before us, we think that the Judge was wrong. It has been ruled by this Court in a long current of decisions (3 Weekly Reporter, Act X. Rulings, 1; 2 Weekly Reporter 155; 1 Weekly Reporter 56) that to grant "mokurruree" leases is beyond the scope of a naib's general authority, and that, to enable him to give such leases, his principal's special consent or approval is necessary.

And this brings us to the third ground of special appeal, Did the zemindar ratify the act of his naib?

Mr. Allan for the special appellant contends that there is no evidence whatever of such ratification, and that the Judge's finding is, therefore, an error of law.

The ratification is said by the Judge to have consisted in taking rent from the special respondent at the rate mentioned in the pottah, and in having entered his name in the zemindaree serishtah.

Now, it cannot be said that there is *no* evidence on these points. Special respondent filed a receipt on the part of the zemindars, and deposed on oath that it was given him by the latter's tehsildar, and that the special appellant had allowed his name to be entered in the zemindaree register, in the place of the outgoing tenant.

These statements on oath, backed by *jumma wassil bakee* papers, in which special respondent's name appeared, and not denied by the special appellant (who was likewise examined on oath, and who simply professed ignorance as to whether the special respondent's name was or was not entered in his register), would undoubtedly be evidence of the ratification, not of a very high character probably, as being uncorroborated by documentary proof of the mutation, still it would be legal evidence so far as it went; and, as the Judge, for reasons given in his decision, chose to rely upon it, we cannot interfere with his order in special appeal. He committed no error in law, as there was some evidence on which to decide in favor of the tenant.

We, therefore, dismiss this appeal with costs.

The 18th April 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation (Plea of—by tenant)—Jurisdiction—Ejectment—Right of occupancy.

Case No. 140 of 1866.

Regular Appeal from a decision passed by Baboo Pearee Mohun Banerjee, Principal Sudder Ameen of Rajshahye, dated the 12th February 1866.

Messrs. R. Watson and Co. (Defendants), *Appellants,*

versus

Ranee Shurut Soonduree Debia (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Onookool Chunder Mookerjee* for Appellants.

Baboos Mohinee Mohun Roy and *Dwarka nath Mitter* for Respondent.

Suit laid at Rupees 14,719-8.

In a suit to recover possession, the defendant, by admitting the right of the plaintiff as the owner of the land in dispute, and acknowledging himself to be the plaintiff's tenant, precludes himself from pleading adverse possession or limitation, in whatever form it may be that the plaintiff asserts his right to the land, *i. e.*, whether he sues the defendant as a tenant or trespasser.

Unless the case be one which comes within the provisions of Clause 5, Section 23, Act X. of 1859, an action for ejectment is not barred in the Civil Court under Act

VIII. of 1859; nor is the Civil Court, in such a case, precluded from determining the question of a right of occupancy pleaded by the defendant.

Under Section 6, Act X. of 1859, it is only when occupancy is inherited that the occupancy of the predecessor is considered as the occupancy of the tenant in possession; and, unless the tenant hold a transferable tenure, the sale by him of his jote to another party without the consent of the landlord does not transfer to the purchaser any right of occupancy which the latter may have possessed, or enable the present occupant to plead that the period of his own possession, joined to that of the former tenant, gives him a presumptive right of occupancy.

Loch, J.—THE plaintiff in this case, being the Collector of Zillah Rajshahye on the part of the Court of Wards managing the estates of the late Rajah Jogendro Narain Roy, brings this suit to recover possession with mesne-profits of certain lands from the defendants, Watson and Co., on the allegation that the defendants, having, during the minority of the Rajah, obtained a farm of Pergunnah Lushkerpore, retained possession of the lands in Mouzahs Luckheekole, Lollpore, and Basodebpore after the expiry of their lease; that, under cover of an Act IV. decree, they took possession of certain lands in Baghberiah Sultanpore and Baraghariah Dustanabad on 18th January 1861, and got possession of other lands in Matgram and Belguriah from Kartick 1267 (1860). Since the case was heard below, the property has been given up by the Court of Wards, and Ranee Shurat Soonduree, widow of the late Rajah, is the respondent who defends the appeal.

It is admitted by the plaintiff's pleaders before us that there has been a partition of Pergunnah Lushkerpore, but that some or portions of some of the villages of that Pergunnah are still held in common by the proprietors of that Pergunnah. The partition was made according to the following fractional shares: 5 annas 10 gundahs belonging to plaintiff and another proprietor in equal shares, 7 annas and odd gundahs, and 3 annas. We have to deal with the first share only in this case.

Among the villages which, or parts of which, are still held in common by the proprietors of Pergunnah Lushkerpore is Mouzah Luckheekole. Of this village the plaintiff alleges that 1,553 beegahs are held in common, and he sues to recover possession of his share, *viz.*, 2 annas 15 gundas. Of the lands claimed in the other villages, except Baghberiah Sultanpore, it is explained to us that the lands in dispute appertain to the 5-annas 10-gundas share of the zemindaree belonging to plaintiff and another proprietor, of which the plaintiff is entitled to a moiety, and that the lands of Baghberiah Sultanpore, comprising 17 beegahs, are the sole property of the plaintiff.

The lands of which plaintiff seeks to recover possession are as follow:—

2 annas 15 gundahs of 1,553 beegahs in Mouzah Luckheekole.

8 annas of 704-18 beegahs in Mouzah Lollpore.

8 annas of 146-13 beegahs in Mouzah Matgram.

8 annas of 111-16 beegahs in Mouzah Belguriah.

8 annas of 20 beegahs in Mouzah Baraghariah Dustanabad.

8 annas of 232-10 beegahs in Mouzah Basodebpore.

The whole of 17 beegahs in Baghberiah Sultanpore.

The allegation in the plaint is that the defendants evicted the plaintiff from possession. The pleader for the plaintiff, respondent, explains that there has not been an actual and violent dispossession, but that the defendants, appellants, during their occupation of the lands as farmers, took possession of and cultivated these lands under one pretence or another, and, since the expiry of their lease, have, without any legal right, retained possession, and have not been recognised as tenants by the zemindar who has refused to receive rent from them considering them to be trespassers.

The defendants deny that they dispossessed the plaintiff. They admit that they held Pergunnah Lushkerpore in farm; but they add that, besides their possession as farmers, they hold possession of lands, and among them those now in dispute, as cultivating tenants direct from the zemindars or as undertenants to tenants who pay rent to the zemindars. They urge, also, that their right to hold as tenants s admitted by the co-sharers in the estate; and that, though their right as farmers expired with the term of their lease, they are entitled to retain possession of their jotes and durjotes, which they have held for many years. It is unnecessary at present to go into further detail of the defendants' statement, as this will be done as we proceed with our investigation village by village. We will only add in this place that the defendants state that the lands in Lollpore and Basodebpore have been held by them for a much longer period than twelve years, and that the lands in other villages were held by Mr. Abbott, proprietor of the Bansbaria Concern, and his title was recognized by the plaintiff's predecessor, and that

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in 1855 (1262) the defendant purchased that concern, and with it Abbott's rights to hold and cultivate those lands.

The Principal Sudder Ameen, after deducting certain lands belonging to other villages, gives the plaintiff a decree for possession with mesne-profits.

The principal defendants, Watson and Co., appeal from the judgment passed adversely to them in the Lower Court. They urge, as they appear to have done in the Court below, that the plaintiff, in bringing this action against them, is bound to recognize them in one of two capacities, either as having ousted him, and consequently holding adverse possession, or, as they themselves assert, as tenants; that, if the plaintiff sues them in the former capacity, he must prove possession and dispossession within 12 years prior to the institution of the suit, or, if plaintiff sues them in their other capacity, then he has come to the wrong forum, and his case must be dismissed, for a suit for ejectment can be brought only under Act X. of 1859, and can be tried only by the Collector. It is further urged that the Principal Sudder Ameen misunderstood the plea of limitation put forward by the defendant, and has tried the case as if it were between a landlord and tenant not having a right of occupancy, without giving the defendant an opportunity of proving that he has, as he alleges, a right of occupancy; that the Principal Sudder Ameen has not looked into the evidence filed by the defendant in Court, which shows that they have held these lands as jotedars paying rent for many years, and has based his decision on the report of the Ameen, who, in the course of his investigation, has exceeded his commission which confined the enquiry to the question of possession; whereas the Ameen has gone into the further question of title, and the Principal Sudder Ameen has accepted, without hesitation, the finding of the Ameen.

In argument before us, the pleader for the appellants urged that, in the course of investigation, the character of this suit had been altered; that the case as put by the plaintiff has not been tried, but that both the Court below and this Court were trying a case as between landlord and tenant—a relationship the existence of which plaintiff had denied, and still continued to deny, but of which he was trying to take advantage, as he felt that he could not sustain his own case as originally brought. Looking at the plaint, we find that the plaintiff seeks to recover possession from the defendants as wrong-doers who have ousted him; but the defendants' pleadings set forth a title to hold possession as tenants from the plaintiff and other co-proprietors; and the Principal Sudder Ameen, in determining the issues, appears to have followed the course prescribed in Section 139, Act VIII. of 1859. The issues were drawn up in the presence of the parties, and defendants allowed the case to go to trial on the issues then framed, and they cannot now be allowed to take exception to them.

In support of the appeal, the pleader for the appellants first points to the evidence adduced by plaintiff in support of the allegation that he was ousted. The statement of witnesses examined in Court goes to prove that the lands were in the actual possession of the plaintiff, and that the defendants on certain dates took forcible possession, sowing indigo thereon, and have retained possession from that time. These statements are altogether at variance with the case now set up by the plaintiff. They are made in support of the case as originally brought in the plaint; but the plaintiff now says all these statements are untrue, and discredits his own witnesses. The further evidence on the part of the plaintiff consists of measurement chittahs and jumma wassil bakees from 1252 and some years subsequent relating to Luckheekole and Baraghuriah Dastanabad; but it is not apparent what they are intended to prove, nor have they been attested. Besides this evidence there is the Ameen's report, which is favorable to the plaintiff. For the appellants it is shown that, after the death of Rajah Hurendur Narain in 1258 (1851), his widow Doorga Soonduree, the mother of Rajah Jogendur Narain Roy, was called upon by the Court of Wards for a report of the assets and collections of the estate; that the report she submitted in 1258 showed the existence of the defendants' jotes in Luckheekole, Lollpore, Dustanabad, and Matgram; that a further report of the said Ranee, bearing date 7th Aghran 1271 (21st November 1854), also submitted to the Court of Wards, showed that defendants held jotes in the above villages; that, after the expiry of the defendants' farming lease in 1859, the estates of the minor were placed under the management of Prosunno Coomar Muzoomdar, to whom defendants paid rent for the jote in Lollpore, and from whom they obtained a receipt, dated December 31st, 1859, which is before the Court. Rajah Jogendar Narain attained majority in 1266

(1859), and took possession of all the lands covered by their farming lease, but did not, up to the date of his death in 1269 (1862), seek to oust the defendants from the lands held by them in jote, nor did the Court of Wards, when it again took possession after the Rajah's death. During the lifetime of the Rajah, his agent Furhutoollah Moonshee applied to the Collector for assistance to measure the lands of Lollpore and Suntoshpore under the provisions of Section 26, Act X. of 1859, and, on 3rd March 1862, the Collector directed the defendants to attend the measurement. The chittahs were deposited with the Court of Wards, and defendants, having received a copy duly signed and sealed, have filed it in this case, and these chittahs show that the defendants are in possession of lands in Lollpore as jotedars. The appellant also refers to an order of the Collector, dated 26th January 1863, requiring Watson and Co. to pay the balance of rent due by them for lands appertaining to the estate of Jogendur Narain Roy in Mouzah Luckheekole amounting to Rupees 240, but they are unable to show that they complied with the order.

In reply, it is urged that plaintiff is proprietor of the land; that all he had to do was to show that the lands in question were within his zemindaree, which is admitted; that, as the defendants urge a tenant's right, they cannot plead limitation against the party whom they call their landlord, though he seeks to oust them as trespassers, and does not acknowledge the relationship; that it is unnecessary for plaintiff under such circumstances to prove dispossession, and, in support of this position, the pleader quotes the following cases: Mohendro Narain Singh, appellant, 9th September 1864, not reported; Watson and Co. (Hay's Reports, page 4), 5th January 1863; Mussamut Delsoaj (Sudder Reports, 1856, page 83), 20th February 1865; Soobul Sett (Hay's Reports, page 111), 2nd August 1862; Sristeedhur (1 Weekly Reporter, page 171), 24th September 1864.

On the objection taken by the defendants that the suit would not lie in the Civil Court under Act VIII. of 1859, but in the Collector's Court under Act X. of 1859, it is contended that, unless the suit be one that comes under the particular class of cases contemplated by Clause 5, Section 23 of Act X., a suit can be brought under Act VIII. of 1859, as ruled by a Full Bench on 21st August 1863 (*see* Special Number, Weekly Reporter, pages 125 and 126).

Further, it is urged that, even if defendants proved in this case that they were tenants, yet they had not proved that they had a right of occupancy. Take, for example, the lands of Luckheekole, which were "bheel bhuratee," *i.e.*, the dried-up bed of a marsh. The witnesses examined by the Ameen stated that it was taken possession of by Abbott some 17 or 18 years ago, and subsequently by Watson. Abbott owned the Bansbaria Concern in 1855 (1262), and the present suit was instituted in 1863 (1270). The defendants, Watson and Co., had then been in possession for about 8 years, and the witnesses above referred to were examined by the Ameen about three years later, so that they were correct in saying that Watson and Co. had then held about 10 or 11 years. Watson and Co. had no right of occupancy in themselves. Could they derive such a right from their vendor Abbott? Had he any title which he could transfer to them, which, added to their own period of possession, would give defendants a right of occupancy? It is clear that Abbott had no such right, and, though Section 6, Act X. of 1859, recognizes the holding of the father or other person from whom a ryot inherits to be the holding of the ryot, it does not recognize the right of a transferee to be identical with that of the transferer.

We do not think the cases quoted above in regard to the plea of limitation, except that of Mohendro Narain Singh, are in all respects similar to the present case. In those cases the relationship of landlord and tenant is admitted. In the present case, however, the relationship is denied by the plaintiff. He looks upon the defendants as trespassers, and, as such, seeks to recover possession from their hands. They plead their right to hold as tenants from the plaintiff, and, on this pleading, it appears to us that they cannot urge limitation against the plaintiff in whatever form he asserts his claim to the lands. By admitting the right of the plaintiff as owner of the lands, and acknowledging themselves to be his tenants, the defendants, so it appears to us, preclude themselves from making any use of the general Law of Limitation. This is the principle laid down in the judgment of Mohendro Narain Singh quoted above. In that case plaintiff sued to set aside a lease to the defendant alleged to have been granted by his guardian, and sought to evict them. The defendant pleaded that he held as a tenant, and at the same time

pleaded the Law of Limitation. The Court held that the defendant, with reference to his defence, was precluded from pleading possession adverse to the plaintiff.

Then, as to the Court in which this suit is brought, it is evident that, unless the case be one which comes within the provisions of Clause 5, Section 23, Act X. of 1859, an action to eject is not barred in the Civil Court under Act VIII. of 1859; and this has been distinctly ruled in the Full Bench decision quoted by the respondent (Special Number, Weekly Reporter, pages 125 and 126). Now, this case is clearly not one which comes under the provisions of Section 23 of Act X., and consequently the plaintiff's right to bring his action in the Civil Court is not barred by the provisions of that Act. Nor do we understand why the Civil Court is precluded from determining the question of a right of occupancy pleaded in answer to a prayer for ejectment by the plaintiff. The appellants' pleader urges that this question can only be tried by the Collector; but, if the plaintiff may sue for ejectment in the Civil Court, the defendant may plead in his defence a right of occupancy, and the Court trying the case must determine whether or not the plea is good.

As regards the right of occupancy, the defendants must, we think, stand or fall, according to the period of their own occupancy. They cannot derive any right from Abbott whose concern they purchased. It is only when occupancy is inherited that the occupancy of the predecessor is considered as the occupancy of the tenant in possession. The terms of the Law, Section 6, Act X. of 1859, are distinct on this point. Unless, therefore, the tenant held a transferable tenure, the sale by him of his jote to another party without the consent of the landlord does not transfer to the purchaser any right of occupancy which the seller might have possessed, or enable the present occupant to plead that the period of his own possession, joined to that of the former tenant, gives him a prescriptive right of occupancy.

(The remainder of the judgment is omitted as turning upon the evidence.)

The 18th April 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Guardian of minor—Certificate (Act XL. of 1858) —Section 246, Act VIII. of 1859—Claims to attached property—Limitation.

Case No. 144 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 10th January 1867, reversing a decision passed by the Sudder Moonsiff of that District, dated the 17th April 1866.

Sreenath Koondoo (one of the Defendants), *Appellant,*

versus

Huree Narain Mudduck (Plaintiff) and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Bykuntnath Pal for Respondents.

Where a person, representing herself as a guardian, neither took out a certificate under Act XL. of 1858, nor obtained the permission of the Court under Section 3 of that Act to appear in the suit without a certificate—HELD that the minor was not bound by any act of the alleged guardian, nor was he bound to sue within 3 years from the order passed by the Court under Section 246, Act VIII. of 1859, rejecting her petition of objection to a sale of attached property.

Kemp, J.—THIS case comes up in appeal before us on the issue in bar alone. The merits have not been entered into by the Courts below.

The plaintiff, special respondent, has admittedly sued within 12 years from the time he reached his majority, whether it be assumed that he attained majority on reaching the age of 16 years or 18 years. The order passed under Section 246, Act VIII. of 1859, rejecting the petition of objection of Mohun Mohinee, who represented herself to be the guardian of the plaintiff, was passed more than a year before the present suit was brought; and, therefore, if the act of Mohun Mohinee was binding upon the minor, the present suit is confessedly beyond time.

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Mohun Mohinee was not the constituted guardian of the plaintiff. She had not taken out a certificate under the provisions of Act XL. of 1858, nor had she obtained the permission of the Court, under the provisions of Section 3 of the said Act, to appear in the suit without certificate. Any act of hers, even admitting that she did present the petition of objection, is not binding upon the minor, and we must, therefore, treat this case as if no claim had been made under the provisions of Section 246 of Act VIII. of 1859. The decision of the Principal Sudder Ameen, holding that the suit was not barred, and remanding it for trial on the merits, is affirmed, and the appeal dismissed with costs and interest.

The 18th April 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Limitation—Adverse possession—Omission of tenant to pay rent.

Case No. 2222 of 1866.

Special Appeal from a decision passed by the Judge of Jessore, dated the 7th June 1866, reversing a decision passed by the Moonsiff of Khoolneah, dated the 11th July 1865.

Troyluckho Tarinee Dossia (one of the Defendants), *Appellant,*

versus

Mohima Chunder Muttuck (Plaintiff) and others (Defendants), *Respondents.*

Baboos Gopal Lal Mitter and *Kalee Kishen Sein* for Appellant.

Baboo Mutty Lal Mookerjee for Respondents.

So long as the relation of landlord and tenant exists, the mere omission by the tenant to pay his rent does not constitute an adverse possession so as to make limitation applicable.

Markby, J.—The defendant has taken an objection in special appeal that, inasmuch as certain documents which the plaintiff relied on in support of his allegation that the defendant was his under-tenant have been found not to be genuine, that allegation must, of necessity, be found against the plaintiff. But this does not follow. The defendant has admitted that the land held by the defendant was granted by the zemindar to the plaintiff as ganteedar, and was held by the plaintiff as ganteedar, and from this the Judge infers, in the absence of all evidence to show that the plaintiff has ever parted with this title, that the gantee is still in existence. The power of the Judge to draw this inference is not affected by the plaintiff having used documents found not to be genuine in another part of the case.

It is further contended that, even supposing the plaintiff to have been admitted to have held these lands as ganteedar at some time or other, there is no admission that he has so held them within 12 years; that the defendant is not shown to have paid any rent within 12 years; and that the plaintiff is therefore barred by the provisions of Clause 12 of Section 1 of Act XIV. of 1859. But the answer to this is that, so long as the relation of landlord and tenant exists, the mere omission by the tenant to pay his rent does not constitute an adverse possession, and the Statute of Limitation has no application.

The appellant also took an objection that the vakeel has no authority to make the admission referred to, but he did not take this objection below or in his grounds of appeal, and we do not think proper to grant him permission to do so now.

The 24th April 1867.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Breach of Indigo Contract—Act XI. of 1836—Limitation.

Cases Nos. 329 and 330 of 1867.

Applications for review of judgment passed by the Hon'ble Justices Bayley and Kemp, on the 28th May 1866, in Special Appeals Nos. 3428 and 3429 of 1865. *

Mr. A. J. Forbes, Plaintiff (Appellant), *Petitioner,*

versus

Purtap Singh Doogur and others, Defendants (Respondents), *Opposite Party.*

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* *See* Vol. V. p. 277.

Mr. A. T. T. Peterson for Petitioner.

Messrs. R. V. Doyne, R. T. Allan, and *C. Gregory* for Opposite Party.

Though Section 3, Act X. of 1836, enables an indigo-planter to join in one and the same suit two distinct causes of action, *i.e.*, the breach of contract on the part of the ryot, and the tort on the part of the person prevailing upon the ryot to break the contract, yet the two causes of action are governed by different periods of limitation, the former within 3 years under Clause 10, Section 1, Act XIV. of 1859, and the latter within 6 years under Clause 16.

Kemp, J.—THESE are applications to review our judgment, dated the 28th May 1866. The suit was instituted under the provisions of Section 3, Act X. of 1836. The plaintiff elected to sue jointly the ryot, and the party who was alleged to have prevailed on the ryot to break the contract.

The suit, in as far as the ryot is concerned, is admittedly governed by Clause 10, Section 1, Act XIV. of 1859, and, inasmuch as it was brought within a period of three years from the time when the breach of contract took place, it is clearly beyond time.

It is now contended that the same period of limitation, *viz.*, three years, is applicable to the claim of the plaintiff as against the party who is alleged to have prevailed upon the ryot to break the contract; and that, consequently, the suit is barred as against that party also.

We are of opinion that the suit as against the alleged instigator is not barred, and that the period of limitation prescribed by Clause 16, Section 1, Act XIV. of 1859, is applicable, *viz.*, six years from the time the cause of action arose.

The instigator was not a party to the contract entered into by the ryot with the plaintiff. The fact of the instigator having prevailed upon the ryot to break the contract renders the former liable jointly with the ryot or severally for damages to the extent of the injury sustained by the plaintiff. Section 3, Act X. of 1836, a special law passed to protect the interests of indigo-planters, enables the planter to join two distinct causes of action, *viz.*, the breach of contract on the part of the ryot, and the "tort" on the part of the instigator, in one and the same suit; but the Act quoted does not, in our opinion, in any way curtail or extend the period of limitation within which a suit on distinct causes of action, and which the Legislature has, by a special enactment, enabled the suitor to join in one suit, must be instituted. The period of limitation which governs the cause of action as against the ryot for breach of the contract is three years, and that as against the party prevailing upon the ryot to break the contract, six years. In this view we adhere to our former judgment, and reject this application with costs.

The 24th April 1867.

Present:

The Hon'ble J. P. Norman, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Appeal—Arbitration—Section 327, Act VIII. of 1859.

Case No. 268 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 28th March 1866.

Digamburee Dossee (Plaintiff), *Appellant,*

versus

Poornanund Dey and others (Defendants), *Respondents.*

Baboo Dwarkanath Mitter for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Suit laid at Rupees 24,057-2.

An order refusing to enforce an obviously illegal award of arbitrators under Section 327, Act VIII. of 1859, is not a decree, and therefore not appealable.

Norman, J.—THIS was a proceeding by the plaintiff, praying that an award might be filed pursuant to Section 327 of Act VIII., that the award might be enforced, and possession of 3 annas in certain estates given to the petitioner pursuant thereto, &c.

The award bore date the 1st of February 1865. On the 9th of June the petition in the present case was presented. On the 12th of June the Principal Sudder Ameen, after calling for a report from the serishtadar, ordered that the case should be entered in the register, and that a summons should be issued, ordering the defendant to appear on the 15th July.

On the day so appointed, the several defendants put in written statements objecting to the award, contending that the arbitrators had exceeded their power.

On the 28th of March 1866, the Principal Sudder Ameen laid down as points for adjudication:—

1st.—Whether the agreement restricted the arbitrators to a decision respecting the joint property only.

2nd.—Whether it empowered them to pass an award on the private or exclusive property of the parties.

He found that the agreement of plaintiff or petitioner related to the whole property, and that of the defendants only to their joint property; that the defendants expressly exempted the private or separate property from the arbitrator's decision; that the arbitrators have awarded shares to the parties of all the property, both joint and private; and that, therefore, as the Court could not enforce an award which was obviously illegal, he dismissed the suit of the plaintiff with costs.

The plaintiff appealed to this Court. On the hearing, a preliminary objection was taken that no appeal lies.

We think that this contention is well founded. Section 327 provides for an application to be written on the stamped paper required for petitions, not for a plaint with a valuation as in a suit. The application is to be numbered and registered *as* a suit. The decision of the Full Bench, 6 Weekly Reporter, Miscellaneous Rulings, p. 83, in effect establishes the proposition that, by such registration, the application does not become a suit, but that the word *as* must be construed "*in the same manner as.*" The same decision further shows that an *order* rejecting an application to file an award is not a *decree.*

Now, it may be said that, in the present case, the decision of the Principal Sudder Ameen is a decision on the merits, and not a mere rejection of the award; that it is in form a decree, and is at least a decree for costs.

Section 11, Act XXIII. of 1861, which is the provision relied upon by the appellant, gives an appeal only from decrees. On consideration of Sections 327 and 325, it appears that it is only where the award is enforced by the Court that a decree follows the judgment pursuant to Section 325. In other cases the only judgment which the Court seems to have power to give under Section 327 is that the award be not filed or not kept on the files of the Court. As pointed out by Sir Richard Couch in the case of Vyankatesh Ram Chundra Jogekar *versus* Baleejarad bin Anoodrad, Bombay cases by Dunbar, 1863-64, page 184, the refusal to file the award does not invalidate it. It only prevents the award being enforced in the summary way provided for by the Act.

We think, therefore, that the order of the Principal Sudder Ameen in the present case must be construed simply as an order rejecting the application to file the award, and is not a decree.

The filing of the award on the 12th of June, without first calling on the defendant to show cause against it on the report of the serishtadar, was wholly irregular—an act done in the absence of the defendant, which cannot alter his position.

There are conflicting decisions, 6 Weekly Reporter, Civil Rulings, page 60, and Brojo Lal Bajpaye *versus* Amruth Lal Bajpaye, Marshall's Reports, page 164, last six lines, as to the right of appeal where the Lower Court has passed judgment, and given a decree in accordance with an award, when the arbitrators have awarded on a matter not submitted to them—a question which arises upon the construction of Section 325, but with which we have not now to deal.

In our opinion, this case is governed by the decision of the Full Bench, and that of the High Court of Bombay above referred to. We think that no appeal lies.

The appeal must, therefore, be dismissed with costs.

Seton-Karr, J.—This was a case in which certain disputes as to family property, moveable and immoveable, were referred by the parties to arbitrators, without any intervention by the Courts, and the arbitration-award was subsequently filed in Court under Section 327 of the Civil Code.

The Principal Sudder Ameen set out at some length the particulars of the dispute, recited the contents of the *ikrars* by which the parties had agreed to submit to arbitration, and ended by ruling that the arbitrators were not empowered to include in their award the property designated as self-acquired, and that the Courts *could not enforce* an award which was obviously illegal. The suit was therefore dismissed with costs.

On the first hearing of the appeal before us, as preferred by the plaintiff, the respondent took a preliminary objection to the effect that no appeal would lie under the Section of Act VIII. applicable to this case, *viz.*, No. 327, and under the ruling of the Full Bench reported at page 83 of the Weekly Reporter, Volume VI., Miscellaneous Rulings.

The case has been twice argued before us on this point alone; on the second occasion we had the assistance of our brother Mr. Justice L. S. Jackson, and the cases noted in the margin have been quoted and referred to.

Several of these cases, especially that recorded at page 60, Volume VI. of the Weekly Reporter, show that appeals from awards have been entertained when such awards have been filed under Section 327. But the respondents take their stand mainly on the ruling of the Full Bench reported at page 83, Miscellaneous Rulings of Volume VI., Weekly Reporter, which lays it down as a rule that an order *rejecting* an application to file an award under Section 327 of Act VIII. is not a decree, and therefore is not appealable as a decree.

Weekly Reporter, Vol. I., page 12.
" " Vol. VI., page 60.
" " Vol. VI., page 83 Mis.
1 Hay's Reports, page 366.
Agra Sudder Court, 7th January 1860.
Bombay High Court, Dunbar, page 184; and
Broughton's Act VIII., Section 327.

The pleader for the respondent contends that the decision of judgment of the Principal Sudder Ameen in the case before us is nothing more in effect and substance than such an order; that the language of the Lower Court, however ambiguous, amounts only to a rejection of an application to file the same, and as such that it falls strictly within the decision of the Full Bench.

It seems, on referring to the record, that the date of the award is the 1st February 1865. On the 9th of June following, or within six months, and therefore within the law, an application was made by the plaintiff to the Lower Court for the filing of the award. On that day the Court ordered the serishtadar to report on the application, and, on that officer's reporting that the plaintiff had filed the award and verified the plaint, the order was passed, on the 12th of June, that the case should be registered, the 18th of July be appointed as the day, and a summons be issued to the defendants.

I had some doubts, at first, whether, on carefully comparing the decision given by the Principal Sudder Ameen with the judgment of the Full Bench and with the referring order of Loch and Macpherson, JJ., the two cases were not distinguishable. It may be argued that the Principal Sudder Ameen's order amounts to something more than a mere refusal to file the award. The case was duly registered and numbered. The Principal Sudder Ameen went at some length into the merits of the dispute and into the effect of the ikrars by which the parties had bound themselves, and he then held that the arbitrators had no business to meddle with the self-acquired property, and so "dismissed" the suit.

I thought it a question whether we might not treat this as a case in which the Court had come to a decision itself on the dispute, and whether we might not deal with the appeal on these points in which any other Sections of the Chapter relating to arbitration or any other law did admit of appeals.

Having now heard the matter re-argued, with the aid of my brother L. S. Jackson, I have only to say that I think this case, in spite of the looseness and ambiguity of the Principal Sudder Ameen's language which raised the doubts alluded to, should be treated as falling under the Full Bench decision, and as not distinguishable therefrom.

In this view the appeal cannot be entertained, and it must be dismissed with costs.

Jackson, J.—I concur with my learned brothers in dismissing this appeal with costs.

The 24th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale in execution—Distinction between voluntary payment and payment under legal necessity.

Case No. 3047 of 1866.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 2nd August 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 15th January 1866.

Kazee Rumzan Ali (Plaintiff), *Appellant,*

versus

Maharaja Soorujbhan (Defendant), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Mr. R. T. Allan and *Baboos Romesh Chunder Milter* and *Kalee Kishen Sein* for Respondent.

Where a person, in order to save his indigo-factory from sale in execution of a decree against a third-party, paid the amount of the decree into Court—HELD that the payment was not a voluntary one, but made under legal necessity.

Norman, J.—THIS is a suit in which the plaintiff seeks to recover a sum of 1,166 rupees paid by him under the following circumstances:—

The defendant obtained a decree against one James for the rent of certain lands held by him on the 6th of July 1864.

James surrendered his tenure to the defendant, who accepted his resignation, upon which the defendant applied to the Deputy Collector for an order for the sale of an indigo-factory then in the possession of the plaintiff.

Of this factory, James had been in possession under some agreement with the former owner, Mr. Macleod, apparently a contract for the purchase which was never completed. The plaintiff had purchased the factory of Mr. Macleod in March 1865.

The plaintiff objected to the sale of the factory. But the Deputy Collector rejected his objections, and declared that the plaintiff, Rumzan Ali, the purchaser of the factory, was liable for the payment of the amount of the decree.

The Judge observes that this order was illegal, and that the Deputy Collector exceeded his powers and jurisdiction in so deciding, and it is certainly a most extraordinary decision.

The plaintiff, in order to save his indigo-factory from sale, then paid into Court Rupees 1,166, the amount of the decree, praying that the Deputy Collector would not part with the money. The Deputy Collector, disregarding his prayer, at once ordered the amount to be paid to the defendant without taking the precaution of requiring him to give the security for the re-payment of the money if the plaintiff should succeed in establishing to the satisfaction of a Civil Court that his factory was not liable to sale.

The Principal Sudder Ameen gave the plaintiff a decree on the grounds that the decree against Mr. James was a personal one, and that the plaintiff was obliged to pay the amount into Court to save his valuable factory from sale.

The Judge reversed the decision on the ground that the payment was not made under a legal necessity. He says the plaintiff paid the money willingly into Court to save himself from the annoyance he might experience if the sale took place. He adds: "The Deputy Collector did not give an order from his Bench that the plaintiff should pay in the money; had he done this, the plaintiff might have pleaded payment under a legal necessity."

We think this decision is clearly erroneous.

It is necessary to remember that there is no appeal from the decision of a Collector in executing a decree. The plaintiff's only remedy was by suit in the Civil Court. He had no power of preventing the sale which might probably have entirely destroyed his property, but by paying the money he now seeks to recover, into Court. Without imputing any fraud to the defendant, he cannot be allowed to retain money so extorted. There are numerous cases by which this point has been settled in Courts of Justice in England. In Pitt *vs.* Combes, 2 Adolphus and Ellis 459, Pitt had been arrested while privileged as in attendance in Court, and paid into Court the amount for which he was sued in order to regain his liberty. Lord Denman said the money having been the price paid to recover liberty improperly taken away must be restored. In Valfy *versus* Manley, 1 Common Bench 594, Bate and Co. had made an assignment of all their property in trust for their creditors, and the trustees were in possession. In execution of a judgment against Bate & Co., a Sheriff's officer entered and made an inventory of the goods, and was about to proceed to sale. In order to prevent the property from being sold, the assignees of Bate having paid the amount of the debt, it was held that they were entitled to recover back the money, Chief Justice Findal pointing out "that, where there is an immediate "or urgent necessity, or the payment is made "for the purpose of redeeming one's person or "goods, the right to bring such an action as "the present exists." He adds: "Where "money is voluntarily paid with full know-"ledge of all the circumstances, *the party* "*intending to give up his right*, he cannot "afterwards bring an action for money had "and received, but it is otherwise where, at "the time of paying the money, the party "gives notice *that he intends to resist the* "*claim*, and that he yields to it merely for "the purpose of relieving himself from the "inconvenience of having his goods sold."

The case of Snowdon *versus* Davis, 1 Taunt. 359, is to the same effect.

Many cases were cited for the respondent in the argument, but all of them appeared to be distinguishable from the present.

The decision of the Judge must be reversed, and the other decree of the first Court restored. The plaintiff will get his costs in all the Courts and interest.

Seton-Karr, J.—I agree in reversing the decision of the Judge, and in restoring that

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of the Principal Sudder Ameen, though not exactly for the reasons, nor under the cases quoted by my learned brother, which, as precedents, do not, as I understand our legal system, necessarily apply to this country or to its Courts.

I would reverse the decision for the grounds very well set forth by the Principal Sudder Ameen in the latter part of his judgment.

The plaintiff may be fairly said to have paid in the money under a pressing necessity to satisfy a decree, and to save his indigo-factory from sale. Had he not adopted this course, his factory would have been sold for a debt, for which the Principal Sudder Ameen finds, as a fact, that it was not liable. The Judge does not impugn this finding; but he rules that, under the circumstances, the plaintiff was not under a legal necessity to pay in the money. This I hold not to be a correct legal inference, and I would decree the appeal with costs.

The 24th April 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Fishery-lease—Construction—Refund of rent.

Case No. 90 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 4th September 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 23rd February 1866.

Ram Gopal Sein (Defendant), *Appellant,*

versus

Allum Malick and others (Plaintiffs), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

No one for Respondents.

The provision in a fishery-pottah that the lessee cannot sue for recovery, if, through his own neglect or otherwise, he fail to catch fish, was held to be no bar to the lessee's claim to a refund of rent from the time that possession of the subject of the lease was taken away, by order of a competent Court, from his lessor, and consequently from him.

Pundit, J.—THE special appellant contends that the Lower Appellate Court has not taken into consideration that, under the terms of the pottah granted to the plaintiff, plaintiff had no right to sue for the return of any portion of the rents he paid in advance to the special appellant for the fishery leased to the plaintiff.

We hold with the Lower Appellate Court that, when it is provided in the pottah that plaintiff cannot sue for recovery, if he fails, owing to his own neglect or otherwise, to catch fish, it was never meant to be a stipulation that, if, by order of a competent Court, possession of the bheel leased was taken from the special appellant himself, and so from his tenant, the plaintiff, the latter was not to be entitled to demand restoration of the advance-rent paid by him. In every case quiet possession is guaranteed, and when, regarding possession, an adverse award is passed by a competent Court against the special appellant, plaintiff has a right to sue for recovery. The special appeal is, accordingly, rejected without costs, as nobody appears for the respondent.

The 24th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Enhancement—Limitation—Declaratory Decree.

Case No. 357 of 1866.

*Application for review of judgment passed by the Hon'ble Justices Norman and Seton-Karr, on the 8th August 1866, in Regular Appeal No. 147 of 1866.**

Madhub Chunder Ghose, one of the Defendants (Appellant), *Petitioner,*

versus

Radhika Chowdhrain, Plaintiff (Respondent), *Opposite Party.*

Mr. J. Cochrane and *Baboo Bungshee Dhur Sein* for Petitioner.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Opposite Party.

Per Norman, J.—Affirmance of the principle of the original judgment that the cause of action in a suit for enhancement of rent after notice does not accrue until after a decree declaring the right to enhance, notwithstanding a subsequent Full Bench ruling to the contrary.

Per Seton-Karr, J.—Full Bench decision are prospective and not retrospective, and the decisions of the Divisional Bench is not shown to be erroneous or unjust.

Norman, J.—I THINK we ought not to grant a review in this case. Our judgment was passed on the 8th of August last. As to any cases which may come before the.

* *See* Vol. VI., Act X., p. 42.

Court since the date of the decision of the 12th of September 1866, we may be bound by that decision. But I think we are not bound in deference to it to reverse our own prior decision if we see no reason to doubt its correctness.

I have given the doctrine laid down in the Full Bench case my best consideration, and I feel it impossible to assent to it. In order to constitute a cause of action, it is ordinarily necessary that there should be a contract as well as a breach. Suppose the parties, instead of coming to the Court to make their contract for them—a course which, whether right or wrong, seems sanctioned by the inveterate practice of the Courts here—had been negotiating for two or three years as to the exact amount of the rent or other terms of the contract, it would surely be a most unreasonable or most unheard of thing to say that a party would be bound to sue for the breach of the contract before the contract itself was made.

The question we have to deal with was fully considered by myself and Mr. Justice Shumbhoonath Pundit on the 9th February 1865, and we came to the conclusion that, looking at the language of the 30th and 32nd Sections of Act X. of 1859, if a suit is brought for enhancement of rent which is pending for many years, and a decree is finally obtained fixing an enhanced rent, a suit for the arrears at such enhanced rent may be brought within one year from the date of the final decree. Many instances were brought to our notice showing the hardship—the danger of losing their rent—to which owners of land would be subjected if a different construction were adopted.

It appears to me that the arguments to which weight has been given by the Court in the two instances in which Division Benches have refused to follow this case are inconsistent with each other and not sound. In the case on the 26th of May 1865, Mr. Justice Trevor and Mr. Justice Campbell assume that, in a suit for enhancement of rent after notice instituted in 1266, in which the plaintiff obtained a decree fixing the rent, in 1269, the plaintiff might have recovered *rents for a period subsequent to the institution of the suit.* This ground the Court in the second case abandons. In the later case the Court lays it down that the decree enhancing the rent is not a cause of action. That is indisputably true, and I am not aware that the proposition was ever controverted. It is equally true that a contract for the price of goods is not a cause of action. It is simply one of the elements which go to make up a cause of action.

I understand that the whole case is to go home to the Privy Council, and the parties will have an opportunity of getting our decision corrected if we are wrong.

I would reject the application for a review.

Seton-Karr, J.—I am wholly unable to grant a review in this case.

The decision of the Full Bench, page 77 of Volume VI. of Weekly Reporter, Act X. Rulings, was passed more than a month after our judgment.

Full Bench rulings are prospective and not retrospective, and this case, at its original hearing, was not in any way made dependent on what might be the judgment of the Full Bench in another case.

Moreover, I have heard nothing to lead me to think that our judgment of the 8th of August 1866 was at all erroneous or unjust.

I refuse the application for review.

The 24th April 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Arbitration.

Case No. 84 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 6th October 1866, reversing a decision passed by the Moonsiff of that District, dated the 23rd March 1866.

Mohun Kishen and others (Plaintiffs), *Appellants,*

versus

Bhoobun Shyam and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboo Chunder Kally Ghose for Respondents.

Section 323, Act VIII. of 1859, authorizes a Court which refers a case to arbitrators to remand it to them for re-consideration when their award contains mistakes, omissions, or defects which cannot be amended by the Court under Section 322. Such award, on the refusal of the arbitrators to re-consider it, becomes null and void without proof of corruption or misconduct under Section 324.

Pundit, J.—It appears to us that Section 323 of Act VIII. of 1859 authorizes the Court which refers a case to arbitrators to re-consider their award under certain circum-

stances as incomplete, and to remand the case to them for re-consideration when it may find that the mistakes, or omissions, or defects in the award, are such as cannot be amended by the Court under the powers granted to it by Section 322 of the Act.

This remand pre-supposes no final award, for the Court must first reject the same as bad or incomplete before it can refer the case again to the arbitrators for re-consideration.

Section 324 of the Act (VIII. of 1859), we think, refers to a case when the Court may not have any occasion to remand the award.

It could not have been intended that an award, which a Court may consider so indefinite as not to be in that state capable of execution, should, on the refusal of the arbitrators to re-consider their award, be held to be good, unless the Court finds proof of corruption and misconduct, on proof of which two facts alone the award can *be set aside* under Section 324.

It is clear that in this case, when the arbitrators refused to re-consider their award, the Court of first instance had no alternative but to try the case itself; and, accordingly, the Lower Appellate Court is not right in upholding the award of the arbitrators, on the ground that the first Court had set it aside without proof of the two facts required by Section 324.

The grounds upon which the Court of first instance remanded the case under Section 323 to the arbitrators were the grounds upon which special appellant pleaded before the Court that the award did not show whether the evidence of the neighbours had been taken by the arbitrators, and that they had wrongly refused to hear the witnesses produced by the plaintiff.

Among the grounds provided for in Section 323 is the broad one that, "if an objection to the legality of the award is apparent upon the face of the award," and the grounds for holding the award to be incomplete, adopted by the Court of first instance, come under the classification given in the words quoted above.

We, accordingly, reverse the decision of the Lower Appellate Court, and, holding with the Court of first instance that there is no longer an award of the arbitrators, we remand the case to the Lower Appellate Court that it may try the appeal before it upon its merits, and those of the judgment passed by the Court of first instance.

Remand accordingly.

The 25th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Enhancement—Evidence (of uniform payment of rent for 20 years).

Case No. 3283 of 1866 under Act X, of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 5th October 1866, reversing a decision passed by the Deputy Collector of that District, dated the 27th June 1866.

Sham Lal Ghose (Plaintiff), *Appellant,*

versus

Boistab Churn Muzoomdar (Defendant), *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Gopeenath Banerjee for Respondent.

A ryot is bound to give strict proof of a uniform payment of rent for 20 years. That is a matter which should not be decided in his favor on mere inference.

Norman, J.—It is clear that this case has not been sufficiently tried. The Judge takes the genuineness of a quantity of dakhilas produced by defendant for granted without sufficient enquiry, without requiring the defendant to prove them.

The defendant's own evidence proves the handwriting of dakhilas for 1262, and of those for 1265. He says he paid the rents of the years 1255 to 1258, of 1262, and those from 1265 to 1268 himself. But the defendant was bound to give strict proof of a uniform payment of rent for 20 years. That was a matter which should not have been decided in his favor on mere inference.

The case must be remanded.

O

The 25th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Oral evidence (to prove non-payment of purchase-money).

Case No. 3215 of 1866.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 28th June 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st August 1865.

Dookha Thakoor (Defendant), *Appellant,*

versus

Ram Lal Sahee and others (Plaintiffs), *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Poorno Chunder Shome for Respondents.

In a suit for purchase-money, oral evidence is admissible to show how the purchase-money has been apportioned.

Seton-Karr, J.—THE pleader endeavours to make out that this case falls within the ruling of the Full Bench reported at page 68 of Volume V., Weekly Reporter, by which it was laid down that parol evidence was not admissible to vary or alter the terms of a written contract. The present case is, however, clearly distinguishable from that ruling. The oral evidence was here admitted merely to show how the purchase-money had been apportioned, and the Judge found, as a fact, that the defendant did not appropriate the sum of 2,000 rupees to the payment of certain creditors of the plaintiff as he had agreed to do. We do not think that this subordinate arrangement really varied the terms of the contract, or that it resembles the case of a person who seeks, by the introduction of parol evidence, to show that a deed, professing to be a deed of absolute sale, is, in effect, a conditional mortgage.

Neither does the present case at all resemble that reported at page 267 of Volume VI., Weekly Reporter.

We think the Judge's decision is legally not to be impugned, and we dismiss the appeal with costs.

Norman, J.—I agree in this judgment. I desire to add a few words as to the facts. The deed of sale stated that the purchase-money "was paid, and that it was necessary to give possession to the purchaser." Possession was, however, not given, but the seller remained quietly in possession for two years. The purchaser then sued the vendor for possession, and the vendor brought this which is the cross-suit for Rupees 2,000 in respect of the purchase-money which he alleged remained unpaid. It is clear that the sale was not completed: no mutation of names in the Collectorate, and no change of possession, took place; and it appears to me to have been quite open to the plaintiff to show that this was the case, and that the money was not paid, notwithstanding the statement in the deed of sale to the contrary.

The 25th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Review—Full Bench Rulings.

Case No. 3111 of 1866.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 11th September 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 2nd February 1866.

Allad Monee Dossia (Defendant), *Appellant,*

versus

Joy Sunkur Roy (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

When the decision of a Lower Court is admitted to review, the suit becomes in all respects a new one, and its decision will be guided by precedents then in force, *e. g.*, by a subsequent Full Bench Ruling of the High Court containing an exposition of the law contrary to that which prevailed at the time when the decision sought to be reviewed was passed.

Glover, J.—THIS was a suit for resumption, and was originally decided adversely to the ryot. More than 90 days afterwards, the defendant applied for a review of judgment on the ground of discovery of new evidence, and the application was granted.

In the interim, the Full Bench of this Court had decided (in the case of Thakooranee Dossee) that, in suits for resumption of this nature, the *onus* was on the zemindar to prove that, at some time subsequent to the Decennial Settlement, the land in question had paid rent, and not on the ryot to establish his lakheraj; and, acting on this later view of the law, the Principal Sudder Ameen dismissed the suit of the zemindar.

The Judge, however, on appeal, held that questions which had been finally decided by competent tribunals could not afterwards be re-considered "merely in consequence of a decision having been passed by the High Court modifying the law or practice which prevailed at the time of such decision." He, therefore, went into the question of lakheraj, laying the *onus* on the ryot, and, finding him unable to discharge it, gave the zemindar a decree.

It is urged in special appeal that the Judge was wrong in this view of the law, and we think that the objection is well founded. The first Court had the power, under Section 376 of the Civil Procedure Code, either to admit or reject a review, and its order admitting the review in question was not subject to appeal. The fact of more than 90 days having elapsed since the date of the original judgment had nothing to do with the question, as there is no limit of time under Section 377 if the party applying for review show just and reasonable cause for not having preferred the application within the proper period.

After the decision was admitted to review, the suit became, in all respects, a new one between the parties, and its decision would, of course, be guided by precedents then in force; and, if there existed at that time a Full Bench ruling of the High Court directing the "*onus probandi*" in resumption-suits to be laid on the plaintiff, the Lower Court was, we consider, bound to follow that ruling, which was not, as the Judge supposes, a "modification" of the law, but an "exposition" of it as applicable to the present state of resumption-cases.

We, therefore, decree this appeal and reverse the Judge's decision, restoring that of the Court of first instance. Special respondent will pay all costs of suit.

The 25th April 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Joinder of causes of action—Hoondees.

Case No. 3302 of 1866.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 24th September 1866, affirming a decision passed by the Sudder Ameen of that District, dated 28th July 1866.

Brojo Kishoree Chowdhrain (Plaintiff), *Appellant,*

versus

Khema Soonduree Dossee, and after her demise, Rookinee Kant Bose, guardian of Tripoora Soonduree Dossee, minor (Defendant), *Respondent.*

Boboo Mohinee Mohun Roy for Appellant.

Baboo Doorga Dass Dutt for Respondent.

A claim for a hoondee may be joined in one suit with a claim for the return of money paid in excess of rent due.

Pundit, J.—We think the Lower Appellate Court is wrong in holding that special appellant could not sue for recovery of the money paid by him in excess of his alleged rent. The grounds upon which the Court below has refused to try the case may, on trial, be perhaps considered to be good ground for refusing a decree, but they are not sufficient to refuse that trial altogether, as has been done.

Under the precedent of the Full Bench, page 174, Volume VII., Weekly Reporter (*vide* also page 127, Volume III., Weekly Reporter), we think the special appellant could join the claim for hoondee with his claim for the return of the money.

We, accordingly, remand the case to be re-tried with reference to the above remarks.

The 26th April 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale of tenure (under Act VIII. of 1835).

Case No. 231 of 1866.

Application for review of judgment passed by the Hon'ble Justices H. T. Raikes and Shumbhoonath Pundit, on the 12th March 1863, in Regular Appeal No. 215 of 1860.

Mr. A. J. Forbes, Plaintiff (Appellant), *Petitioner,*

versus

Protap Singh Doogur and others, Defendants (Respondents), *Opposite Party.*

Mr. A. T. T. Peterson for Petitioner.

Messrs. R. V. Doyne, R. T. Allan, and *C. Gregory* for Opposite Party.

In a suit to set aside a sale in execution of a decree for arrears of rent due up to Aghran 1262, the plaintiff, who claimed under a deed of conditional sale, was held not entitled to a decree on the following grounds:—

(1.) He was not a registered tenant at the time of the sale, but a sezawal was legally in possession.

(2.) The zemindar need not ordinarily look beyond his register for sale of a tenure of a registered defaulter.

(3.) The plaintiff never tendered the arrears for which the sale was made.

(4.) Under Act VIII. of 1835, no separate attachment of a mehal or notification of sale in the Mofussil is necessary in order to render the sale valid.

(5.) The change of date of sale from a holiday to the next advertized public sale-day is not in this case such a postponement of the sale as to require any new distinct notification.

(6.) A sale is not invalid because it is not for the full complete arrear due at the end of the year; it may take place at the end of the year for such arrears as may then be existing.

(7.) No fraud or collusion was proved to justify the sale being set aside.

(8.) In this case, not the rights and interests of the defaulter, but the tenure itself, passed, for the arrears due upon it.

(9.) Attachment by the appointment of a sezawal is no bar to a sale for arrears due before such attachment.

Bayley, J.—THIS is an application for a review of a judgment of Mr. Justice Raikes and Mr. Justice Shumbhoonath.

There was a regular appeal before the Sudder Court, No. 213 of 1860, decided by Messrs. Raikes and Steer on the 12th April 1862, and another appeal decided by the High Court on the 12th March 1863.

This application is for a review of the decision of the 12th March 1863. The petition was filed on the 4th of June 1866, that is, more than three years after the date of that judgment.

The plaintiff's appeal from the decision of the Zillah Judge was then dismissed, but, in so dismissing it, this Court relied mainly upon the decision of the late Sudder Court of the 12th April 1862.

Intermediately between this date (12th April 1862) and the filing of the application for review, an appeal had been preferred by the applicant to Her Majesty's Privy Council against the decision of the late Sudder Court of 12th April 1862, and Her Majesty's Privy Council, on the 3rd February 1866,* reversed that decision of the late Sudder Court.

Ordinarily the decree of Her Majesty's Privy Council could not have reached this country within six weeks or two months of its issue; and this petition was filed on the 4th June 1866. This delay of two months we considered not unreasonable. In this view the application was admitted, and the Hon'ble the Chief Justice, on the 13th February last, determined that the review should be heard by this Division Bench.

* *See* 5 Weekly Reporter, p. 47.

It is necessary, even at this late date of this protracted litigation, to repeat some of the more prominent facts in order to come to a right understanding of the points to be decided.

A. J. Forbes, as plaintiff, sued early in 1853, under Regulation XVII. of 1806, against Ali Reza, by his representative Abbas Reza, to obtain possession of Talook Gowan and other mehals. Plaintiff, A. J. Forbes, alleged his title to them as sold to him by a deed of sale by Ali Reza on the 13th March 1850. There was an ikrar of contemporaneous date given by plaintiff to his vendor Ali Reza, to the effect that, if the sum due to plaintiff were paid off with interest within one year, plaintiff would restore the mehals to defendant; but, if not, plaintiff was to enter into possession.

Defendant, on the same date, gave A. D. Forbes, plaintiff's son, an assignment on the rents of 1258 Moolkee, to the extent of Rupees 2,101 in part-payment of interest due. A. D. Forbes held the lease of these villages from 1258 to 1260 (*M*). Defendant Ali Reza made no further payment to A. J. Forbes; and it was on this that plaintiff sued under the law above mentioned, in order that the conditional sale might be made absolute.

Defendant acknowledged in that suit that such a transaction as plaintiff alleged had taken place, but urged that, as the interest had been paid, the sale to plaintiff should be deemed cancelled. And the plea was added that the plaintiff had not proceeded legally as required by Regulation XVII. of 1806.

The Zillah Court (Mr. G. Loch), on the 18th December 1854, held that plaintiff was in possession, and that defendant in no way showed that plaintiff had been paid by the usufruct or otherwise. The Zillah Court, on these grounds, gave plaintiff a decree for possession and mesne-profits at the sum claimed.

An appeal having been preferred to the late Sudder Dewanny Adawlut, that Court, on the 22nd June 1857, held that it was for plaintiff A. J. Forbes, as in possession under a deed of conditional sale, to render his accounts according to Regulation XVII. of 1806, and to show that he had not realized from his usufructuary possession the amount of the debt due by defendant. The case was ordered by the late Sudder Dewanny Adawlut to be remanded, in order that plaintiff might produce such accounts, and prove that he had not been paid by his usufructuary possession.

The Zillah Court, on this remand, on the 29th March 1859, held that the plaintiff had failed to render the accounts required, and had not shown that the loan had not been liquidated with interest from the usufruct of the property. The Zillah Court, accordingly, dismissed plaintiff's suit.

The plaintiff appealed to the late Sudder Court on the grounds that the defendant admitted a balance due, and that, therefore, such accounts as were filed were sufficient to entitle plaintiff to a decree.

The late Sudder Dewanny Adawlut, however, on the 12th April 1862, ruled that there had been no sufficient compliance by the plaintiff with the law, or with the order of that Court as to plaintiff's rendering proper accounts, and proving thereby non-satisfaction of the alleged debt. The appeal of A. J. Forbes was accordingly dismissed.

On this there was an application for review, which was rejected on the 31st January 1863.

A. J. Forbes then appealed to Her Majesty's Privy Council. Her Majesty's Privy Council decided on the 4th February 1866 that A. J. Forbes was entitled to possession by virtue of his deed of conditional sale having become absolute.

In the meantime, the zemindar, Protap Singh, sued the istmerardar, Ali Reza, for arrears of rent due *up to the kist of Aghran 1262*, or 6th January 1855, and, having got a decree, sold the tenure.

Plaintiff sued to set aside the sale. The Zillah Court dismissed his suit. Plaintiff appealed to the High Court. It was then held on the 12th of March 1863 that, as the former appeal of the plaintiff in the *foreclosure case* had been dismissed, the appellant was no longer in a position to carry on this appeal, as his right of action had been entirely lost below. It was added that the pleader abandoned the appeal.

We thus come to the present stage of the proceedings, when (as has been stated), Her Majesty's Privy Council having reversed the decision of the 21st April 1862 on which the High Court rested their decision of the 12th March 1863, an application for review was made and admitted for hearing on the special plea before mentioned.

The application now comes before us on these pleas :—

I. That, as A. J. Forbes had a decree for legal possession under the Judge's order of 12th December 1854, now upheld by her Majesty's Privy Council, and obtained possession under that decree, he is entitled to sue to set aside the sale upon the grounds which he before urged with that view.

II. That the sale in execution for arrears did not pass the actual possession of the tenure to the plaintiff, but only the rights and interests of the defaulter, which were at that period *nil ;* inasmuch as plaintiff had acquired the legal title and possession under the decision of Her Majesty's Privy Council, holding his conditional deed of sale to have become absolute.

III. That the sale of the tenure was fraudulent and irregular, and therefore invalid.

IV. That the sale was illegal, as plaintiff had offered to pay the rents.

After hearing Counsel very fully on both sides, and such parts of the records as they required to be heard, we are clearly of opinion that the plaintiff is *not* entitled to a decree to set aside the sale.

It is clearly proved that the plaintiff was *not* the registered tenant; that he did not seek to be so *till after* the sezawal was in possession; that the sezawal was legally appointed after a decree for the arrears up to Aghran 1262 ; that he was thus legally in possession ; that plaintiff did not tender any *rent as due up to Aghran 1262*, while it was clearly for these last *specified* arrears of rent, and for *that* default, that the sale took place, and *not* for those rents of *Maugh* which plaintiff alleged he tendered. Further, plaintiff then sued to set aside the sale, *not* on the ground that he had tendered the rent due *up to Aghran 1262*, for which the sale took place, but on the ground that he was in possession under the decree of the 18th December 1854, and on the ground that he had tendered the rent for Maugh 1262, *i. e.*, for a period *subsequent to the decree obtained* on the 28th February 1865, for *arrears due up to Aghran 1262*. Thus, then, these arrears for a period anterior to the date of plaintiff's decree of 1854 remained *unpaid* and due under the decree for these rents against the istmerardar, Ali Reza, when the sale of the tenure in execution of that decree took place.

It is true that plaintiff also alleged that he had applied to be registered in the zemindar's serishtah, and that his request was refused.

The plaintiff also urged that the sale was irregular, because it was not on account of arrears *up to the end of the year* in which the sale took place, and because no proclamations were properly issued in the Mofussil ; and, lastly, because the tenure was sold

fraudulently at an inadequate price to the mooktear of the zemindar, defendant.

The answer of the zemindar was that he did not know of the sale, and had petitioned the Commissioner against it, as brought about by the fraud of his mooktear Johobar Ali. This defendant also pleaded that the petitioner was not registered in his (defendant's) (zemindaree) serishtah, while the istmerardar was so; that this defendant thus could not legally look to plaintiff for the amount of arrears *due up to Aghran 1262*, for which the mehal was sold. This defendant added that plaintiff never tendered the arrears, *viz.*, *up to Aghran 1262, for which the sale was made*, and that, as long as the sezawal was in charge as appointed under the law, plaintiff could not be registered or regarded as the tenant; lastly, that the sale-notifications were, in law, quite sufficient.

The Additional Principal Sudder Ameen, upon consideration of these pleadings and the evidence adduced in support of them, dismissed plaintiff's suit on the 28th March 1860, holding that the sale was made for arrears due up to Aghran 1262; that plaintiff was not registered in the zemindar's serishtah, and that, therefore, the defendant, the zemindar, could not legally look to plaintiff as the tenant. Further, that plaintiff would not be considered to have a right to be then registered as the tenant, as the sezawal was legally collecting; and, lastly, that, as the arrears remaining unpaid then, *viz.*, *up to Aghran 1262*, were, on account of the default of the registered tenant, the istmerardar, the sale was necessary and legal.

We consider this view of the Lower Court correct for the reasons it has given.

It is now urged in argument that it is for defendant, zemindar, to show that the sezawal did *not* collect the balance due before the sale can be pronounced a valid one. But we cannot see that plaintiff, not being registered, or having taken action by which he could be entitled to be registered, nor having paid the arrears *up to Aghran 1262*, the existence of which unpaid led to the legal process of sale, can raise such a question as one on which he can successfully sue to set aside a sale thus legally made.

Next, as to the alleged invalidity of the sale on the ground of insufficiency of notification and process.

The plaintiff is, in fact, for the reasons before given, not in a position to raise the question; but, supposing (for argument's sake) that he is so, we have to observe that it is clear from the record that the law under which the sale proceeded was Act VIII. of 1835, and that law requires only the proclamation in the Collector's and another in the Judge's Court-houses; and it is clearly shown, and not denied, that these proclamations were duly issued. The law requires no separate *attachment* in the mehal.

Another objection taken is that there should have been a distinct and renewed proclamation, when the sale did not take place on the day first fixed. Plaintiff is, however (as before shown), not in a position to raise this point. But here again, allowing for argument's sake that he is, there is no illegality in what took place. The day first fixed being found to be a holiday, the date was changed to the next public sale-day advertised in the Government Gazette for mehals to be sold for arrears of Government revenue, because that was a day when it was naturally to be expected that a large number of general bidders would be in attendance, and therefore the most advantageous date for all parties. There is nothing in the law to make this change such a definite adjournment or postponement of the sale as to require any new distinct notification.

It is next urged as to the alleged invalidity of the sale that it should not have taken place, except for a full and complete arrear due *at the end of the year*. But the law does *not so enact*. It enacts that *sales shall take place at the end of the year for such arrears as may then be existing* and recoverable under the rent-laws.

Furthermore, it is pleaded before us that the defendant, zemindar, should have taken notice, before the sale, of plaintiff's decree and of plaintiff's possession under it. But it has been repeatedly held that the zemindar may sell any tenure where the arrears are those due by the defaulter who is registered in his serishtah, as was the case here; and in this case the heirs of such defaulter were the parties against whom the decree was given, in execution of which the sale took place. If plaintiff wanted to save the tenure from sale, he should have tendered the arrears *up to Aghran 1262*, for which it was about to be sold in execution of that decree (not other rents which he did tender), and got himself registered by the zemindar, or, on refusal, proceeded by action at law to enforce such registration. Plaintiff, however, took neither of these legal courses; and, therefore, he cannot now successfully urge that his formal possession by the symbolical means used by the Court's Officer gives him a title,

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in such a case as this, to set aside a sale otherwise legal.

Another point to be noticed is whether the sale should be set aside with reference to the Full Bench ruling of this Court of 13th March 1867, or on account of fraud. We do not think fraud is proved, although it did for some purpose suit the zemindar, defendant, to repudiate, or pretend to repudiate, the acts of his agent at the sale. There is nothing to show any collusion or fraud such as to justify the sale being set aside as no real sale.

Then, as to the question raised in the petition whether rights and interests only or the tenure itself passed, we think that, as plaintiff cannot show (for the reason before given) that he had any right to stay the sale by any legal transfer of the rights and interests of the defaulter to plaintiff or by plaintiff's occupying his, the defaulter's, place as registered tenant, or as having made payment of the arrears due *up to Aghran* 1262 (for which arrears the tenure was sold), this point cannot be taken by *him*. But, in fact, the tenure in this case did *pass*, for it is one of those cases contemplated by the Full Bench ruling cited, where, by the terms of the sunnud or lease, it is not the rights and interests, but the tenure itself, which passes if the arrears due upon it (including Government revenue undertaken to be paid as part of the rent) should not be paid.

The last point urged is that the defendant should have shown that there was a balance due, after the sezawal's collecting what he might have done, before the sale could be held to be a valid one. But the sale was *for arrears due up to* Aghran 1262, arrears which the *defaulter*, whose tenure was liable, had to pay (or some one on his behalf) as for that period of default. Those arrears not being paid, the decree against the defaulter (not against another party) was given, and in execution of that decree the sale took place. That sale could, in our view, legally take place, quite irrespective of the sezawal and his collections, or his accounts, all which were matters of date subsequent to *Aghran* 1262, the date of *arrears of rent being due* for which the sale took place. Attachment by appointment of a sezawal legally follows as an independent act. But, for satisfaction of arrears due before such attachment, the tenure is legally liable to be sold in such a case as this.

After, then, a full consideration of all the circumstances in this case, we see no reason to allow the plaintiff's application, and, accordingly reject it with all costs.

The 26th April 1867.

Present:

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Sale in execution (Reversal of—as fraudulent)—Adverse title—Shareholders.

Cases Nos. 3218 and 3219 of 1866.

Special Appeals from a decision passed by Mr. H. S. Thompson, Principal Sudder Ameen of Backergunge, dated the 19th September 1866, modifying a decision passed by Moulvie Suminooddeen, Sudder Moonsiff of that District, dated the 25th January 1866.

Chundee Churn Roy (Defendant), *Appellant*

versus

Ram Coomar Dutt (Plaintiff) and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Nilmonee Sein* for Appellant.

Baboos Sreenath Doss and *Chunder Madhub Ghose* for Respondents.

In a suit to set aside certain sales in execution of a decree as fraudulent and collusive, where the only question raised in the first Court was whether or not certain persons had *bond fide* conveyed certain shares in the estate purchased by the decree-holder previously to the passing of the decree in his favor—HELD that it was not competent to the Lower Appellate Court to enquire into the title or interest of any shareholders in the estate in dispute, not parties to the suit, as adverse to the title or interest of the decree-holder.

Hobhouse, J.—IN these cases the special appellant, defendant in the Court of first instance, obtained a decree against certain persons, *viz.*, Ram Kanaye, Ram Comul, Kisto Mohun, Boydonath, and Mohun Chunder Manjee, and, in execution of this decree, became himself, by purchase, the possessor of 16 annas of an estate called Oosut Talook, Shib Ram Manjee, alleged to be the property of the above judgment-debtors.

Special respondent in No. 3218, plaintiff in the Court of first instance, sued to set aside this decree and sale, on the ground that, previous to the decree, *i.e.*, in the year 1864, he had, by three several deeds of sale, purchased 12 annas 16 gundahs of the estate in question from certain of the judgment-debtors and from three other persons, not judgment-debtors, *viz.*, Ram Gopal, Goluck Chunder, and 4 ladies, the alleged heirs of Gopee Kisto.

The Court of first instance found the above sales to be fraudulent and collusive, and dismissed the suit.

The Lower Appellate Court found that the above sales had, in fact, taken place, but that, inasmuch as they were executed under suspicious circumstances, and inasmuch as the vendee (plaintiff) never had possession under them, therefore they were not transfers binding on the decree-holder *quoad* the interests of the judgment-debtors, but yet that they were transfers binding on the decree-holder *quoad* Ram Gopal and the other persons above named, who were not judgment-debtors; and the Lower Appellate Court, therefore, released certain shares of the estate said to be the shares of the above-named persons.

This finding is, we concur with the learned Counsel for special appellant, bad in law.

No question was raised in the Court of first instance as to the title or interest of any shareholders in the estate in dispute as adverse to the title or interest of the decree-holder. The only question that was raised was this, *viz.*, whether or not certain persons had *bond fide* conveyed certain shares in the estate purchased by the decree-holder previous to the passing of the decree in his favor.

The Court of first instance distinctly, and the Lower Appellate Court in substance, found as facts that there was no such *bond fide* conveyance, and it followed that plaintiff's, special respondent's, suit fell to the ground, and was rightly dismissed *in toto* by the Court of first instance.

In this view of the case we decree this special appeal with costs in this and in the Lower Appellate Court; but, in doing so, we desire to express that we do so without prejudice to any rights which Ram Gopal and the other persons above mentioned, not judgments-debtors of the special respondent, may think that they have.

No. 3219 is, by consent of parties, governed by the judgment in this case.

The 26th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Jurisdiction (of Civil Court)—Suit for possession and mesne-profits.

Case No. 2284 of 1866.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 6th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 5th September 1865.

Tara Chand Zurgur (one of the Defendants), *Appellant,*

versus

Lokenauth Dutt (Plaintiff) and others (Defendants), *Respondents.*

Moulvie Syud Murhumut Hossein for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondents.

A suit for possession and mesne-profits may be brought in a Civil Court.

Seton-Karr, J.—THE only point taken before us is that the suit should have been brought in the Collectorate, and not in the Civil Court. This point was never taken in either of the Lower Courts, though, of course, it could be entertained before us if made out satisfactorily and clearly. But it appears that the defendant set up an adverse title to the plaintiff; and, independently of this, it has been ruled that a plaintiff, suing for possession and mesne-profits, as in the present case, may bring his suit in the Civil Court. *See* case of Shib Pershad Chuckerbutty, 9th June 1864. A similar principle has been acknowledged lately in a case decided by a Full Bench. The point is, therefore, untenable, and we dismiss the appeal with costs.

The 26th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Section 9, Act VI. of 1862 B. C.—Measurement.

Case No. 3334 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 16th July 1866, affirming a decision passed by the Deputy Collector of that District, dated the 21st March 1866.

Mr. J. P. Wise (Plaintiff), *Appellant,*

versus

Rama Chunder Bysack (Objector) and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Kalee Mohun Doss for Respondents.

Under Section 9, Act VI. of 1862 B. C., only a proprietor, who is *in receipt of the rents* of an estate or tenure, has a right to make a general survey and measurement of the lands comprised in such estate or tenure.

Norman, J.—THIS is a suit brought by the plaintiff who claims 4 annas of certain property by conveyance from the mortgagee, and 12 annas as purchaser of a certain shikmee tenure seeking to establish his right to measure the lands comprised in the estate.

The Judge has dismissed the suit upon the ground that Act VI. of 1862, Bengal Council, "was never intended to give the "Revenue Courts power to decide between "conflicting claims under equal titles, but "only to give assistance to proprietors when "resisted by squatters and others, either "forcibly resisting measurement, or setting "up subordinate tenures which they could "not establish."

The words of the 9th Section of Act VI. of 1862 are, as follows: "Every proprietor "of an estate or tenure, or other person *in "receipt of the rents of an estate or tenure,* "has a right of making a general survey "and measurement of the lands comprised "in such estate or tenure," &c.

It seems clear that the expression "*in receipt of the rents*" overrides both the prior members of the sentence, and extends not only to "other persons," but also to the "*proprietor of the estate or tenure.*" In the present case, the plaintiff has not, by his plaint, ventured to state distinctly that he is in receipt of the rents, and it is clear that the suit is one to establish a title under some conveyance made to him very shortly before the institution of the present suit. It is not a suit in which a zemindar in quiet possession seeks to enforce the ordinary rights of a zemindar against his tenants.

It is clear that the plaintiff's case does not come under the words of the 9th Section, and we are perfectly convinced that that Section never intended to give a party a right to sue for possession of land under color of the assertion of a right to measure.

We dismiss the appeal with costs and interest.

The 27th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Jurisdiction—Section 24, Act X. of 1859.—Suit against Agent for Rent received in kind.

Case No. 3290 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 6th October 1866, modifying a decision passed by the Deputy Collector of West Burdwan, dated the 30th June 1866.

Koylash Chunder Ghose (Plaintiff), *Appellant,*

versus

Joymojoya Shyam (Defendant), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Kishen Sueca Mookerjee for Respondent.

A suit for the value of rice received as rent by an Agent will lie in the Revenue Court under Section 24, Act X. of 1859.

Seton-Karr, J.—THE main point in this special appeal is whether the Judge is right in holding that a suit for the value of rice received as rent by the agent will not lie against that agent under Section 24 of Act X. of 1859. By that Section suits may be brought by zemindars against agents "for "money received or accounts kept by such "agents in the course of such employment, "or for papers in their possession." The question, then, is whether a suit for the value of rice paid as rent is comprised in the words "money received" or "accounts kept," it being, obviously, not intended by the words "papers in their possession."

It seems that the plaintiff had previously instituted a suit against the defendant for his accounts, whereupon the defendant put the accounts into Court, and it is from inspection of the same that the plaintiff has brought his claim for rent in money which has been decreed, as well as for the rent paid in kind, which has been disallowed. The respondent, we may observe, takes a cross-appeal, to the effect that no set-off has been allowed him for his salary and for the expenditure of collection, and that the Judge for these items has wrongly referred him to a civil suit. The first point, however, to be settled is whether the action will lie in the Collector's Court for the value of the rice received as rent under Section 24.

The point appears to be a novel one, and not to have been discussed or decided in any previous judgment of a Divisional Bench. But I am inclined to construe the Act differently from the Judge. The framers of the law, as the Judge remarks, were perfectly well aware that rents were paid in kind in many parts of the country to which the law was intended to apply. And it would seem to be ananomaly that a zemindar might sue an agent for money received as rent in the Collectorate, but that he would have to go to the Civil Court to sue him for rent received in kind. I think we should construe the law liberally, and so as to avoid multifarious litigation, and that we may fairly say that, by the custom of some parts of the country, rent in kind is money or money's worth, and that it was intended that agents should be sued for rents under the Clause in question, in whatever shape the rents were received.

On the whole, I prefer this view of the law to that which was also pressed on us by the pleader for the appellant, *viz.*, that the defendant would be liable to account for this portion of the claim under the terms "accounts kept by such agent in the course of such employment." The law does not say "for an account" but "accounts kept," and this term would make the defendant liable to give in his accounts of receipts, *i. e.*, his own papers as well as the zemindaree books and papers which would be included in the other term "papers in his possession." I admit that it is possible to argue that, under the words "accounts kept by such agents," an agent might be called on to account for what he had actually taken from the ryots in whatever shape. But I prefer to rest my judgment, reversing that of the Judge, on the broad principle that "money received" should be applicable to whatever represents money or to money's worth.

In this view I would remand the case to the Judge to decide what amount of rent has been received in kind by the agent; and at the same time I would direct the Judge to take into account the claim of the defendant to a set-off on account of salary and expenses.

The argument of the respondent that a second suit will not lie, because a previous suit has been brought for accounts against him, and those accounts have been put into Court, seems to me altogether untenable.

Norman, J.—I concur in the conclusion above stated. By Section 24 of Act X. zemindars are empowered to sue their agents for the *money received or accounts kept by such agents in the course of such employment or for papers in their possession.* The language is not very well chosen. But Section 33 shows that "suits for accounts" means "suits for the delivery of accounts," and not merely suits for the delivery of *account books* kept which would properly come under the head of suits *for papers.* Now, in a suit for an account, the accounting party can only discharge himself by showing that he has paid or accounted for all the money or other property that has come to his hand, and for which he is accountable. And, in the present case, if the defendant has not accounted for rice received, he may be declared accountable for it, and a decree may be given for the value of such rice. I understand the former suit to have been, in reality, a suitf or the books of accounts and papers. The Judge will go into the whole account.

The 27th April 1867

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Uniform payment of rent for 20 years—Evidence.

Case No. 3120 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 7th September 1866, affirming a decision passed by the Deputy Collector of that District, dated the 28th July 1866.

Komul Lochun Roy (Plaintiff), *Appellant,*

versus

Zumeerooddeen Sirdar and another (Defendants), *Respondents.*

Baboos Gopal Lal Mitter and *Greeja Sunkur Muzoomdar* for Appellant.

Baboos Kallee Kishen Sein and *Nil Madhub Sein* for Respondents.

Uniform payment of rent for 20 years may be presumed without proof of such payment for every separate year.

Seton-Karr, J.—We see nothing illegal or defective in the decision of the Judge. It is not illegal for him to draw an inference of uniform payment for 20 years on the evidence which shows that one rate has been paid during and over that period, although there may be some gaps in the evidence, and although payment for every separate year may not be proved. The gaps, however, are said to be for short periods.

The Judge, moreover, remarks that the plaintiff made no attempt to rebut the documents produced by the defendant. We find that the taking of the evidence of the witnesses of the plaintiff was postponed by the Deputy Collector until the defendant's evidence should have been taken. No further request appears to have been preferred by the plaintiff after the evidence for the defendant had been recorded, and, in his appeal to the Judge, the plaintiff never laid any stress on this point, nor did he declare that he was ready to produce rebutting evidence. He confined himself to impugning the defendant's evidence by general objections.

There seems no force in the appeal which we dismiss with costs.

Norman, J.—I entirely concur. The plaintiff's vakeel contended that there cannot be a presumption upon a presumption, and no doubt it is true that the existence of uniform payment for the entire period of 20 years might be proved for the purpose of raising the presumption under Section 4, and nothing less is sufficient. But such uniform payment may be proved by evidence very much short of the production of the receipts for each and every year during such period. In this case the proof was abundant.

The 27th April 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Jurisdiction—Section 8, Act XI. of 1865—Residence.

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes at Kishnaghur.

Porgash Paray, *Plaintiff,*

versus

Hachim Khansamah, *Defendant.*

A suit is not maintainable at *K* against a defendant, who is employed as a domestic servant at *M*, and who is not shown to have any immediate or early intention of returning to *K*, where his family are continuing to reside; the word "dwell" in Section 8, Act XI. of 1865, it being held, must be used in the strict sense of actual residence.

Case.—The point of law which I beg to refer for the decision of the High Court in this case concerns the meaning of the word "dwell" in Section 8, Act XI. of 1865. This Section is as follows: "Courts of "Small Causes may try all such suits as are "described in the 6th Section, and thereby "made cognizable by Courts of Small Causes "*if the defendant, at the time of the com-*"*mencement of the suit, shall dwell or* "*personally work for gain or carry on* "*business within the local limits of the* "*jurisdiction of such Courts,*" &c.

The defendant in the present case is a *khansamah*, and it is admitted that he is in service at Monghyr, and was so at the time of the commencement of this suit. His *baree* or home is within this jurisdiction, and his people, including his wife and children, reside there. He will, in all probability, return thither when his present service is ended; and, when he takes other service, he may again leave his home to follow his master. Can he be said to "*dwell*" within the local limits of the jurisdiction of this Court within the meaning of the above-quoted Section?

I think not, for the following reasons: "Dwell" would seem to be synonymous with "be resident," and not with "have his domicile or home," such residence being

real and actual, and not only probable and possible at some future indefinite times. It was decided under the English County Court Act in the case of Macdougall *vs.* Paterson, 11 C. B. 755, that, where a person has a permanent place of dwelling, he cannot be said to dwell at some other place where he has lodgings for a temporary purpose only; but the Indian Act expressly declares (Explanation A to Section 8) that, "where a person has a permanent "dwelling at one place, and also a lodging "at another place for a temporary purpose "only, *he shall be deemed to dwell at both "places in respect of any cause of action "arising at the place where he has such "temporary lodging.*" The law, however, does not say "and also in respect of any cause of action arising at the place where he has such permanent dwelling." If *A*, therefore, had a permanent dwelling at Hooghly, and a lodging for a temporary purpose at Serampore, he could be sued in either Court in respect of any cause of action arising at Serampore; but, in respect of any cause of action arising at Hooghly, he could, I opine, be sued at Hooghly alone. If, therefore, the defendant in the present case has a "permanent dwelling" at Kishnaghur within the meaning of the law, he can be sued at Kishnaghur alone, and, if plaintiff's case be thrown out here, he will have no remedy at Monghyr.

What, then, is a "permanent dwelling"? Can that be called a permanent dwelling to which the return of the defendant is uncertain, remote, and contingent? If the defendant had merely gone to Monghyr to transact some temporary business which would make a delay of a few days or even weeks, I would find no difficulty.

In the case of Macdougall *vs.* Paterson already quoted, the plaintiff resided at Inverness and came up every year to London for a few *months* to transact business; his permanent dwelling was held to be at Inverness. In the case of Kerr *vs.* Haynes (29 L. J. N. S., Q. B., 70) the plaintiff occupied a house at Margate as his home, but at the same time carried on business, and occupied houses in London, sleeping there three or four nights every week. It was held that he must be considered as having "dwelt at Margate" (*see* Davis's Practice and Evidence of the County Courts, p. 19; also Pollock and Nicol's County Court Practice, p. 53). Now, in both these cases, more especially in the latter, the return of the person to his "dwelling" was tolerably certain within a definite time. They differ materially from the case of a servant whose services may last for years, perhaps for the whole period of his life, and whose return home at any time partakes more of the nature of a visit than otherwise. It seems to me that a line must be drawn somewhere, but it is not very easy to decide where to draw it. A shopkeeper residing at Kishnaghur, who had gone to Calcutta merely to buy a stock of goods, would clearly be within the jurisdiction of the Court; but a coolie, who had gone to Assam or the Mauritius, and had expressed his intention of returning when he had made some money, could not be sued during his absence from home. I think each case must be decided on its own merits, having regard to the defendant's return in the ordinary course of things within a reasonable or definite period. In the present case the return, though possible at some future time, is not certain or even probable within any calculable period; and, on this account, I would dismiss the case.

I may remark that Section 8, Act XI. of 1865, differs materially from Section 5, Act VIII. of 1859, which permits a suit to be brought *in all other cases* (excepting those of immoveable property), *first*, if the cause of action shall have arisen, *or*, *secondly*, the defendant at the time of commencement of the suit shall dwell or personally work for gain within such limits. The mere fact of the cause of action having arisen within their local limits does not give jurisdiction to the Mofussil Courts of Small Causes. (*See* also Section 28, Act IX. of 1850, as to the distinction between their jurisdiction and that of the Calcutta Court of Small Causes.)

The judgment of the High Court was delivered as follows:—

Jackson, J.—I am of opinion that the Judge was right in holding that this suit is not maintainable against the defendant at Kishnaghur. The defendant, it appears, is employed as a domestic servant at Monghyr, from which place he is not shown to have any immediate or early intention of returning, though his family reside at his permanent home in the Kishnaghur jurisdiction.

I think the word "dwell" must be used in the strict sense of actual residence, and that the defendant in this case really dwells for the time being in Monghyr. The place where he is in service of the nature described cannot be looked upon, I think, as a "lodging for a temporary purpose only," but is, in reality, the place where the defendant

is dwelling, although he may have the intention of returning, at some future time, to another dwelling where his family are now residing.

I think this case is clearly distinguishable from a case lately decided by the Chief Justice and myself, which, I understand, is not yet reported.* I refer to the case of Gopal Chunder Sircar *versus* Kurnodhar Moochee and others. In that case the defendant dwelt, *i. e.*, had his only real permanent home in the Meherpore jurisdiction, but was temporarily detained in prison at Kishnaghur. That might, perhaps, be called a lodging for a temporary purpose within the meaning of the Explanation A annexed to Section 8 of Act XI. of 1865. In that case the defendant had not taken up his abode or adopted any other dwelling than the dwelling in which his wife and family then were.

Markby, J.—I am entirely of the same opinion. The word "dwelling" is one of an exceedingly ambiguous character, and is capable of a variety of meanings depending on the context with which it is used.

I think that, in this Section 8 of Act XI. of 1865, it was intended that the action should be brought at the place where the defendant had his "dwelling" in the sense of his usual place of residence, and that Kishnaghur was not the defendant's usual place of residence. It is perfectly possible that, although Kishnaghur had ceased to be the defendant's dwelling for the purposes of this Act, yet still for other purposes, and in the sense in which the word is used in other places, it may well continue to be his dwelling; and, with regard to the case which was referred to by my brother Jackson, it seems to me that a place in which a man passes the greater part of his time in no sense even temporarily ceases to be his residence, simply because, without taking up his residence elsewhere, for a certain period he is absent from it.

* Since reported.—*See* Vol. VII., p. 349.

The 27th April 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Agent—Lease.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Court of Small Causes at Pubna.

T. J. Kenny, *Plaintiff,*

versus

Mookta Soonderee Dabee and her general mooktear Ram Soonder Chowdhry, *Defendants.*

Mr. R. T. Allan for Plaintiff.

No one for Defendants.

The agent of a lessor was held to have acted in excess of his power in granting a lease containing a stipulation that the lessee was to receive from the lessor the expenses which he might incur in any litigation which might take place with third parties respecting the land leased. Where such litigation did ensue, and the lessee was cast in costs, he was held entitled to recover the same, not from the lessor, but from the agent.

Case.—THIS is an action brought by the plaintiff to recover from the defendants the sum of Rupees 139-15-9, being portion of the costs with interest awarded against present plaintiff in suit No. 74 of 1864, by the Principal Sudder Ameen of Pubna.

The plaint runs as follows: "That, on the 2nd Assin 1270 B. S., defendant leased temporarily to plaintiff beegahs 41-13-6 of land at an annual rental of Rupees 41-10-8, being 13*g.* 1*c.* 1*k.* share of the 1,000 beegahs of khamar land in Chur Hateesh Hurrypore appertaining to Pergunnah Hapaneah recorded in the toujee of the Collectorate of Pubna in Nos. 164 and 972; that, owing to suits relative to its possession having been adversely decided in the Criminal and Civil Courts, plaintiff has failed to obtain any benefit under the said pottah; that defendant, having stipulated in the pottah to meet all expenses that would be required in carrying on suits regarding possession of the aforesaid land, has not yet paid the same; that Messrs. Simson & Co., defendants in the above case No. 74 of

1864, have realized from the present plaintiff by execution the sum of Rupees 899-8 as costs due to them under the above decree; that Rupees 765-1-4 are still due by the plaintiff to other defendants in the case on account of costs, and that plaintiff had to bear his own costs in the case to the extent of Rupees 1,543-14-3; that as of these sums amounting to Rupees 3,208-7-7, together with interest Rupees 151-4-6, making a total of Rupees 3,359-12-1, defendant Mookta Soonderee is justly liable for Rupees 139-15-9 on account of her 13*g.* 1*c.* 1*k.* share; the present action has been brought to recover the same, and that the cause of action for the present suit accrued since 23rd June 1866, the date of the decision of the aforesaid civil suit."

Defendant Ram Soonder Chowdhry, in answer to the claim, alleges that he executed on Mookta Sooderee's behalf the temporary lease or temporary ijarah-pottah of the 2nd Assin 1270, B. S., under authority of the mooktearnamah given him by Mookta Soonderee, and that, therefore, he is not personally liable.

Defendant Mookta Soonderee, admitting that her mooktear, defendant Ram Soonder Chowdhry, did actually on her behalf execute the pottah in plaintiff's favor, contends that the stipulation as to the payment of costs, &c., agreed upon in the pottah was written therein without her knowledge and consent; that the aforesaid mooktear was authorized simply to execut a pottah, but not to insert any condition therein as to bind her to pay costs of any suit; and that she is not, as alleged by plaintiff, liable for any portion of the costs of the suit No. 74.

The substance of the pottah filed by plaintiff is as follows:—

"That, if there shall arise any suit with any other person regarding the boundaries of these lands, you shall, taking from me such document as required, try your best to preserve the boundaries, and shall get from me all expenses that will be required on this account."

The substance of the am-mooktearnamah or general power of attorney given by defendant Mookta Soonderee is as follows:—

"That all kaemee jothee, meadee jothee, ijara or meadee ijarah-pottahs that you shall execute and grant to any person after making settlements with him, and in which you shall sign my name, as my agent and on my behalf, as well as all receipts for re-payment of deposit-money due to me and for documents taken back from any Court of Law which you shall write and give signing them as my agent and on my account, that, if required, all verbal pleadings that you shall make on my behalf in any case against me and any vakalutnamah or other mooktearnamah that you shall give signing them for me as my agent; and that all bynamahs that you shall receive, I shall admit, reckon, and hold as my own acts done by me in person.

The pleader for plaintiff orally contends that, as defendant Mookta Soonderee was to enjoy every advantage under the pottah executed by her mooktear, she must, as a matter of course, also bear any loss resulting from the said acts of the mooktear; that, if the mooktear has exceeded his powers, defendant Mookta Soonderee is to resort to law against the mooktear for remedy; that, inasmuch as defendant Mookta Soonderee admits the grantor of the pottah to the plaintiff to have been employed as her mooktear, and to have been authorized to grant the ijarah-pottah, &c., she must abide by all the terms entered into in the pottah by the said mooktear; that, if, notwithstanding, the Court would hold the defendant Mookta Soonderee not liable, the other defendant who was the executor of the pottah is still bound by his own acts, and is personally liable for the costs of the plaintiff sued for in the present action, and the Counsel for the prosecution prays that the matter be referred to the High Court for decision.

The Counsel for the defendant Mookta Soonderee argues that, as the mooktearnamah, by which Ram Soonder Chowdhry and others were appointed mooktears, conveys no authority to them to bind her to any liability, she is not bound by any acts of the said mooktear done in contravention of his powers, and that, as suit No. 74 was not instituted with Mookta Soonderee's assent or at her direction, she cannot now be held liable for any costs of that suit.

The pleader for defendant Ram Soonder Chowdhry verbally contends that, as his client derived no benefit from the ijarah-pottah in question, but simply executed it as agent of defendant Mookta Soonderee for her benefit, she is clearly bound by all the terms of the pottah which were entered into for her benefit, and she alone, but not Ram Soonder Chowdhry is liable under the pottah.

Issues.

1. Whether the mooktear, executor of the ijarah pottah, had authority to come to any terms in the pottah binding defendant Mookta Soonderee to plaintiff for the payment of costs of any description or not?

2. Whether, under the terms of the said ijarah pottah, the female defendant is or is not liable to pay a portion of the costs of civil suit No. 74 as alleged by plaintiff?

3. Whether, if the female defendant be not responsible for the aforesaid costs, Ram Soonder Chowdhry, mooktear, who executed the pottah, and entered into the aforesaid stipulation, will or will not be personally liable for the claim of the plaintiff?

There is no dispute with regard to the share of defendant Mookta Soonderee, and it is, therefore, needless for me to enter into that question. The general power of attorney, by virtue of which defendant Ram Soonder Chowdhry executed the ijarah pottah, in favor of plaintiff, does not appear to convey to him any such authority as to bind his principal, namely, defendant Mookta Soonderee to plaintiff for any expense by any terms in the pottah. It only authorized the mooktear to grant the ijarah pottah, and to settle the estate in jote; and, therefore, under this authority, the said mooktear is not competent to enter into any other terms on behalf of defendant Mookta Soonderee. Under these circumstances, she is not bound by any acts of the mooktear done in supercession of his authority, and therefore plaintiff's claim for part of the costs of suit, No. 74, cannot stand against the defendant Mookta Soonderee.

It is now necessary only to adjudicate whether defendant Ram Soonder Chowdhry is personally liable to plaintiff for his claim. The stipulation for the payment of costs mentioned in the pottah is, doubtless, to be viewed in the light of a promise made in a valid contract, and the point now to be decided is whether defendant Ram Soonder was to derive any benefit from the said contract. It is quite clear that, since the mooktear, defendant, who executed the ijarah pottah, would lose or gain nothing if, owing to boundary disputes, any injury or improvement would be caused to the lands composed in the ijarah in question, he cannot fairly be held liable under the said contract, because a contract, to be binding, must have some consideration to support it, and one without it, being *nudum factum*, is void. Hence a person executing an agreement without any consideration is not bound by it, as, under the Roman Law, a suit *ex contractu* is not tenable on a contract, unless there is sufficient consideration to support it (*vide* Blackstone's Commentaries, Book II., Part I., Chapter XXX.). Further, I am of opinion that the plaintiff, inasmuch as he accepted documents without previously enquiring into the extent of his authority, must bear the consequence of his own laches. This being the case, plaintiff's claim, in my opinion, is untenable, and his action must fall to the ground.

The judgment of the High Court was delivered as follows:—

Jackson, J.—In this case Mr. Kenny, the plaintiff, took a lease, signed on the part of Mookta Soonderee Debea, by her general mooktear Ram Soonder Chowdhry, of certain lands, and the lease contained (amongst other things) a stipulation that the lessee was to receive from the lessor the expenses which he might incur in any litigation which might take place with third parties respecting the land leased. Litigation did ensue, and the lessee, having been cast in costs, now sued both Mookta Soonderee and the mooktear for the amount which he had been compelled or was liable to pay. The Judge of the Court of Small Causes has referred this case to us at the instance of the plaintiff.

The view which he has taken is that Mookta Soonderee is not liable, inasmuch as the stipulation contained in the lease was in excess of the power which the mooktear held from her, and that the mooktear is not himself liable, inasmuch as he personally was not to derive, and did not derive, any advantage from the lease.

It appears to me that the view of the Judge of the Court of Small Causes is partly right and partly wrong. I think he is right in holding that Mookta Soonderee is not liable, inasmuch as the stipulation in question was clearly beyond the mooktear's power. But I think he is not right in excusing the mooktear from liability, because the mooktear having, by his representations, induced the plaintiff to believe that he was empowered to grant a lease containing that stipulation, and having thus induced the plaintiff to accept the lease and to enter into the litigation which ended with his having to pay the costs, there was, in that way, a sufficient consideration to support this suit. Consequently, the observation of the Judge as to *nudum factum* has no force. I think, therefore, that the mooktear was liable, and that judgment should pass against him.

In respect to Mookta Soonderee, Mr. Allan, who appears for the plaintiff before us, contends that she might be liable if there was evidence of her having ratified the lease. That probably might be so. But that is not the case submitted to us by the Court of Small Causes, and we are not therefore at liberty to express any opinion on that point.

I may add that, for the purpose of the opinion which I have expressed, it makes no difference whether the pottah was executed by the mooktear as agent, or in the name of Mookta Soonderee by her attorney.

Markby, J.—I am entirely of the same opinion. The principle on which this case was decided was very much discussed in England in the year 1856, in the case of Collen *versus* Wright, reported in Vol. 27 of the Law Journal, Queen's Bench, 215. That case was not discussed on any principles peculiar to the Law of England, but on the general law of agency; and it was shown there that, where an agent presumes to exercise an authority which he does not possess, and, by the exercise of that authority, induces another to enter into a contract, he is liable to the same extent, though not, according to English notions, in precisely the same manner as the principal would have been, had he been bound by the contract.

The 27th April 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Jurisdiction—Suit by Gomashta for expenses in excess of rents collected—Accounts.

Reference to the High Court by Baboo Punchanun Banerjee, Judge of the Court of Small Causes at Hooghly.

Prosunno Chunder Roy, *Plaintiff,*

versus

Sreenath Sreemanee and others, *Defendants.*

A suit by a gomashta for excess expenses incurred by him over and above the amount of rents collected by him, is cognizable in the Small Cause Court, notwithstanding that the nature of the defence may render it necessary to investigate the accounts of the mehal.

Case.—THE plaintiff was a gomashta of a mehal belonging to the defendants, and alleges to have expended on behalf of the defendants Rs. 148-6-8-14-1 in excess of the amount of receipts of rent realized by him from the mehal, and has brought this claim for the recovery of the above-mentioned amount of Rs. 148-6-8-14-1 with interest.

The defendants deny the plaintiff's demand, and plead that the plaintiff neither rendered any account, nor made any settlement whatever with them as to the balance in question. On the contrary, they add that the plaintiff, who was in their service as a gomashta from 1265 to 1272 B. S., was liable to them for Rs. 85-4-9-1, the cash balance in the custody of the plaintiff at the time he was dismissed from service. They further urge that, under Section 6 of Act XI. of 1865, the claim of the plaintiff cannot be maintained in a Small Cause Court.

The account filed by the plaintiff was not admitted by the defendants, nor could the plaintiff show to the Court that his account on which he has founded his claim was settled with the defendants, and a balance struck in his favor. Had he adjusted his accounts, it is most probable that he would have obtained from the defendants a receipt for the amount alleged to be due to him, or some other document in the shape of a letter of indemnity.

There exists, therefore, no doubt in my mind that a suit of this nature in which the claim is not for money due on a bond, nor for breach of contract, nor for a balance of account struck by the parties, cannot be maintained in this Court under Section 6 of the law above cited, especially as the accuracy of the account shown by the plaintiff depends on mofussil investigation of the collections made by the plaintiff from the ryots of the defendant's mehal for 8 years. I think such enquiries seem to be inconsistent with the simple procedure prescribed for the Small Cause Courts. Had the defendants admitted the balance, then there would probably have been no objection to entertain the plaintiff's suit. Such, however, not having been the case, I am of opinion it is not cognizable by this Court.

The judgment of the High Court was delivered as follows:—

Jackson, J.—In the case referred to us by the Judge of the Court of Small Causes at Hooghly, the plaintiff was a gomashta employed in the collection of rents. He alleged that, in the course of his employment, he had been at expenses on behalf of the defendants over and above the amount of rents which had come into his hands, and he sued to recover that excess. The defendants

denied that they owed the plaintiff anything, and alleged, on the contrary, that the plaintiff had not paid in full the amount of rents which had come into his hands. The Judge expresses a doubt whether such a suit is cognizable in his Court. He doubts whether the suit comes within any of the descriptions of suits declared by Section 6, Act XI. of 1865, to be cognizable by Courts of Small Causes, and he adds, "especially as the accuracy of the "accounts shown by the plaintiff depends "on mofussil investigation of the collections "made by the plaintiff from the ryots of the "defendant's mehal for 8 years," and he thinks such enquiries inconsistent with the simple procedure prescribed for the Small Cause Courts.

It is quite clear that, if the suit had been brought by the defendants for the recovery of rents in the hands of the plaintiff, the suit would not lie, as it would come expressly within the 4th Exception annexed to the 6th Section of Act XI. being a claim for which a suit might now be brought before a Revenue Officer, and, as such, cognizable before no other Court. But, assuming a contract to have subsisted between the plaintiff and the defendants that the plaintiff should act as a gomashta and collect the defendant's rents, and do all acts necessary for the discharge of his duty as gomashta, and that he should be repaid such expenses as he should be at in the course of that employment, I think this suit would be maintainable in the Court of Small Causes, and it would be quite an immaterial consideration that the nature of the defence rendered it necessary to investigate the accounts of the mehal.

I think, therefore, that the suit should be entertained and gone into by the Court of Small Causes.

Markby, J.—I entirely concur.

The 29th April 1867.

Present :

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Res judicata—Ancestral property—Possession—Ejectment.

Regular Appeals from a decision passed by Baboo Tara Kant Bidyasagur, Principal Sudder Ameen of Jessore, dated the 30th August 1866.

Case No. 382 of 1866.

Baboo Gooroo Doss Roy (Plaintiff), *Appellant,*

versus

Baboo Huronath Roy and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss and *Obhoy Churn Bose* for Respondents.

Case No. 409 of 1866.

Baboo Huronath Roy and others (Defendants), *Appellants,*

versus

Baboo Gooroo Doss Roy (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Obhoy Churn Bose* for Appellants.

Baboo Onookool Chunder Mookerjee for Respondent.

A suit to establish the plaintiff's right to a share of ancestral property, part of which was in his sole possession, cannot operate as a *res judicata* in a subsequent suit to recover possession of a part of the ancestral property which was, as he alleges, in his sole possession, and from which he was forcibly evicted by the defendant during the pendency of that suit.

Loch, J.—The plaintiff sued to recover possession with mesne-profits of the julkur Bheel Rottinghatta situated within the resumed Talook Kismut Gopalpore, Pergunnah Nuldee, No. 4467, from which he alleges that he was forcibly ousted by the defendants in Chyet 1268.

The defendants deny the plaintiff's allegation of possession and ejectment. They admit that the property in dispute is included in Kismut Gopalpore, which was settled

with plaintiff and defendant jointly after it had been resumed by Government, and that it has been brought on to the Towjee under No. 4467. They urge that, though a joint settlement of the estate had been made, they, the defendants, are in sole possession of the disputed property, plaintiff having sole possession of other portions of the estate in a similar manner; that the defendants sued for the cancellation of the settlement, and that these lands were included in the suit for a share in the family property brought by plaintiff against the defendants disposed of by the late Sudder Court on 22nd July 1861, against which decision an appeal has been preferred and is now pending before the Privy Council; consequently, this second suit for the same property is barred by Section 2, Act VIII. of 1859.

The issues before this Court in appeal are: *1st*, whether the hearing of the suit is barred under Section 2, Act VIII. of 1859, on defendant's plea of *res judicata; 2nd*, whether plaintiff was in possession of the whole julkur, and was evicted by the defendants, and is entitled to recover possession with mesne-profits.

On reference to the judgment of the late Sudder Court, dated 21st July 1861, reported at page 142 of the Sudder Reports, Volume II. of that year, we find that the plaintiff in the present suit brought an action against the defendants to recover a half share of all the ancestral property. In the Schedule attached to his plaint, he stated that he was in possession of the property, the subject of the present suit, a statement which the defendant denied in general terms, contending that it and other property was comprised in a deed of gift from their grandfather, and was in their possession. The Court in their judgment held "the "plaintiff to be entitled to the possession of "a moiety of all estates and interests in land "covered by the deed of partition, the deed "of gift to Ram Nidhee, the deed of gift to "Radha Churn, and the distribution of per-"sonalty, and the deed of family trust made "by Roop Ram in the name of his grandson "Ram Narain." The judgment then goes on to the disposal of other property, and then gives the following directions: "Moreover, with a view of facilitating the "perfect settlement of the terms of the "decree, in accordance with the view of the "Court as to the rights of the parties before "it, the Counsel and pleaders of the parties "have agreed that the date on which the "plaintiff and defendant separated shall be "taken to be the first of Bysack 1243, "B. S.; that all properties which have been "acquired since that date by either party "shall be kept out of consideration, and be "considered the property of the party pur-"chasing them; but that all properties "acquired by either party before that date, "whether in their own names or in the "names of others, for which no special title "has been set up, shall be brought into "hotchpot, and that each party shall be "entitled to possession of a moiety of such "properties.

"As to wassilat, or mesne-profits, we "direct that an account of wassilat be "taken upon all the foregoing properties, "whether estates or talooks, or jote jum-"mas, from the same date, 1st Bysack "1243; and that each party before the "Court be entitled to credit for half the "wassilat as against the party who may "have been in possession of the entire pro-"perty, provided that in those cases in "which either party has been in possession "only of the moiety to which they are "entitled, no enquiry as to wassilat need "be made."

The defendants, respondents, admit that they have not executed this decree, but that, being dissatisfied with the judgment, they have preferred an appeal to Her Majesty in Council. They somewhat inconsistently ask the Court not to look upon this decree as of any force because of that appeal, and yet wish to take advantage of the judgment, inasmuch as it limits the plaintiff's right to the property in dispute in this case to a half, and declares him not to be entitled to the whole.

We must, however, look upon the decree of the Sudder Court of 1861 as in force till it be set aside by the order of a competent Court, and must pay respect to the order contained therein in regard to the property. As defendants have not executed that decree, it is evident that, if plaintiff was, as he alleges, in possession at the time when the former suit was instituted, and was ousted by defendants before that suit was decided, the cause of action in this case is not the same as in the other. In that, the plaintiff sued to establish his right to a share of the ancestral property, part of which was in his sole possession. In this he brings an action to recover possession of a part of the ancestral property, which was, as he alleges, in his sole possession, and from which he was forcibly evicted by the defendant during the

pendency of that suit. No doubt, the parties in this and that suit are the same; and it is clear that, under the judgment of the late Sudder Court of 22nd July 1861, the right of plaintiff has been limited to a moiety of the property in dispute in the present case; but the cause of action is different, for in the present case it arises from the forcible dispossession of plaintiff from the property to part of which, under the Sudder Court's decree, he is legally entitled. We, therefore, concur with the Court below that the defendant's plea of *res judicata* must be rejected.

The next question is, whether plaintiff is entitled to recover possession of the whole of the property with mesne-profits or of part. The Lower Court awards possession of a moiety of the property, but leaves the mesne-profits to be determined when the decree in the former suit is executed. The plaintiff asks to be restored to possession of the whole property. Had he brought his action within six months from the date of dispossession, he might have recovered possession of the whole under the provisions of Section 15, Act XIV. of 1859; but, having failed to do this, the plaintiff is bound to prove his title, and that title has been determined by the judgment of the Sudder Court of 22nd July 1861, which limits the plaintiff's right to a moiety of the property in dispute, of which he will be entitled to recover possession, if he prove that his possession has been disturbed.

On the point of possession we have no hesitation in coming to the conclusion, from the documents before us and by reference to a judgment of this Court of 22nd July 1861 reported at 2 Sudder Dewanny Reports of 1861, page 3, that the plaintiff was in possession of the property in dispute; and, as he has not been evicted by process of law in execution of the decree of 1861, or of any other judgment, we consider that he has proved his allegation of having been forcibly evicted by the defendants, and, under this view of the case, we think he is entitled to recover immediate possession of one-half of the julkur now in dispute with mesne-profits; and therefore, in amendment of the order passed by the Lower Court, we give plaintiff a decree for a moiety of the julkur sued for with mesne-profits, and costs in proportion. The amount of mesne-profits will be ascertained in execution, and will bear interest from date of suit to date of liquidation. The costs will also carry interest from date of this decree.

We dismiss appeal No. 409 with costs.

The 29th April 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal—Local Investigation.

Lowazima Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Mymensing, dated the 24th January 1867, modifying a decision passed by the Collector of that District, dated the 28th July 1866.

Meer Bahadoor Ali (Defendant), *Appellant,*

versus

Bhabo Soonduree Debia Chowdhrain (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondent.

No appeal lies from the order of a Judge directing a local investigation by an Ameen.

Deputy Registrar.—This is an appeal against an order of the Lower Appellate Court directing a local investigation by an Ameen, in which that Court records in the closing sentence that the "*final decree* will be given on the receipt of the Ameen's report."

The order appealed from is, therefore, I presume, such an order as that referred to in Section 363, Act VIII. of 1859, and is not appealable except as provided in that law.

I beg the order of the Judge presiding in the Miscellaneous Department as to whether this appeal may be received or not.

Jackson, J.—No appeal lies from the order of the Judge in this case.

The 29th April 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Ex-parte decree (on appeal against Respondent)—Section 119, Act VIII. of 1859.

Omda Bibee, *Petitioner,*

versus

Acowrie Singh and another, *Opposite Party.*

Mr. C. Gregory and *Baboo Khetturnath Bose* for Petitioner.

No one for Opposite Party.

Section 119, Act VIII. of 1859, will not apply to a decision passed on appeal against a respondent.

Deputy Registrar.—This is an application (the first of its sort presented to this Court) to set aside an *ex-parte* decree of *this* Court, so far as it relates to an absent respondent, and is filed within 30 days after

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the date of the order of the Lower Court passed in execution.

The pleaders presenting the application (Mr. Gregory and Baboo Khetturnath Bose) urge that the provisions of the Section 119, Act VIII. of 1859, are extended to appeals by Section 37, Act XXIII. of 1861.

Section 346 of Act VIII. of 1859 is, however, the law which lays down the procedure in regard to appeals heard *ex parte*, but it is silent as to an application to set aside an *ex-parte* decree.

Section 37, Act XXIII. of 1861, declares that, "*unless otherwise provided*, the Appellate Court shall have the *same powers* "in cases of appeal which are vested in the "Courts of Original Jurisdiction in respect "of original suits," and seems to me to invest the Appellate Court with certain *powers* in appeals which Act VIII. of 1859 does not provide; but, even if it should refer to the *procedure* in appeals, it would, I presume, extend to appeals the procedure in original cases only up to decree, and not to matters *after* decree, for which Act VIII. of 1859 expressly provides.

Section 376, Act VIII. of 1859, appears to me to be the law that provides the remedy in a case like this.

As there is reason for doubt, I beg to refer the point for the orders of the Judge presiding in the Miscellaneous Department.

Jackson, J.—As at present advised, it appears to me that Section 119, Act VIII. of 1859, will not apply to a decision passed on appeal against the respondent *ex parte;* but it appears to me that the petitioner ought to allege the circumstances stated as cause against this decree being executed at all in the Court below. If the Court below should not, notwithstanding the fact being represented, order the decree to be executed, the petitioner will then have an appeal.

The 30th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sale to Government Contractor—Right of suit.

Case No. 365 of 1866.

Regular Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 11th August 1866.

Messrs. Gordon, Stuart, and Co. (Defendants), *Appellants,*

versus

The Executive Engineer of the Calcutta and Jessore Road Division, on the part of Government (Plaintiff), *Respondent.*

Mr. R. V. Doyne for Appellants.

Baboo Kishen Kishose Ghose for Respondent.

Suit laid at Rupees 8,000.

Where *C* entered into a contract with the Government to construct a railway-feeder, and purchased coal from a Coal Company, and, after the coal had been delivered and deposited at a certain place, *C* absconded—HELD that the Government had no right to detain or claim the coal, or to take the same out of the possession of the Coal Company, who were entitled to retain possession of the coal against any claimant but *C* himself.

Seton-Karr, J.—THE facts out of which this case arises are not denied, and are simple. One Croft entered into a contract with the Government to construct a railway-feeder for 17 miles extending from Choadanga to Meherpore, and signed an agreement containing various stipulations as to the quality of the bricks, the amount of coal to be expended in burning the same, the metalling and consolidation of the road, and the time within which the work was to be completed.

In pursuance of this agreement, Croft received certain advances from Government, and purchased a considerable quantity of coal from the defendants in this case, who are the agents of the Bengal Coal Company. The coal was also, by the agreement, carried to the station of Choadanga on the Eastern Bengal line.

Some time in 1865, Croft, the contractor, absconded, whereupon the defendants claimed the coal so deposited, and notified their claim to the Eastern Bengal Railway Company. The Government laid claim to the coal at the same time, and an arrangement was come to between the Solicitor for the Railway Company and the Legal Remembrancer, whereby the coal lying at the

station of Choadanga should be made over to the Executive Engineer, Government undertaking to pay for the same, and then to settle the claim of the Bengal Coal Company, subsequently, either by arbitration or by regular suit.

The Government have now brought this suit, on the above facts, against the Bengal Coal Company and the Eastern Bengal Railway Company, and the Judge has given the Government a decree, setting forth his reasons for the same at considerable length, and holding that, because the coal had been delivered to the contractor, Croft, the right of the defendants to a stoppage *in transitu* had ceased. The Railway Company were absolved by the Judge.

The case has been argued in appeal before us by Mr. Doyne, very clearly and concisely, for the Bengal Coal Company, and by Baboo Kishen Kishore Ghose for the Government.

It is evident to us that the decision of the Judge must be reversed, and that the Government have no lien, as claimed, on the coal delivered at Choadanga.

We have read the contract between Croft and the Executive Engineer, and it is quite clear to us that the former was not a servant of Government, but an independent contractor, who undertook to purchase or prepare materials for the road, to lay down, roll, and consolidate the same, and, by a certain date, to complete the railway-feeder, and make it over to Government available for public traffic. In order to ensure the metalling of the road in a satisfactory manner, Government insisted on the insertion of certain stipulations as to the amount of the coal to be used in burning each lac of bricks, as to the quality of the *khoa* and *jhamma*, and so forth. But these stipulations do not alter the position of the contractor in any way.

The Government pleader lays stress on the 21st Section of the contract entered into by Croft, which runs as follows: "I agree "to deliver at or close to Choadanga or "Meherpore the quantity of coal required, "in four instalments, on the 1st of October, "November, December, and January, but "this is not to prevent me delivering the "coal as soon as I can: the quantity of coal "will be calculated at not less than 700 "maunds to every lac of bricks, but it is "to be understood that this is not to affect "the quantity of coal used, being only to "ensure early delivery."

This stipulation must, however, be read with the whole of the contract, and it is quite clear that the use of the words "deliver" and "delivery" only regarded the deposit of the materials at a certain spot. There was not, and there could not have been, any delivery of the coal to Government. The preparation of the materials, and the metalling and consolidation of the road, subject to certain conditions, were left entirely in the hands of the contractor.

In this state of things, even granting that the Judge is quite correct in holding that Croft had taken delivery of the coal at the Choadanga station, it is impossible to say that Government had any lien on the materials, and it is no argument to urge that the defendants, the Coal Company, had no lien on the said coal either. The Judge has confined himself almost exclusively to the right of defendants to stop the coal *in transitu*, and has lost sight of the right of Government, who are plaintiffs, and who must prove their case. In fact, it is not too much to say that the plaint, as framed by the Government, really discloses no cause of action. The right of Government against Croft was at most no more than that of a creditor, and would not warrant a claim of this kind.

But, to make the case against Government stronger, Mr. Doyne endeavoured to show that, at the time when Croft absconded, Government actually owed him a sum for advances of 6,374 rupees, and Baboo Kishen Kishore has not refuted or explained this away.

But, in any view of the case, Government had no right to detain or claim the coal, or to take the same out of the possession of the defendants, and, the suit being wholly groundless, it ought to have been dismissed. The defendants, it is rightly urged, could retain possession of the coal against any claimant but Croft himself.

The decision of the Judge is reversed with all costs.

The 30th April 1867.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Oral evidence (to prove non-payment of consideration).

Case No. 16 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 4th October 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th May 1865.

Shaikh Walee Mahomed (Plaintiff), *Appellant,*

versus

Shaikh Kumur Ali and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Baboo Romanath Bose for Respondents.

Oral evidence is admissible to prove that consideration has not been paid at all or in full, notwithstanding the recital in the bond that full consideration has been paid.

Pundit, J.—THE special appellant objects that the Lower Appellate Court has received oral testimony to prove that, for the bond admitted by the defendant to have been executed, no consideration was paid. He also pleads that he should obtain a decree against defendant who admits his claim.

Of the last plea the special appellant cannot make anything.

As regards the first, we observe, first, that it is too late for the special appellant to urge this plea, as the Lower Appellate Court has taken the present view in compliance with suggestions thrown out by the order of remand previously passed by this Court; moreover, we are not aware that it is illegal in such a case as this to receive evidence to prove that, notwithstanding the bond reciting that full consideration has been paid, no consideration at all, or that no full consideration, was paid.

We, accordingly, see no reason to interfere, and reject the special appeal with costs.

The 30th April 1867.

Present :

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Pre-emption.

Case No. 2912 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 27th August 1866, modifying a decision passed by the Moonsiff of that District, dated the 6th December 1865.

Mohunt Ajoodhya Pooree and others (Plaintiffs), *Appellants,*

versus

Sohun Lal and others (Defendants), *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellants.

No one for Respondents.

A claim to pre-emption should be made as soon as the claimant becomes aware of the completion of the sale.

Jackson, J.—IT appears to me that the decision of the Lower Appellate Court ought to be affirmed.

The special appellant's pleader has referred us to Section 3, 4th Chapter of Macnaghten's Principles of Mahomedan Law, which is to this effect: "The right of pre-emption "cannot take effect until after the sale is "complete as far as the interest of the seller "is concerned." I understand the decision of the Zillah Judge on the first appeal to mean this, that, whereas the plaintiff should have alleged and proved that, as soon as he became aware of the fact of sale, that is, of the sale being complete, he had made his claim of pre-emption, instead of alleging or proving that, he only alleged and proved that, as soon as he received intelligence of the decree of the Appellate Court, by which the right to possession was finally adjudicated upon, he then made his claim. It appears to me perfectly clear that, not the decree of the Zillah Court, but the fulfilment of the condition of the kutkobalah and determination of the year of grace completed the sale; and that, as soon as he became aware of that fact, he ought to have preferred his claim.

The argument of the vakeel for the special appellant appears to me wholly untenable, and the judgment below correct.

Markby, J.—I am of the same opinion.

The 30th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mesne-profits—Section 11, Act XXIII. of 1861.

Case No. 418 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 4th September 1866.

Baboo Issur Dutt Singh and others (Plaintiffs), *Appellants,*

versus

Alluck Misser and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Appellants.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Section 11, Act XXIII. of 1861, does not bar a separate suit for mesne-profits when there was no adjudication whatever in the matter of mesne-profits in the former suit for possession.

Glover, J.—This was a suit to recover mesne-profits together with interest, accruing on certain lands decreed to the plaintiffs in 1858.

It will be unnecessary for us to state the case further, as the Principal Sudder Ameen has dismissed the plaintiff's suit on a preliminary issue, holding that the claim ought to have been included in the original suit for possession, and that a fresh suit for wassilat would not lie in accordance with Section 11, Act XXIII. of 1861.

This is the only point for consideration in appeal.

And on it we have no doubt whatever that the Principal Sudder Ameen is wrong.

Section 11, Act XXIII. of 1861, refers to suits in which the mesne-profits themselves have been decreed, but where the amount has not been fixed, and not to cases where there has been no adjudication whatever in the matter. The meaning of the Section is very clear. Where a party sues for both possession and mesne-profits, and gets a decree for all that he claims, but no specification of the amount to be paid to him as wassilat, this Section prohibits a fresh suit for ascertaining that amount, but to bring it into play mesne-profits must have been part of the subject-matter of the original claim.

The Principal Sudder Ameen has based his judgment on a ruling of the High Court in the case of Beer Chunder Joobraj, VI. Weekly Reporter 86. But in this case the point for decision was whether a Court executing a decree could award interest when the Court making the decree had passed no order on the point.

And, moreover, the explanation which the learned Judges gave of Section 11 of Act XXIII. of 1861 had reference to cases where the omission from the decretal order was of some portion of what had been the subject of the original suit; it did not apply to cases where the relief sought in the second suit had never been asked for in the first.

Section 10, Act VIII. of 1859, lays down in the most distinct terms that a claim for the recovery of land, and a claim for the mesne-profits of such land, shall be deemed distinct causes of action.

There are several rulings of this Court in support of the appellant's case. In Regular appeal No. 333 of 1866, Gour Kishen Singh *versus* Fukeer Chund, decided on the 9th of April 1867,* precisely the same question was raised; and it was held that, as there was no question of mesne-profits raised or decided in the first suit for possession, a second suit to recover them would lie.

And the same principle was laid down in the Full Bench Ruling of the 15th September 1866, † *vis.*, that Section 11, Act XXIII. of 1861, only applies where payment of interest or mesne-profits is provided for in the original decree, and even then not in respect of all questions that might arise. The Judges say: "It clearly could not have "been intended to determine, it may be "contrary to the terms of the decree, or in "the absence of any decision on the subject, "whether interest or mesne-profits were or "were not payable."

We think, therefore, that the plaintiff's suit was perfectly admissible, and we remand the papers to the Principal Sudder Ameen for a decision on the merits as to the claim for wassilat; the costs of this appeal will be on the respondent.

* *See* 7 W. R., p. 364.
† *See* 6 W. R. (Miscellaneous), p. 109.

The 30th April 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Attached property—Sale.

Case No. 2929 of 1866.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 26th July 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st November 1865.

Prannath Mitter (one of the Defendants), *Appellant,*

versus

Shumboo Chunder Nath (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Romesh Chunder Mitter* for Appellant.

Baboo Ashootosh Dhur for Respondent.

Where a judgment-debtor raised a sum of money by a sale of part of the attached property, and devoted some part of that money to a payment on account to the judgment-creditor, and the judgment-creditor thereupon withdrew from the execution and from the attachment of the property—HELD that the attachment would not invalidate the sale.

Jackson, J.—IT appears to me that the decision of the Lower Appellate Court is quite right.

In this case the property in question had been attached presumably in a regular manner by the issue of a written order prohibiting alienation. Shortly after such attachment, the judgment-debtor enters into a negotiation, whereby he raises a sum of money by a sale of part of the premises, and devotes some part of that money (it is not clear how much) to a payment on account to the judgment-creditor, and the judgment-creditor (as the Judge informs us) thereupon withdrew from the execution and from the attachment of the property. I think it must be considered that that sale and the withdrawal of proceedings in execution by the judgment-creditor were parts of one whole transaction; that the judgment-creditor consequently assented to the sale and waived, for the time being, all right that he had, by way of attachment, over that property. The sale having taken place in that way, the rights of the judgment-debtor passed to the person to whom he sold. If the judgment-creditor had been no party to the transaction, of course the sale would have been subject to the attachment and execution, and the sale by the judgment-debtor would, probably, at the instance of the creditor, have been declared null and void. But, as the judgment-creditor was a party to the transaction, and as he withdrew his execution and attachment, that attachment would certainly not invalidate the sale. Under these circumstances months after, when a third party comes in and purchases that portion of the decree which still remained unexecuted, and, under the right so obtained, he causes a fresh attachment of that property as if any right or interest in it still remained to the judgment-debtor, I think it cannot be contended that anything was taken by the purchaser under such a sale.

I think the decision of the Lower Appellate Court must be affirmed with costs.

Markby, J.—I am of the same opinion.

The 2nd May 1867.

Present:

The Hon'ble J. P. Norman, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

High Court (Powers of superintendence of)—Release of person imprisoned in execution of an old summary decree for rent against his father.

Petition complaining of an order passed by Mr. W. R. Davis, Deputy Collector of Purneah, dated the 11th January 1867.

Gopal Singh, *Petitioner,*

versus

The Court of Wards on behalf of the Maharajah of Durbhangah, *Opposite Party.*

Messrs. R. T. Allan and *R. E. Twidale* for Petitioner.

Baboo Kishen Kishore Ghose for Opposite Party.

Where, in execution of a summary decree for rent obtained under Regulation VII. of 1799 in 1851 against the father of the petitioner and another, the petitioner was arrested and lodged in jail in January 1867—HELD by the majority of the Court (Norman, J., dissenting) that the High Court could not, under the general powers of superintendence vested in it by Section 15 of the High Court's Act or Section 16 of the Letters Patent, interfere to order the release of the petitioner.

Norman, J.—THIS was a rule calling on the Collector of Purneah as representing the Court of Wards and the General Manager of the Durbhangah estates appointed under the Court of Wards, to show cause why an order of the Deputy Collector, made in a case wherein the General Manager under the Court of Wards was decree-holder, and Gopal

Singh judgment-debtor, should not be quashed as having been made without jurisdiction, and why the petitioner should not be discharged out of custody, on the ground that there was nothing to warrant the order for his arrest.

The general manager under the Court of Wards on behalf of the Durbhangah Rajah brought a summary suit under Regulation VII. of 1799 in Zillah Purneah against Tej Narain Singh, and obtained a decree on the 10th of December 1851 for Rupees 8,205. On the death of Tej Narain Singh, the case was struck off the file. On the 4th of July 1861, the plaintiffs prayed for execution against Gopal Singh as heir of Tej Narain Singh, but the case was again struck off the file, no proof of heirship having been given.

After this the decree-holder applied from time to time for execution of his decree, but of these applications Gopal Singh had no notice, he being a resident of Bhaugulpore. On the 13th of September 1866, the decree-holder applied for execution of his decree, and procured an order from the Court of the Collector of Purneah for the arrest of Gopal Singh. Gopal Singh was, accordingly, arrested on the 21st of September. On the 26th Gopal presented a petition objecting to the arrest on various grounds. His petition was rejected by the Collector on the 2nd of October. Gopal Singh, amongst other answers, denied that he was in possession of any property by inheritance from his father Tej Narain. The Collector referred it to a Deputy Collector to enquire whether Gopal Singh was in possession of any such property as heir of his father, and on the 11th of January 1867 the Deputy Collector found that he was in possession of some land as such heir, and ordered that he should be imprisoned and remain according to custom in the Civil Gaol of Purneah.

The proceedings are headed "In the Court of the Collector, Zillah Purneah."

It appears clear, and indeed was not disputed by Baboo Kishen Kishore Ghose, who appeared for the Collector to show cause against the rule that in summary proceedings under Regulation VII. of 1799 the personal property of the defaulter may be distrained, his person attached, and the talook or tenure of the defaulter may be brought to sale for the arrears of rent which may have accrued upon it.

Regulation VIII. of 1819, Section 18, Clause 4, which was referred to, contains an express declaration that no summary decree for arrears shall be considered to warrant the subjecting other real property belonging to the defendant in such action to sale in execution; and that, if the plaintiff should be desirous of having any estate, or house, or landed property of the defaulter brought to sale in satisfaction of his claim for rent, it will be necessary for him to *institute a regular suit for that purpose*, notwithstanding the existence of a summary award in his favor.

It is, in fact, admitted that there is no law or Regulation under which the Collector can justify the proceedings against Gopal Singh as heir of Tej Narain Singh.

The question is—Has the High Court power to quash the orders which have issued from the Collector's Court?

By the 15th Section of the Act for establishing High Courts of Judicature in India, 24 and 25 Victoria, Chapter IV., it is enacted that each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction.

The term "superintendence" is one, not only quite intelligible in itself, but it has a legal force and signification which are perfectly well known to the Legislature.

In 3 Blackstone's Commentaries, page 110, it is pointed out that "it is the peculiar busi-"ness of the Court of King's Bench to *su-"perintend* all inferior tribunals, and therein "to enforce the due exercise of those judicial "and ministerial powers with which the "Crown or Legislature have invested them, "and this, not only by restraining their "excesses, but also by quickening their negli-"gence and obviating their denial of jus-"tice."

See further Bacon's Abridgment, title Mandamus Titles (D.) (E.), and cases cited —Tapping on Mandamus, pages 105, 230, 231.

In Bacon's Abridgment, title Prohibition, it is said: "As all external jurisdiction, whether "Ecclesiastical or Civil, is derived from the "Crown, and the administration of justice is "committed to a great variety of Courts, "hence it has been the care of the Crown "that these Courts keep within the limits and "bounds of their several jurisdictions pre-"scribed to them by the Laws and Statutes of "the Realm." * * "The superior Courts at "Westminster *having a superintendency* "over all inferior Courts may, in all cases of "innovation, award a prohibition. In this "the power of the Court of King's Bench "has never been doubted being the superior "Common Law Court of the Kingdom."

Exercising this most salutary power, the Courts at Westminster, and particularly the Court of Queen's Bench, by decisions which may be counted by thousands, have kept all the inferior Courts in the Kingdom within the limits of their several jurisdictions. Prohibitions lie to persons or bodies pretending to be Courts if they assume to exercise jurisdiction as such. These prohibitions have issued to the Pope's Collector assuming jurisdiction as a spiritual Court—to a Bishop pretending to visitatorial authority—to a Court calling itself a Court of Honor. *See* Comyn's Digest A. 1, F. 11, *per* Holt, Chief Justice, Salkeld's Reports 553.

This power of superintendence is entirely distinct from the jurisdiction to hear appeals. If the inferior Court, after hearing the parties, comes to an erroneous decision, either in law or fact, on a matter within its jurisdiction, the Court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal.

In order to see over what Courts the High Court has a power of superintendence, we must look to the 15th Clause of the Charter of 1862 by which it is ordained that the High Court shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William and from all other Courts whether within or without the said Bengal Division from which there is now an appeal to the Court of Sudder Dewanny Adawlut at Calcutta—and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Dewanny Adawlut by virtue of any law or Regulation now in force, or shall become subject to appeal to the said High Court by virtue of such Law and Regulation relating to Civil Procedure as shall hereafter be made by the Governor-General in Council.

The first branch of this Clause constitutes the High Court a Court of Appeal from the several Courts therein mentioned in general terms, while the second branch indicates the cases in which such appellate powers are to be exercised.

By Section 160 of Act X. of 1859, an appeal was given in certain cases to the Court of Sudder Dewanny Adawlut from the Collector's Court; by Section 161, a special appeal from the decisions of a Judge on appeal from a Collector.

Appeals from the decisions of Collectors' Courts to the Sudder Dewanny Adawlut in suits under Regulation II. of 1819 were given by the 26th and 30th Sections of that Regulation.

A suit in the nature of an appeal from the decision of a Collector or proceedings under Regulation VII. of 1822 by the 23rd Section of that Regulation.

If I were obliged to decide that point, I am not sure that I should not be prepared to hold that, under the 15th Clause of the Charter of 1862, the High Court was constituted, in general terms, a Court of Appeal from the Collector's Court whenever the Collector acts judicially. For my present purpose, it is not necessary for me to express an opinion on that point.

It is clearly constituted a Court of Appeal from the Collector's Court exercising jurisdiction in suits for rent since the passing of Act X. of 1859.

It is equally clear that the High Court under the 15th Section of the Charter Act has superintendence over the Collector's Court dealing with such suits for rent.

By the 16th Section of the Charter of 1866, it is ordained that the High Court shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the High Court by virtue of any Laws or Regulations now in force.

Thus, the existing Charter assumes that the Collector's Court is subject to the superintendence of the High Court, and by that description alone constitutes the High Court a Court of Appeal from it. If the High Court has not a power of superintendence over the Collector's under Act X., the High Court, as constituted by the Charter of 1866, has no power of appeal from it.

Now, if the Collector's Court, described in Act X. as a Court having jurisdiction to entertain suits for rent, is to be taken as a Court which existed antecedently to the passing of Act X. of 1859, if the 148th Section is no more than a Clause regulating the proceedings of the Court, and empowering the Collector to hold his Court in any place within the limits of his district, if it be one and the same Court as that which entertained summary suits under Regulation VIII. of 1831, its powers being merely modified by the latter Act, it would be clear, and a matter beyond controversy, that our general powers under the 15th Section will enable us to superintend all its operations whether in summary suits or in suits under Act X.

If, however, the Collector's Court under Act X. is to be treated as a new Court constituted by Section 148, and regulated by the Sections which follow, and if we have the power of superintending the Court as constituted by Act X., then, in order to see whether we have the power of interfering with the Collector's proceedings in the present case, we must see what power he has exercised or professed to exercise, or which comes to the same thing, what powers he must be taken to have exercised.

By Section 23 of Act X., it is enacted that all suits for arrears of rent due on account of land shall be cognizable by Collectors of land-revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal as provided by that Act, *shall not be cognizable in any other Court, or by any other officer, or in any other manner.*

Regulations VII. of 1799 and VIII. of 1831 were repealed by Act X. of 1859, except as to proceedings commenced before that Act came into force, *i. e.*, the 1st of August 1859.

The proceedings against Gopal Singh as heir of Tej Narain were not commenced until after the repeal of those enactments. They were in no sense warranted by anything in those Regulations, and cannot be said to have grown out of, or to have been a continuance of, any proceedings in the summary suit.

On the contrary, they were wholly new proceedings for which there was no warrant under the law or precedent according to the practice of the Court.

The case does not then appear to fall within the exceptions in Section 1 of Act X. of 1859. Whatever the Collector's own notion may have been, his orders cannot be treated as passed by a Court for the enforcement of a summary decree under those Regulations, because, except as to special cases, of which that before us is not one, the Regulations themselves had been repealed, and the Collector's power to hold such a Court was, therefore, at an end. The Collector had no power to entertain any suit or proceeding for the recovery of arrears of rent against Gopal Singh as heir of Tej Narain, except under Act X.

It is clear that, in ordering the commitment of Gopal Singh, the Collector used powers which he could at that time have only exercised as a Court constituted under Act X.

The proceedings, as we have seen, are headed "In the Collector's Court, Zillah Purneah." There is nothing on the face of the proceedings to show that the Collector professed to act under any special powers. The proceedings must be presumed to have taken place, under such judicial powers as the Collector then possessed, in that which was the Collector's Court in existence at the time when the orders were passed. This is no mere question of words. The officers of that Court were bound to obey orders *so headed.* However illegal the proceedings may have been, the nazir could not have refused to execute the process; nor could the gaoler have refused to receive Gopal Singh. If proceedings had been taken for a wrongful arrest by Gopal Singh against the gaoler or the nazir, these parties could have justified themselves as acting under the orders of an existing Court of competent jurisdiction having power to try all questions relating to suits for arrears of rent. The law on this subject is fully discussed in the case of the Marshalsea, 10 Coke's Reports 76 A; *see* also Broom's Legal Maxims, pages 12 and 89 to 94. The Collector cannot contradict his own proceeding. He cannot say: "This was not an act done by me in any "existing Court. I was a mere trespasser; "I was acting under Regulations which are "repealed, and exercising the functions of a "Court which no longer existed."

The importance of the heading of the proceedings is illustrated by the cases of Andrews *versus* Morris, 1 Queen's Bench Reports, page 3, and Carratt *versus* Morley, 1 Queen's Bench Reports, page 18. They were actions of trespass against officers of Courts of Request. In both cases the judgments of the Courts of Request were void. The precept to the Serjeant was in the first case correct. In the second case it did not describe the Court by its proper style. In the first case it was held that, as the subject-matter of the cause was within the general jurisdiction of the Court, the Serjeant was not bound to look beyond the warrant, and, as it appeared on the face of it to have issued regularly, he was justified. In the second case it was held that the officer was not protected by a warrant which, on the face of it, did not appear to be authorized by law.

The Collector having exercised such powers without any jurisdiction or warrant in law, it would have been competent to us, by virtue of our general superintendence, to prohibit him from proceeding further, and we may now quash his order as illegal.

In a matter on which my colleagues entertain so much doubt, I should hesitate to exercise our extraordinary jurisdiction if I could see that the applicant had any other remedy.

But here we have a petitioner who has been for months in prison for a debt for the payment of which, as far as we can judge at present, he appears not to be liable. Any suit to recover the amount either in the Collector's Court under Act X. of 1859, or by plaint in the Civil Court founded on the decree, would be apparently barred as out of time.

Baboo Kishen Kishore Ghose, who appeared for the Collector, could point out no means by which the prisoner could regain his liberty. He suggested that he might bring a suit and allege that he had not inherited real property from his father. But that is not the point. Whether he inherited lands from his father or not, his imprisonment was equally unjustifiable. According to the law of England and the law of this country, as it stood under Regulation III. of 1793, Section 10, Gopal Singh might probably have had a remedy by a suit for damages for the illegal imprisonment against the Collector as having acted without jurisdiction. But that remedy is probably taken away by Act XVIII. of 1850. If he could bring such a suit, it would be a poor remedy if he must remain in jail till the suit were decided. We have seen that he could probably maintain no action against the nazir and gaoler.

Under Section 4 of Regulation VIII. of 1831, a Commissioner would probably not interfere with the proceedings of the Collector in execution of his own decree. That appears to have been the opinion expressed in a letter from the Secretary to the Government of Bengal, Revenue Department, to the Secretary of the Sudder Board of Revenue, No. 1418, dated the 11th of October 1836.

However that may be, if I am right in my construction of Section 1, Act X. of 1859, Regulation VIII. of 1831 is now repealed by Act X. of 1859, and such jurisdiction as the Commissioner had under that Regulation is gone.

It is suggested that the defendant may apply to the Government of Bengal or the Board of Revenue. But the plaintiff in any such case as the present has a right to be heard to say that the proceedings are regular. He is not to be lightly deprived of that which may turn out to be his legal right, the security for a debt which he claims to be due to him. Neither the Government nor the Board of Revenue are Courts of Justice. They have no power to enquire into, and cannot determine judicially the matter in dispute. They would hardly be likely to order the discharge of the defendant, and would perhaps not be justified in interfering with the alleged legal rights of the plaintiff.

It seems to me that it would be a grave reproach on the administration of justice if a man illegally deprived of his liberty, imprisoned by the order of a Court having no jurisdiction, has no remedy in a Court of Justice to regain his liberty, but must be in prison, because the highest Court of Judicature in this country has no power to release him.

After a very careful consideration, I have come to the conclusion that we have authority to quash the Collector's orders, and that we ought to order the discharge of the prisoner. I would, therefore, make the rule absolute.

Seton-Karr, J.—This is a case in which the senior Government pleader appears before us to discharge a rule served on the Collector who has been called on to show cause why the applicant, Gopal Singh, in whose behalf the rule was procured by Mr. Allan, should not be discharged from custody. I have had the advantage of hearing the whole matter twice fully argued; once when sitting with my brother Norman, and again when sitting with him and with my brother L. S. Jackson.

The facts are simple and are not in dispute. In the year 1851, a summary decision for rent, of more than 8,000 rupees, was obtained against the father of the applicant and another.

Subsequently application was made, on several occasions, to execute the decree against the father, but no process of execution was attempted to be taken out against the present applicant until 1861, after his father's death, and that application was struck off on the 10th of April 1862, as there was no proof of heirship.

In the autumn of last year, process of execution was again taken out, and the present applicant, who is a resident of Bhaugulpore, was arrested and lodged in the jail at Purneah.

The matter has been fully and ably argued by Mr. Allan, in order to make the rule absolute; and by Baboo Kishen Kishore Ghose, in order to have the rule discharged.

The point for consideration is, after all, whether we can interfere under the 15th

Section of the Charter Act, or under the 16th Section of the Letters Patent.

I have considered this matter very attentively, and I am quite clear that, in a delicate matter like this, involving the liberty of the subject on the one hand, and the jurisdiction of the High Court on the other, we ought not to interfere except on the clearest proof that we have a full right to do so, and that the law is on our side.

The laws quoted in the margin have been referred to in the course of argument, but I do not find that any one of them placed the Collector under the late Sudder Court or subjected his proceedings to appeal or to *review* by that authority, or by the Civil Courts Notoriously, both the law and practice were that summary decisions, passed under Regulation VII. of 1799 and other laws, could be annulled by regular civil suits separately brought for that purpose. They could not be touched by the Civil Courts in the way either of *revision* or of *appeal*.

Regulation II. of 1793, Sec. 4.
„ VII. of 1799, „ 15.
„ XIX. of 1817, „ 15.
„ XIV. of 1824.
„ VIII. of 1831.

No case has been quoted to us in which either the late Sudder Court or the High Court ever dealt with any proceeding of a Collector in execution of a decree obtained under Regulation VII. of 1799 in the way in which we are now asked to interfere. No one professed ever to have heard of any such a case. And a Circular of the late Sudder Court of the 4th of January 1833, quoted on the first hearing of the rule, distinctly lays it down that Collectors were empowered to execute their own awards independently.

Had the decree been gained under the present law, *viz.*, Act X. of 1859, I do not believe that we should have been able to interfere with it in execution, *by way of appeal*, this Court having already held that there is no appeal against the execution of such decrees. At the same time, if the case had been one under Act X. of 1859, and if the Collector had gone entirely beyond his jurisdiction in executing the same, I think we might possibly have interfered under the power vested in us by Section 15 of the Charter.

The question, therefore, remains: Can we, as a Superintending Court, interfere in a case where an old decree, passed at a time when the Collector was not under the jurisdiction of the late Sudder Court, is being executed; and can we, as the Court, which has succeeded to all the powers of the Sudder Court, and which has other powers besides, direct the release of the applicant?

I think the interpretation of the word "superintendence," used in the 15th Section of the Charter Act, will often be a matter of great nicety, and that it behoves us to be careful in exercising any special jurisdiction which we may conceive ourselves to be vested with under that phrase.

But, in the present case, it is first necessary to enquire whether the Collector, carrying out an old decree which was not itself in any way appealable to the highest Civil Court in the country, falls within the meaning of the words used in the 15th Section of the Charter Act. By that Section, our Court "shall have superintendence over all "Courts which *may be subject to its appel-*"*late jurisdiction*, and shall have power to "call for returns," &c., &c., and to direct the transfers of suit, and to make general rules for regulating practice. The 16th Section of the new Letters Patent merely constitutes the High Court, a Court of Appeal from the Civil Courts and from other Courts subject to its superintendence. But we are not asked to deal with this case as a Court of Appeal, and the Letters Patent do not, therefore, apply at all. Can it then be said that the Collector, in anything that he does, is generally subject to our appellate jurisdiction? No doubt, in cases of Act X. of 1859, appeals are preferred, both regular and special, to the High Court from the orders of Collectors and Deputy Collectors in rent-suits, and in rent-suits only. And, as I have said, if the Collector went beyond his jurisdiction in any matter appertaining to a rent-suit under the present law, we might, even if the matter were not actually appealable, possibly interfere on a motion made to that effect, as we are asked to do now. But I express no decided opinion on this point.

Mr. Allan is, no doubt, quite correct in stating that this is a case of apparently great and real hardship; in urging on us that it seems monstrous that a man should be suddenly seized in another district, and put into jail for a summary rent-suit, which only bound the crops, the land, or the defaulter himself, decreed against his father 16 years ago; and that the proper remedy of the decree-holder in such cases was either to sell the tenure, as well as the personal property of the defaulter, or to have put the defaulter himself in prison at or shortly after the decree of 1851.

I myself never heard of such a case as that of a man being suddenly put in jail for an old summary rent-decree passed long ago against his father and others, and several of my learned colleagues whom I have consulted, and who have had great experience in these matters, never heard of such a case; and, were I convinced I had the power, I should be very glad to interfere in the applicant's behalf.

But I cannot hold, on anything that I have heard during the course of argument, that the words of the Charter quoted give us a power of general superintendence over Collectors in all matters, or that we can scrutinize and interfere with his acts, unless they be questioned judicially in some case from which an appeal lies, or unless the matter refers to some case in which the Collector would be rightly termed a Court "subject to our appellate jurisdiction" or a "Subordinate Court." Ordinarily and admittedly the Collector is not under the High Court, and we do not, in his case, call for returns, or direct the transfer of suits, or prescribe to him rules of practice.

I cannot, however, think that the applicant is so wholly without a remedy. One remedy suggested by Baboo Kishen Kishore was that the applicant should bring a civil suit to show that he had not inherited any property from his father, and that the Collector is wrong in ruling that he is his father's heir, or the applicant should prove that he was otherwise not personally liable to pay the arrears of rent of the summary suit.

But there arrears to me a shorter remedy available. The Collector is placed under the control and supervision of the Commissioner and the Board of Revenue, to say nothing of that of the Executive Government. The summary decree is one sought to be executed on behalf of the Court of Wards by the Manager of the Durbhangah estates who would, I have no doubt, readily listen to any suggestion which the Commissioner of the Division might think fit to make. I will venture to say that, if any hardship has been inflicted on the applicant, or any severe, unnecessary, or unprecedented measure has been had recourse to, as seems probable, an application to the Commissioner would, in all human probability, have the effect of doing that which justice seems to require.

But, for my own part, I must adhere to the rule that this Court should not interfere or exercise its power in an extraordinary mode, unless we are quite satisfied that we have jurisdiction; and, not being satisfied that we have conferred on us any such jurisdiction or power of interference as is contended for, I would discharge this rule.

After all, on the arguments which we have heard on the subject, the point really resolves itself into this.

The Collector is not acting as a Court established by Section 148, Act X. of 1859. He is carrying out, as the law empowered him to do under the jurisdiction which remained to him in regard to old decrees and proceedings, an old decree familiarly known as a "huftum," or one obtained under Regulation VII. of 1799. As far as we can judge, he has acted with judicial power in executing the decree which had apparently been kept alive by sundry processes, and in arresting and confining the defendant, though it may well be said that there is no instance known of a summary rent-decree having been thus carried out against the heir of one of the original defaulters. The Collector's order would not have been appealable to the late Sudder Court, and is not appealable to, nor liable to be otherwise called in question by, the High Court by any law or Charter that I can find.

Whatever the apparent hardship may be, I would discharge the rule and leave the applicant, whom otherwise I should be desirous of assisting, to any other remedy available.

Jackson, J.—The petitioner obtained a rule of this Court, calling on the Collector of Purneah to show cause why the order (of Mr. W. R. Davis, a Deputy Collector), dated 11th January last, under which the petitioner remained imprisoned in the Civil Jail of Purneah, should not be set aside as having been made wholly without jurisdiction.

The Collector showed cause, and the matter, having been once argued before Norman and Seton-Karr, JJ., has now been again argued before those two learned Judges and myself.

Two persons (brothers) named Tej Narain and Thuckoo Lal having jointly taken a lease, Thuckoo Lal died, and the zemindar afterwards obtained from the Collector of Purneah a decree, dated 10th December 1851, in a summary suit for rent against the survivor.

Subsequently, the judgment-debtor Tej Narain himself died, leaving a widow and a minor son, Gopal Singh, the petitioner.

No further proceedings were taken at that time, and it seems that, about a year after-

wards, namely, on the 30th January 1853, two other brothers of the lessees entered into an engagement with the zemindar by which, after reciting that the lease had been taken for the benefit of all the four brothers, they made themselves jointly responsible for all arrears of rent existing and future.

On the 1st August 1859, Act X. of that year took effect, and the previous Regulations relating to summary suits for rent became repealed except as to proceedings commenced before that date.

On the 4th July 1861, the zemindar applied to execute his old summary decree against Gopal Singh, who had, I suppose, by this time, come of age, and who dwelt in Zillah Bhaugulpore.

It appears that no notice of the application was served on Gopal Singh; but the proceedings were, on the 10th April 1862, taken off the file for want of any proof that Gopal was the heir of Tej Narain.

In March 1863, and afterwards from time to time, the application was renewed, but without result, apparently in consequence of no property liable to be taken in execution being found within the jurisdiction.

Finally, on the 15th September 1866, the decree-holder applied for the arrest of Gopal Singh. He was arrested accordingly, taken to Purneah, and then committed to the civil jail on the 21st of that month.

On the 26th September, he made a petition to the Collector, in which he objected to his being made liable. This petition was referred to the Deputy Collector by whom, on the 2nd October, it was overruled, and the decree-holder was required to produce evidence of Gopal Singh having in his possession assets of the deceased judgment-debtor, Gopal being meanwhile detained in custody, and the matter finally came on for hearing before the Deputy Collector on the 11th January 1867, when Gopal Singh was declared to be liable, and ordered to be imprisoned "according to practice" in the civil jail.

The actual warrant of imprisonment is not before us, but the rubookaree or proceeding in which the order was contained has been read to us. It is headed "In the Court (Adawlut) of the Collector of Purneah," and Mr. Allan thereupon contends that the Collector's Court is subject to the appellate jurisdiction of the High Court; that, consequently, by the 15th Section of the Act for establishing High Courts, we have superintendence over the Court of the Collector; and that, by virtue of that power, exercised according to its largest meaning, the order before us ought to be quashed.

That the order is one which ought to be set aside if we have authority to do so, has been fully shown, and admits of no dispute.

I will assume, for the purpose of considering this question, that the Section referred to is applicable to all Courts or tribunals over which we have our appellate jurisdiction, whether limited or unlimited, and that, *e. g.*, we could exercise over the Courts constituted by Act X. of 1859 all the superintendence, and all the powers of calling for returns, of directing transfers, and issuing general rules conferred by the 15th Section of the Statute.

It will then be necessary to consider whether this is a proceeding of any Court subject to our appellate jurisdiction.

It is said that the use of the word "Adawlut" or "Court" of the Collector in the proceeding before us implies the only Collector's Court now in existence, and Section 148 of Act X. of 1859 is referred as constituting the Collector's Courts for the purposes of that Act. (I do not understand the Section in that sense, but merely as a distinct provision, the Collector to hold an Ambulatory Court in any part of his jurisdiction.)

It is said, also, that, as no proceedings had been commenced against the petitioner, Gopal Singh, before Act X. came into operation, the repealed laws cannot be applied against him, and that, consequently, the proceedings complained of must have been taken under Act X. of 1859, and under no other law.

From these premises, the conclusion is pressed upon us that the Collector's order emanates from a Court constituted under Act X., and is, therefore, liable to be dealt with under our powers of superintendence.

It appears to me, in the first place, that the employment of the vernacular term "Adawlut" at the head of this proceeding, if it can be invested with any significance at all, by no means imports that the proceeding is taken in the Court (or Revenue Office) of a Collector or Deputy Collector exercising any powers under Act X. of 1859.*

* *Note.*—As for the observation that the Collector holds no "Court" otherwise than under Act X. of 1859, that appears to me quite unfounded, *see* Section 23, Clause 1, Regulation VII. of 1822.

The words of that Clause appear to confer upon a Collector, whenever he is acting judicially by virtue of any Regulation, the power of a Civil Court, but they do not make his Court one of "the Civil Courts of the Bengal Division," &c.

It is quite clear that there might be Collectors and Deputy Collectors acting under that law, and also, in proceedings commenced before 1859, acting under the old Regulations, and the word "Adawlut" would be equally applicable to both.

Indeed, there might be Deputy Collectors entrusted with police-functions, who, under Section 164 of Act X. of 1859, would be incapable of exercising any judicial powers under that Act, and yet who would be fully competent to deal with cases under the old law of summary suits; and there is nothing before us to show what powers were exercised by Mr. Davis. It may be conceded, however, that he was not incapacitated from acting under Act X., yet the use of the word Court in my opinion affords no ground for assuming that he was so acting, and, as I have already observed, he might equally have been acting otherwise.

But then it is said the old Regulations will not apply, because no proceedings had been commenced against Gopal Singh before Act X. came into operation, the execution against him being treated as a proceeding wholly new, subsequent to the Act.

Now, it appears to me to be of little importance, if the proceedings are *not under Act X.*, whether Regulation VII. of 1799, or any other of the summary suit laws, apply to the case or no. For it is in respect of the jurisdiction created by Act X., and of that only, that an appeal lies from the Collector to this Court, and as to the many other functions exercised by the Collector, this Court cannot claim either appellate power or superintendence.*

Now, I think it quite clear that the execution has not been allowed under the provisions of Act X. of 1859. For that Act contains no provisions whatever for carrying out proceedings commenced or executing decrees given under the old law; and such proceedings were clearly meant to be carried to a termination under the same law as that under which they had begun.

And the reason of this is obvious, for Act X. introduced, not merely a new procedure, but conferred a new character of finality on the Collector's proceedings.

The order of a Collector under the old rent-laws were not, indeed, subject to appeal, except on the single point of the relevancy of the law, but they were liable to be questioned and wholly set aside by the parties themselves in a regular civil suit, whereas the decisions of a Collector under Act X. upon the matters over which he is invested with exclusive jurisdiction are as irreversible as those of any other Court.

Nor can I see that an application to execute the decree against an heir, supposing that the rent law permitted such a course, could be designated as a new proceeding. It seems to me to stand on the same ground as substituting the heir or legal representative for the defendant in a suit. If either of these could be called new proceedings, a plaintiff or decree-holder would often be barred by the Law of Limitation.

I think, therefore, that this was no new proceeding; but that, in applying to execute his decree against the heir, the zemindar was continuing, though irregularly, proceedings commenced before Act X. came into operation.

But this, as I have remarked, appears to me immaterial, and it is on the ground that the order did not appear to be, and was not, and could not have been, an order of any Court constituted by Act X. of 1859, that I am of opinion this Court has no power under Section 15 of the Act of Parliament to set it aside.

This view may be thus stated in another way. If we can touch this order in the way of superintendence, we must do it as having appellate jurisdiction, and, if so, we have that jurisdiction over every Collector carrying out proceedings under Regulation VII. of 1799 commenced before Act X. of 1859 came into operation.

But, by the 16th Section of our Letters Patent, we are enabled to exercise our appellate jurisdiction only in such cases as are by law subject to appeal. Now, the law of summary suits expressly interdicted appeal except to the Commissioner on one point (the relevancy of the Regulation).

Consequently, we should have an appellate jurisdiction without being competent to exercise it in any case whatever, which, it seems to me, is absurd.

What other mode of relief may be within the petitioner's reach, is a question which I do not think it necessary to discuss; and

* *Note.*—Wherever by the Bengal Regulations a suit was allowed in the nature of an appeal from the decision of a Collector, it lay, not in the Sudder Court which was a Court of Appeal, but to the proper Court of Original Civil Jurisdiction in the Zillah.

whether or not there be any other mode in which the power of this Court may be brought to bear upon the case, is a matter which I do not understand to be at present before us.

The subject being of some importance, and the liberty of the petitioner being concerned, I have thought it my duty to state at some length the reasons which have led me to the conclusion which I have formed, and I regret that, after the fullest consideration, I have been unable to arrive at the same conclusion as Mr. Justice Norman.

The 2nd May 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Stamp-duty—Unstamped receipts for rent.

Cases Nos. 375 and 414 of 1866 under Act X. of 1859.

Regular Appeals from a decision passed by the Assistant Collector of Chumparun, dated the 18th July 1866.

Baboo Gour Pershad Singh and others (Defendants), *Appellants,*

versus

Lalla Nund Lal, Manager on behalf of Maharajah Rajendur Kishore Singh Bahadoor (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellants.

Mr. C. Gregory and *Baboo Romanath Bose* for Respondent.

Where no application was made to the Lower Court to receive unstamped receipts for rent on payment of the stamp-duty and penalty, the Appellate Court held that it was not in a position to order their admission on such payment.

Jackson, J.—* * * * The final objection was that the Deputy Collector had rejected certain unstamped receipts for rent which had been tendered as evidence by the defendants.

It was urged that they ought to have been allowed to have these receipts stamped for the purpose of being used, and we were asked to make that order in the appeal.

On this point a case was cited* in which the Judicial Committee of the Privy Council had ordered a document to be stamped, and directed a new trial.

* No report of the case has yet appeared, but the judgment of their Lordships is printed in 5 Weekly Reporter, page 55, Privy Council Rulings.

That case differed widely from the present. There the documents were papers which apparently did not require a stamp, unless it was sought to use them as evidence.

The documents having been tendered for that purpose, and the necessity for their being stamped having been pointed out, the defendant, who tendered them, proposed to have them stamped then, but the Principal Sudder Ameen, refusing this, rejected them, leaving the title which they supported to be adjudicated upon in a fresh suit after the defendant should have had the documents stamped.

It need hardly be said that such a course was unreasonable, tending to prolong and not to put an end to litigation.

The receipts tendered in this case, which do not come within any of the exceptions, are imperatively required to be stamped, and the person receiving payment of money is liable to a penalty for refusal to provide a properly stamped receipt.

Section 29, Act X. of 1862.

Civil Courts are authorized to receive in evidence unstamped instruments or writings on payment of the stamp-duty and penalty, in cases where the stamp might be impressed under Section 15 of the Act, that is, in cases where the Court is satisfied that the omission to execute the writing on the proper stamp did not arise from intention to defraud the Government.

Section 17, ib.

Obviously the Appellate Court, not being a Local Court, would be unable to satisfy itself on that point, even if it were at liberty to overrule the decision of the Lower Court upon the point.

But in the present case no application of the kind was made, so far as we are informed, to the Deputy Collector at all; the defendants having insisted either that the receipts were exempted, or that it was the custom for the plaintiff to grant receipts unstamped.

We, consequently, are not in a position to make an order that the receipts be now admitted on payment of the duty and penalty.

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The 22nd May 1867.

Present:

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Joint Hindoo Family—Inheritance—Widow.

Special Appeals from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 26th September 1866, modifying a decision passed by the Moonsiff of Soorujgurrah, dated the 5th May 1866.

Case No. 3220 of 1866.

Mussamut Mooniah and others (Defendants), *Appellants,*

versus

Mussamut Teeknoo (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboos Mohesh Chunder Chowdhry and *Kalee Kishen Sein* for Respondent.

Case No. 51 of 1867.

Mussamut Teeknoo (Plaintiff), *Appellant,*

versus

Mussamut Mooniah and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Kalee Kishen Sein* for Appellant.

Mr. C. Gregory for Respondents.

Where property is acquired by the members of a joint Hindoo family from funds derived from the ancestral property and held by them in joint possession, on the death of one of them, his share does not devolve on his widow.

Loch, J.—THE plaintiff in this case sought to recover possession of her husband's share in the family property, on the allegation that, during his lifetime, her husband had separated from his brother, and had held separate possession of his share of the property in question; that, on his death, she, as the next legal heir, succeeded to the property, but was dispossessed by the defendant.

The Lower Appellate Court held that the plaintiff had entirely failed to prove her allegation of separation; and that, under the Mitackshara Law, she was consequently not entitled to any share in the ancestral property, but that, with regard to some other property which was acquired by her husband, she was entitled to a share in it. The Principal Sudder Ameen, therefore, dismissed her claim so far as it related to the ancestral property, but gave her a decree for a moiety of the property purchased by her husband, quoting the decision of the Privy Council in the Sheva Gunga case, reported in 2 Weekly Reporter, page 31, in support of his decision.

Two special appeals have been preferred: one by the plaintiff in regard to the Principal Sudder Ameen's finding on her allegation of separation—a finding on the evidence with which we cannot interfere in special appeal—the other by the defendant objecting to the order awarding half of the property purchased jointly by the defendant and plaintiff's husband to the plaintiff.

We think that the Principal Sudder Ameen has wrongly applied the ruling of the Privy Council in the Sheva Gunga case. Their Lordships nowhere say that property acquired by the members of an unseparated Hindoo family from funds derived from the ancestral property, and held by them in joint possession, shall devolve on the widow on the death of her husband. All that is said is that, even when a family is united, the widow is entitled to succeed to the separate acquisitions of her husband. The judgment of the Lower Court is sought to be supported by the respondent's pleader, by reference to another judgment of the Privy Council, 6 Moore's Indian Appeals, page 526. But that does not help his case, for that was a Bengal case in which the property had been disposed of by will; and, when a suit was brought by the widow of one of the brother's heirs under the will, their Lordships thought that the Sudder Court had enlarged the terms of the will which, in their opinion, did not prevent the widow from receiving the profits of her husband's share in the estate during life, though the rest of the property had, under the will, devolved on the brothers of the deceased. The Principal Sudder Ameen in the present case finds for the plaintiff, on an admission made by defendant, that plaintiff's husband had acquired the property, but we do not find that they admit that he acquired any portion of it from his own separate funds, nor does the plaintiff say so. Acquisitions are admitted to have been made to the family property, but from funds derived from ancestral sources, and plaintiff herself says that her husband and Brojo Lal purchased the property jointly, and only claims possession on the allegation of separation, which allegation she has failed to prove. We reverse the decision of the Principal Sudder Ameen in appeal No. 3220 of 1866 with costs, and dismiss appeal No. 51 of 1867 with costs.

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The 2nd May 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Judgment—Mortgage—Presumption of bona fides—Limitation (Section 246, Act VIII. of 1859).

Case No. 300 of 1866.

Regular Appeal from a decision passed by Baboo Mohendro Narain Bose, Officiating Principal Sudder Ameen of Hooghly, dated the 23rd July 1866.

Radhanath Banerjee (Plaintiff), *Appellant,*

versus

Jodoonath Singh and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Nil Madhub Sein* for Appellant.

Mr. C. Gregory and *Baboos Kishen Succa Mookerjee* and *Khetter Mohun Mookerjee* for Respondents.

Remarks on the impropriety of a Principal Sudder Ameen who, after hearing the evidence in a suit, was promoted in the same district from the second to the first grade, and refrained from deciding the case, but left it to his successor for decision.

Quære per Markby, J.—Whether such a decision is legal.

Where a mortgage is found to be genuine, and the receipt of consideration admitted, the Court is bound to assume, unless it be shown to the contrary that the transaction was a real one, and that the consideration-money was paid.

The limitation under Section 246, Act VIII. of 1859, is not applicable to an adjudication upon a petition disallowed on the ground that the Section did not apply at all to the petitioner's case, and that the case was not a fit one for adjudication under that Section.

Jackson, J.—This is a judgment which, I think, we can have no hesitation in reversing. The circumstance which first attracted our attention in reviewing this judgment was that this suit has been determined, not by the Judge who took the evidence in the case, but by the gentleman who succeeded him, and found the case in all respects complete, and merely awaiting judgment. It is unnecessary for us to say that a judgment passed under such circumstances must always be unsatisfactory. It often happens, no doubt, that a Judge, subordinate or superior, is obliged, by the circumstances of service in this country, to quit his judicial post before he has been able to come to a decision upon all the matters before him, and in such cases there is no remedy but for his successor to come to a decision upon such materials as are before him. It might, no doubt, be possible, but it would only be possible at an enormous sacrifice of public time and at excessive inconvenience to all the parties concerned, for the Judge who so succeeded to call before him again all the parties concerned and all the witnesses, and to hear evidence *de novo*. But that is a course which I do not think this Court would require to be taken upon all occasions. In the present case we have reason to know that the Judge who heard the evidence never left the district, but was promoted from being second to being first Principal Sudder Ameen.

There was nothing whatever in the change that took place, which prevented him from proceeding to a final determination of the case. I, therefore, regret extremely that he should so far have mistaken his duty as to refrain from deciding the case, and that his successor should not have given it over to him for decision. I think it right to make these observations, because the case may occur again, and because it might have been necessary for us, if we had entertained a less decided opinion than we do in this case, to have sent it back in order that a decision should be given by the officer who originally heard the witnesses. We should have been reluctant to make such an order, unless it appeared to us absolutely necessary; and, as the case turns out, we do not think it necessary.

In this case the plaintiff alleges that he lent a considerable sum of money to two of the defendants, and that, as security for the re-payment of his loan, he took a mortgage of the premises mentioned in the plaint. That mortgage was prepared according to English form in the office of an Attorney in Calcutta, and the instrument, after being properly executed with every formality, was registered in the office of the Registrar of Deeds in the 24-Pergunnahs. The agreement was that interest was to be paid upon the principal sum monthly, *i.e.*, on the 25th of each month, and it was stipulated that, if the defendants made default in the payment of interest in any month, the plaintiff was at liberty to foreclose.

These defendants, it appears, were persons who had been largely engaged in mercantile transactions under which they had become seriously involved, and, in fact, there were large claims outstanding against them. Default did take place as to the payment of the very first monthly instalment of interest, and, immediately upon default happening, the plaintiff took steps to have his mortgage foreclosed. After this, several persons, who had claims against these two defendants,

instituted suits and recovered decrees. At least four such decrees are referred to in the proceedings. Having obtained decrees, the creditors proceeded to execute them, attaching the premises now in dispute. Upon this attachment being effected, plaintiff, who was then in the position of a person holding a deed of mortgage of which the year of grace had not expired, presented a petition to the Civil Court objecting to the attachment. That objection was overruled, and his petition was rejected, and the Civil Court proceeded to sell the rights and interests of the judgment-debtors. Upon such sale taking place, these rights and interests were purchased by the remaining defendants in the suit, and they, having purchased the property, obtained possession by order of the Civil Court. The plaintiff now sues, having completed the foreclosure of his mortgage, to obtain possession of the mortgaged premises.

Various pleas were set up including limitation of more than one kind; but the ground most insisted upon by the purchaser-defendants was that the deed of mortgage executed by the defendants, who were judgment-debtors, was not a genuine *bonâ fide* transaction, but a fraudulent and collusive one come to with the intention of defeating the claims of creditors.

The Principal Sudder Ameen overruled the pleas of limitation; but, on a consideration of the evidence touching the merits of the case, he was of opinion that the plaintiff had not proved the mortgage-deed to be a *bonâ fide* transaction, or that the consideration-money had passed; and, having come to that conclusion, he dismissed the plaintiff's suit.

Plaintiff has now appealed to this Court, and the defendants have separately appeared as respondents to support the decision of the Court below. Upon the merits it appears to me quite clear that the Principal Sudder Ameen has miscarried. Plaintiff gave evidence to show, as I think most clearly, that the defendants, judgment-debtors, had executed the mortgage, and had admitted the receipt of consideration. That being so, the case, it seems to me, fell clearly within the principle laid down by the Judicial Committee of the Privy Council in the case of Chowdhry Debee Pershad *versus* Chowdhry Dowlut Singh, III. Moore's Indian Appeals, page 346: "There is no doubt," their Lordships say, "that the ruffanamah which con-"tains a statement of the fact that the "Rupees 21,000 were paid is evidence. It "is admitted on both sides that it was "not conclusive evidence as the statement "of such a fact in a deed under the seal "would be in a Court of Law in England; "but it is evidence, as far as it goes. Then, "let us see whether that evidence, which is "*primâ facie* proof of the payment, is or "is not rebutted by all the circumstances of "the case. We think that, looking at the "mode in which this case has been treated "by the Judge of the Sudder Dewanny "Adawlut (who must be supposed to be "well informed of the law and the practice "in India in such cases), the statement of "such a fact in a deed of this description "is *primâ facie* evidence that the money "therein stated to be paid was paid at the "time of the execution of the deed. But "he says that it is an understood thing that, "after documents are drawn out, money "mentioned in them is paid, and therefore "mention of the receipt of money is made in "the documents." Again they say: "Now, "that being so, the inference that would be "derived from the statement of such a fact "in the deed is that the *ruffanamah* must "*primâ facie* be considered as evidence that "there was at the time the deed was exe-"cuted, and as part of the same transaction, a "payment of money," that is, where the deed recites payment at the time of execution, it would be taken to be *primâ facie* evidence of such payment at that time; and in like manner, if the deed recites payment previously made, it would be taken to be *primâ facie* evidence of such previous payment. Upon that *primâ facie* evidence, it seems that plaintiff would be entitled to a verdict in his favor, unless the defendant succeeds in rebutting the inference which arises therefrom. In this case the defendant adduces absolutely no evidence whatever, and it was only sought by a minute examination of the evidence adduced by plaintiff himself to raise a suspicion, certainly of the very faintest kind, but in my judgment no reasonable suspicion of fraud. It appears to me that every one of the circumstances of the plaintiff's conduct in this case is, to say the least of it, equally consistent with perfect honesty as with fraud, and that many of them, so far from going in a direction to establish fraud, go in precisely the opposite direction. Among the circumstances which have struck me as distinctly going to negative the imputation, I may refer to one of the recitals in the mortgage-deed as being very significant. Generally speaking, in cases of this sort, difficulty arises from the averment

in the mortgage-deed, and the nature of the proof accompanying it, that the consideration consisted of a sum of money in cash paid by the mortgagee at the time of execution of the document. Such payment in money from its nature is not susceptible of being easily traced, and very often in consequence a troublesome enquiry takes place as to the source whence that money came. But in this case the mortgage-deed sets out that not a sum of money, not even Bank or Currency Notes, were the medium in which the consideration was paid, but Promissory Notes of the Government of India commonly called Company's Paper described by their numbers, dates, and amounts, and, consequently, capable of being readily traced. It appears to me that, if any circumstance was necessary to show the honest dealing of the plaintiff, that would be one of great significance.

Some of the assumptions and inferences which the Principal Sudder Ameen has arrived at appear to me to be of a most extraordinary character.

He says: "Let us, therefore, consider the "several circumstances which involve and "surround the present transaction. The "first and foremost of these is that the "debtors who were respectable mahajuns "failed, or in other words became insolvent, "on or about this time. Several persons "brought their respective suits against them "immediately after. We find, on reference "to our Register Book, that suit No. 19 was "brought by Jehamoye on the 14th May; "No. 20 by Neda Chand on the same date; "No. 88 by Bunno Bibee on the 16th May; "No. 21 by Markund Chunder on the 20th "May; No. 36 by Kisto Kaminee Dossee "on the 26th September, and there is no "knowing how many other suits were "brought against them in the other Courts "about this time. Is it not to be presumed "that the mortgage was an attempt only to "defeat and defraud the other creditors? "It is not unknown to any that insolvent "persons always have recourse to fraud in "protecting their properties from their credi-"tors, and I do not think the present debtors "could have acted otherwise in the present "matter."

Here are respectable mahajuns against whom not a word is breathed, except the fact that they were insolvent, and upon this the Principal Sudder Ameen chooses to assume that they must have acted fraudulently in this matter. It appears to me that to decide a case upon assumptions of that kind is a violation of all the principles of justice.

Again he says: "*Thirdly*, the place "selected for bringing about the matter is "also a proper one. Both the parties are "residents of Hooghly. Why was then the "deed executed and registered in Calcutta? "Most likely not to give the creditors an "opportunity of knowing the real state "of affairs of the debtors, that they may not "fall foul on them at once. *Fourthly*, why "was not a sale, instead of a mortgage, exe-"cuted at the time? But then it would be "necessary to deliver possession immediately "after, and that would have led to the much-"feared disclosure of the debtor's insolvent "condition."

Now, the answer to that is very simple. The only force in the objection is that the mortgage may be supposed to have been resorted to as a transaction more favorable to purposes of concealment than an out-and-out sale would have been. Now, if the plaintiff had proceeded with any such intention as that, he would have kept silence; he would not have disclosed the transaction; and he would have remained *perdu* until after the property had been sold and parties had taken possession. But, instead of that, on the very first occasion which he has to assert his rights, namely, on the early default by the defendants, judgment-debtors, to pay their interest, he rushes into Court and insists upon his foreclosure; and the very fact that he has done so is one of the matters urged against him by Mr. Gregory who appeared for one of the respondents, and declared that that savored of fraud.

Take another part of the reasoning in the judgment of the Court below. In the 7th paragraph he observes:—

"What were the properties mortgaged? "Why, they are no other than the family "homestead, the boituckhana house, the "garden, land, &c. Such properties, as far "as I know of the Hindoo community, are "the last things which a man would be "willing to part with, unless he is compelled "to do so by the Court. The conditional "sale of such properties to the plaintiff "makes the transaction woefully suspicious, "and excites the greatest repugnance to it in "the breast of every right-thinking man."

And yet in the 5th paragraph above he had said: "It is not disclosed in evidence "that there existed other properties of the "debtors besides the present. It is to be "presumed from the creditors afterwards, "taking these very properties in execution,

"that these were the only ones left to them "at the time."

So that he first imputes fraud on the ground that defendants had *no other* property, and had, therefore, given a fraudulent preference to one creditor; and further on he insists that these premises were properties which should have been the *last* to be parted with as if it appeared that the judgment-debtors *had other* property, and for that reason the sale was tainted with fraud.

But the climax of unreasonable suspicions is in the concluding paragraph:—

"In conclusion, I have only to say that, "although the defendant Bholanath has ad-"mitted the claim of the plaintiff, his very "admission denotes his collusion with him. "For, after a man has purchased a certain "property, it looks most awkward and "absurd in him to turn round and waive "his title thereto and give preference to "another. He is of the same quarter with "the debtors, and it has been affirmed on "the side of the defendant that he is their "poorohit."

I have thus gone through the whole of the reasoning upon which the Principal Sudder Ameen proceeds, and I really cannot find any part of it that seems to justify the conclusion at which he has arrived. I have said that the plaintiff's conduct is at least as consistent with honesty as it is with dishonesty, and a great deal of it appears distinctly to show the *bona fides* of his proceedings. But after all these matters had been considered and argued, Baboo Khettur Mohun Mookerjee, who appeared for one of the respondents, urged upon the Court with much persistence a point which had been considered in the Court below, and upon which the Principal Sudder Ameen had decided in the plaintiff's favor. He contended that this suit was barred by limitation under Section 246 of the Code of Civil Procedure. That Section is to this effect:—

"In the event of any claim being preferred "to, or objection offered against, the sale "of lands or any other immoveable or "moveable property which may have been "attached in execution of a decree, or under "any order for attachment passed before "judgment as not liable to be sold in exe-"cution of a decree against the defendant, "the Court shall, subject to the proviso "contained in the next succeeding Section, "proceed to investigate the same with the "like powers as if the claimant had been "originally made a defendant to the suit, "and also with such powers as regards the "summoning of the original defendant as "are contained in Section 220. And if it "shall appear to the satisfaction of the "Court that the land or other immoveable "or moveable property was not in the "possession of the party against whom "execution is sought, or of some other "person in trust for him or in the occupancy "of ryots or cultivators or other persons "paying rent to him at the time when the "property was attached, or that being in "the possession of the party himself at such "time it was so in his possession, not on his "own account or as his own property, but "on account of or in trust for some other "person, the Court shall pass an order for "releasing the said property from attach-"ment. But if it shall appear to the satis-"faction of the Court that the land or other "immoveable or moveable property was in "possession of the party against whom "execution is sought, as his own property, "and not on account of any other person, "or was in the possession of some other "person in trust for him, or in the occupancy "of ryots or cultivators or other persons "paying rent to him at the time when the "property was attached, the Court shall "disallow the claim."

(Now it will be well to observe here that the position in which the plaintiff was, and alleged himself to be, at the time when he presented that petition to Court in the execution-proceedings, was that of a person who had a lien upon the estate. He did not, and could not, allege that he was in possession: nor could he effectually contend that such rights as the judgment-debtor possessed could not be put up and sold.) The Section then proceeds: "The order which may be "passed by the Court under this Section shall "not be subject to appeal, but the party against "whom the order may be given shall be "at liberty to bring a suit to establish his "right at any time within one year from "the date of the order." It is quite clear to me from the language of the Section that finality was to be given to the decision on the matter which the Court was to determine under that Section unless the party against whom the decision had been given should contest it by a suit in the Civil Court within one year. Was there any decision given under this Section? Clearly not. What the Court did actually determine has not been submitted to us, and we were subjected to a considerable loss of time, while Baboo Khetter Mohun Mookerjee was vainly searching for the order: but manifestly the

point which the Court had under its consideration, and upon which the petition must have been disallowed, was that the Section did not apply at all to the petitioner's case, and that the case was not a fit one for adjudication under that Section. That being so, there could be no finality in the order, and the plaintiff must be entitled to proceed as if he had never made the objection. But, moreover, the truth is that plaintiff has now sued in virtue of rights which have accrued to him since then, and which were not in a perfect state at the time when he made that petition. He had not then foreclosed. He has done so since, and is now in quite a different legal position as to the property. Therefore, it appears to me that the adjudication by the Court upon that petition could not be in any sense treated as an answer to the present suit.

These are all the observations which I think it necessary to make upon this case. As I stated, I think the decision of the Principal Sudder Ameen is wholly wrong. The judgment of the Court below will, therefore, be reversed, and a decree given to plaintiff for possession of the premises named in the plaint, together with wassilat to be ascertained in execution, with costs of suit and also of this appeal, and interest at the usual rate.

Markby, J.—I also think that the decision ought to be reversed. I confess that, when the case was first broached, I had considerable doubts as to whether there had been any legal judgment in this case at all. *Primâ facie* there had been none, because, in the judgment pronounced by the Principal Sudder Ameen, he stated that he had never had the evidence before him. What he had had before him were the notes of the evidence taken by his predecessor or by some officer of the Court, but that is not the evidence in the suit. The evidence in the suit is that which is orally stated by the witnesses. It may be (and upon that point it is not at all necessary to express any opinion) that there are circumstances under which, by a practice which has grown up in this country, a Judge may sometimes pronounce a decision without having heard the evidence. All I say is that *primâ facie*, according to general principles, such a practice is illegal. However, as the parties themselves raised no objection, it is not advisable to send the case back for any other judgment to be recorded. Because, although we are told that the Principal Sudder Ameen who heard the evidence in his case is still on the spot, it is not probable that we should obtain from him at this distance of time any satisfactory opinion at this on the case.

With regard to the merits of the case, I think there is no doubt that the Principal Sudder Ameen, who decided this case, has come to a wrong conclusion. He finds, as a fact, that the contract of mortgage was genuine, and that it was executed by the mortgagors.

Now, it appears to me that, in accordance with the decision referred to of the Privy Council, 3 Moore's Privy Council Cases 347; the decision in 1 Weekly Reporter, page 327, that in the Sudder Court in 1859, page 197, and that in 1 Hays' Reports, page 57, in all ordinary cases that ought to be considered sufficient, and that the Court is bound to assume, unless it be shown to the contrary, that the transaction was a real one, and that the consideration-money was paid. Moreover, to my mind, it makes no difference whether the parties in possession and who rely on the mortgage are the original mortgagors or persons who claimed through them. I say in all ordinary cases, because there may be some extraordinary cases, in which more may be required; and it may be that the case referred to in the 3rd Volume of the Weekly Reporter, page 111, where the mortgagee was the servant of the mortgagor, was a case in which the Court was justified in requiring from those who relied on the contract some evidence that the consideration-money was paid. But in all ordinary cases, in accordance with the decisions which I have referred to, I think for those, who rely on the mortgage, it is sufficient to prove that the document is genuine, and that then the inference that the consideration, as stated, was performed, ought to stand until that is rebutted by some evidence to the contrary.

Nor does it appear to me to make the least difference whether that rebutting evidence comes from the defendant's witnesses, or is extracted from the mouths of the plaintiff's witnesses in cross-examination. I do not, therefore, base my opinion in this case on the sole ground that the defendant called no witnesses. I think one ought to see whether there is anything stated either by the plaintiff's witnesses or by the defendant's witnesses which rebuts the inference. To my mind there is in this case nothing whatever. It is not necessary for me to analyse the evidence. I entirely concur with

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I have thus gone through the whole of the reasoning upon which the Principal Sudder Ameen proceeds, and I really cannot find any part of it that seems to justify the conclusion at which he has arrived. I have said that the plaintiff's conduct is at least as consistent with honesty as it is with dishonesty, and a great deal of it appears distinctly to show the *bona fides* of his proceedings. But after all these matters had been considered and argued, Baboo Khettur Mohun Mookerjee, who appeared for one of the respondents, urged upon the Court with much persistence a point which had been considered in the Court below, and upon which the Principal Sudder Ameen had decided in the plaintiff's favor. He contended that this suit was barred by limitation under Section 246 of the Code of Civil Procedure. That Section is to this effect:—

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(Now it will be well to observe here that the position in which the plaintiff was, and alleged himself to be, at the time when he presented that petition to Court in the execution-proceedings, was that of a person who had a lien upon the estate. He did not, and could not, allege that he was in possession: nor could he effectually contend that such rights as the judgment-debtor possessed could not be put up and sold.) The Section then proceeds: "The order which may be "passed by the Court under this Section shall "not be subject to appeal, but the party against "whom the order may be given shall be "at liberty to bring a suit to establish his "right at any time within one year from "the date of the order." It is quite clear to me from the language of the Section that finality was to be given to the decision on the matter which the Court was to determine under that Section unless the party against whom the decision had been given should contest it by a suit in the Civil Court within one year. Was there any decision given under this Section? Clearly not. What the Court did actually determine has not been submitted to us, and we were subjected to a considerable loss of time, while Baboo Khetter Mohun Mookerjee was vainly searching for the order; but manifestly the

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These are all the observations which I think it necessary to make upon this case. As I stated, I think the decision of the Principal Sudder Ameen is wholly wrong. The judgment of the Court below will, therefore, be reversed, and a decree given to plaintiff for possession of the premises named in the plaint, together with wassilat to be ascertained in execution, with costs of suit and also of this appeal, and interest at the usual rate.

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With regard to the merits of the case, I think there is no doubt that the Principal Sudder Ameen, who decided this case, has come to a wrong conclusion. He finds, as a fact, that the contract of mortgage was genuine, and that it was executed by the mortgagors.

Now, it appears to me that, in accordance with the decision referred to of the Privy Council, 3 Moore's Privy Council Cases 347; the decision in 1 Weekly Reporter, page 327, that in the Sudder Court in 1859, page 197, and that in 1 Hays' Reports, page 57, in all ordinary cases that ought to be considered sufficient, and that the Court is bound to assume, unless it be shown to the contrary, that the transaction was a real one, and that the consideration-money was paid. Moreover, to my mind, it makes no difference whether the parties in possession and who rely on the mortgage are the original mortgagors or persons who claimed through them. I say in all ordinary cases, because there may be some extraordinary cases, in which more may be required; and it may be that the case referred to in the 3rd Volume of the Weekly Reporter, page 111, where the mortgagee was the servant of the mortgagor, was a case in which the Court was justified in requiring from those who relied on the contract some evidence that the consideration-money was paid. But in all ordinary cases, in accordance with the decisions which I have referred to, I think for those, who rely on the mortgage, it is sufficient to prove that the document is genuine, and that then the inference that the consideration, as stated, was performed, ought to stand until that is rebutted by some evidence to the contrary.

Nor does it appear to me to make the least difference whether that rebutting evidence comes from the defendant's witnesses, or is extracted from the mouths of the plaintiff's witnesses in cross-examination. I do not, therefore, base my opinion in this case on the sole ground that the defendant called no witnesses. I think one ought to see whether there is anything stated either by the plaintiff's witnesses or by the defendant's witnesses which rebuts the inference. To my mind there is in this case nothing whatever. It is not necessary for me to analyse the evidence. I entirely concur with

the observations which have been made upon it by my brother Jackson.

I only add this that, if this deed of mortgage could be set aside upon such reasoning as is used by the Principal Sudder Ameen, it would be scarcely safe to deal with any man having creditors at all.

With regard to the further point of limitation, I do not wish to add anything, because I entirely concur in the observations of my brother Jackson.

The 3rd May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Religious Endowment (Assam)—Lease (by High Priest).

Case No. 162 of 1867.

Special Appeal from a decision passed by Major H. S. Bivar, Officiating Judicial Commissioner of Assam, dated the 1st December 1866, reversing a decision passed by Mr. H. W. Mackenzie, Extra Assistant Commissioner of that District, dated the 9th July 1866.

Ram Doss and others (Plaintiffs), *Appellants,*

versus

Mohesur Deb Missree (Defendant), *Respondent.*

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter, Sreenath Doss,* and *Bhugobutty Churn Ghose* for Appellants.

Mr. J. W. B. Money and *Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee,* and *Tara Prosunno Mookerjee* for Respondent.

The High Priest of a religious endowment in Assam, who was only a nominee of the grantees, was held to have no right to grant leases in his own name and of his own authority.

Glover, J.—This was a suit on the part of a religious fraternity in Assam to restrain the defendant, who styled himself the Bora Shastree, or High Priest of the endowment, from doing certain acts independent of the control of the brotherhood. The wording of the plaint is "to establish the hereditary title in the Kollea Thakoor or idol," but the object of the plaintiffs was undoubtedly to obtain a declaration of their controlling right over the endowment as against the defendant acting as High Priest of the idol, and general manager of the estate with which it was endowed.

The defendant claimed to exercise these rights independent of the fraternity as hereditary High Priest.

The immediate cause of this action appears to have been the granting by the defendant of certain leases in his own name instead of in that of the idol, an assumption which the plaintiffs declared to be altogether inconsistent with his duties which were those of an elective High Priest of the brotherhood.

It is admitted, however, that this is one only of numerous causes of complaint between the parties, and that for the last 30 years the Shastree and the Bhukuts have been on bad terms. There are on the record several decisions of the Courts of Assam in suits between the parties in which the contest was the right of hereditary succession to the Shastreeship independent of the votes of the Bhukuts.

The plaintiffs claim under a copper-plate grant from the Rajah of Assam, dated on the 4th of Assar 1657 Shock Hindoo Era, by which a certain quantity of land is made over to 280 families of Bhukuts and others all named in the deed, for the purpose of making provision for the worship of the idol in the temple of Sree Shunkur Madhub Deb, the founder of this particular sect.

The Court of first instance found for the plaintiffs, holding the defendant to be merely an elective manager and priest, with no hereditary or independent rights in the endowment.

The Judicial Commissioner, however, decided that the grant conveyed "no proprietary right in the temple, or in the idol and lands" either to the plaintiffs or to the defendants. He held both parties to be administrators of a trust created by the grant, and therefore dismissed the plaintiff's suit.

Against this decision Mr. Doyne, for the special appellants, contends that the Judicial Commissioner has altogether misunderstood the nature of the plaintiff's claim; that they did not sue for possession of a proprietary right in the idol, but for a declaration of their privileges as conferred by grant, and for an order restraining the defendant from usurping rights which his position as Shastree gave him no claim to.

He further contends that the "Phallee" (copper-plate grant) confers the endowment solely on the Bhukuts and Pykes, and that the special respondent derives his position solely from them.

There can be no doubt, we think, that the plaintiff's suit was not for possession of, or to establish personal ownership in, the idol, but for a declaration of their privileges as grantees under the endowment, privileges which the defendant by giving leases in his own name was encroaching upon. The defendant claimed the right to give such leases as hereditary High Priest and manager. The grant was not made to the "idol," but to the religious fraternity of an already existing "Tharo" or temple, * and the families named in the grant were put in possession of the lands on condition of their keeping in their faith and worshipping the idol.

* *Note.*—The words used are "to the Tharo of Sree Shunkur Madhub Deb situated at Poora Buuttia composed of the 280 families of Bhukuts, &c., &c.

The holding of the endowment was to depend, no doubt, on the regular worship of the idol, but the suit was not for possession of the "Tharo," but for the control of the property attached to it.

But, were it otherwise, we do not see why a proprietary right in the endowment and in the idol as representing that endowment should not exist in the parties to this suit. The land is given absolutely to the Tharo which is described as being composed of such and such families, the only restriction being that the property is not to be alienated from the temple, and the parties would undoubtedly have a proprietary right within the words of the restriction.

Mr. Money, for the special respondents, argues that his client, being the duly-elected head or abbot, as the learned Counsel styles him, of the fraternity, cannot be restricted from exercising the rights of his office, or indeed be sued at all by his subordinates. This, we observe, is not the defendant's case as set forth in the pleadings. He there claims independent action as hereditary High Priest, not as elective head of the fraternity, and, moreover, this assumption begs the entire question. The special respondent is nowhere allowed to hold such a position as an abbot's would be; on the contrary, he is called a nominee, almost a servant, of the fraternity, bound to abide by their directions and counsel in all matters connected with the management of the endowment. It may be that, as Shastree, he has a certain religious pre-eminence, but that is not the point at issue here. It has been stated by the Judicial Commissioner that the grant shows the Bhukuts to be subordinate to the Shastree, but this part of his decision has been strongly objected to, and forms one of the grounds of special appeal.

And with reference to it and to the general construction placed upon the "Phallee" by the Judicial Commissioner, we are compelled to record our opinion against such meaning.

The Phallee itself is a grant to certain Bhukuts and Pykes, all of whom are named, and to their descendants for ever, of the lands. There is no mention of any Shastree as partaker of the endowment-benefits, nor is any one appointed to the office. At the head of the list of grantees, a blank space is left for the "High Priest" or Shastree. And this is to our minds convincing evidence that the appointment to that office was with the grantees generally. Had the Rajah intended to appoint himself, either at that or at any subsequent time, he would have expressly reserved to himself the necessary power. After the grant was executed unreservedly to the Bhukuts, the grantor had no power to appoint to the office of Shastree, so that, even supposing for the sake of argument that the notice of the office of Shastree placed at the head of the list of grantees is proof that the Rajah intended such office to be created, it is clear that the appointment to it rested with the Bhukuts, and that the party so appointed would be the nominee of the holders of the endowment, without any share in the endowment itself, and that, save in matters connected with the worship, the High Priest would have no authority at all, unless it were specially delegated to him by the grantees.

That this was so is, we think, apparent from the special respondent's own pleadings. He does not claim any portion of the endowed lands, which he certainly would have done had he been one of the fraternity, but merely demands certain privileges as manager of the estate.

As to his claim to hold his office by hereditary succession, we find no proof of the allegation in the Judicial Commissioner's judgment; on the contrary, that officer styles him, on the authority of the Board of Revenue, malgoozar or collector of rents by election, a position which the special appellants are quite ready to accord him.

And, although the Lower Appellate Court makes no mention of the fact, it is clear from the evidence recorded and noticed by

the Court of first instance, and from the decisions of the Assam Courts on the record of this suit, that the office of Shastree was not hereditary, but elective.

We think, therefore, that, as the plaintiff's suit was not for any proprietary right in the idol, but for the free exercise of their rights as grantees under the Phallee, the Judicial Commissioner's decision was based on a mistake of facts. We think, moreover, that his reading of the "Phallee" is a clear misconstruction of that document; that by it no superior rights are conveyed to the Shastree for the time being, but that the grant was made solely to the Bhukuts for the purpose of keeping up certain religious ceremonies.

This being so, it follows that the special respondent is only a nominee of the grantees, and had no right to grant leases in his own name, and of his own independent authority.

We think that the special appellants are entitled to the declaration of title sought, and that the Judicial Commissioner's order must be reversed with costs on special respondent.

The 3rd May 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Land-owners (Liability of)—Damage (to neighbouring lands).

Cases Nos. 3233, 3236, and 3237 of 1866.

Special Appeals from a decision passed by the Judge of 24-Pergunnahs, dated the 15th September 1866, affirming a decision passed by the Second Principal Sudder Ameen of that District, dated the 9th April 1866.

Kadur Buksh Biswas and others (Plaintiffs), *Appellants,*

versus

Ram Nag Chowdhry and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *R. T. Allan* and *Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee,* and *Obhoy Churn Bose* for Appellants.

Baboos Mohesh Chunder Chowdhry, Khetter Mohun Bose, and *Sham Lal Mitter* for Respondent.

A land-owner is not liable for damage caused to neighbouring lands where there is no proof of wrongful act or admission on his part.

Bayley, J.—It is admitted by the pleaders for all parties before us now that one and the same decision here will govern the above three cases.

Plaintiffs, certain ryots, sued certain zemindars as defendants for damages on account of injury done to their lands by the overflow of salt water from the Bidyadhuree river.

The first plaint was to the effect that the injury was caused by salt water coming through the Babnaira khal, owing to the defendants not maintaining a dam (embankment) with sluice gate in that khal which they were bound to maintain in such a manner that the salt water should not overflow so as to injure the cultivated lands of plaintiffs.

That first suit was dismissed on the finding of fact below that the alleged obligation of defendants did not exist.

On special appeal this case was remanded by a Division Bench of this Court; and it was ordered that the plaintiffs should be allowed to amend their plaint, by alleging that another khal had been opened which had injured plaintiffs.

The Principal Sudder Ameen (*i. e.,* the Court of first instance) dismissed those suits also, as it was not proved that this second khal (termed *Goee Khal*) was opened by defendants or with their sanction, and because no obligation on defendants so as to render defendants liable to plaintiffs for damages was shown.

An appeal was preferred to the Zillah Judge, not so much against the general finding as one of fact, but more upon the distinct and separate plea that every landholder had a general obligation to take such order on his land that damage might not accrue to his neighbours.

The case in appeal being argued in that shape before the Zillah Judge, he has held in a very full and elaborate judgment that the defendants are under no obligation or liable for damages to plaintiff, and that there is no reliable evidence adduced by plaintiffs to show that the khal was opened by the acts or sanction, or with the knowledge of the defendants.

Then, on the separate and new pleas raised for the first time before the Zillah Judge in appeal, the Judge holds that, there being

nothing to connect defendants directly with the cause of damage, no such general liability attaches to the owner of the land as was contended for by the appellants. The Judge also finds as a fact that, "so long as this channel was within the power of defendant's control, they kept out the salt water," and that here no wrongful act or omission is proved against the defendant.

In this view the Zillah Judge dismissed the appeal.

The special appeal is put before us in these terms by Mr. Allan, the Counsel for special appellant, *viz.*:—

That, as the defendants obtained profits from the illegal acts of their tenants, they are liable; and further the defendants are liable, because they are bound so as to govern and manage their lands that the neighbouring lands be not injured.

We do not think this special appeal can be allowed.

The plea in appeal below, and those in special appeal, are far beyond and far different from either the original or amended pleadings in the first Court, and this is not ordinarily permissible. But, allowing it to be so, and looking to the arguments pressed upon us by the learned Counsel, on the view that the present new plea may be taken, we are clearly of opinion that the learned Counsel has neither shown by any precedent of this Court, or of the late Sudder Court, or by the law, that his case comes within the purview of the maxim that a man must so use his own property as not to injure his neighbour. Mr. Allan quotes Broom's Maxims, page 277. That passage refers to acts done by owners, or with their sanction and knowledge. Here we have no acts, no knowledge, no sanction of defendants. But we may remark that the same learned author in his Commentaries, page 843 *et seq*, has clearly drawn the line as to a party being liable when his negligence is productive of damage, or where a wrong is done by his servants acting within the scope of their ordinary duty. Such negligence as the author refers to is not shown here as a fact on the part of defendants, nor are the ryots (supposing even them to be before us in these suits which they are not) of that class of servants as to render their zemindar responsible for their acts done without order or knowledge. In fact, there is neither duty, nor breach, nor consequential damage shown here; and, therefore, on no principle of law could we allow this plea now taken in special appeal.

On this view it would be perhaps not necessary to go into the plea in respect to the increased profits from julkur rents alleged to have been obtained by the defendants, and thus to making them responsible for the acts of the ryots. But no such enhanced profits in the case of these defendants is shown, nor, if they were, would they be other than profits incidental to the character and position of the estate.

In every view, consequently, we think that this special appeal should be dismissed, and we dismiss it accordingly with all costs.

The 3rd May 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Hindoo Law (Mitakshara)—Joint Family—Onus probandi—Sale by son (without father's consent).

Case No. 2527 of 1866.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 10th July 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 17th March 1866.

Sheo Ruttun Koonwar (Defendant), *Appellant,*

versus

Gour Beharee Bhukut and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Where one member of a joint family claims a property as separate, the *onus* is on him to prove his allegation. Under the Mitakshara Law, an alienation by a son without the father's consent is invalid.

Bayley, J.—THE pleas taken in special appeal are, in our opinion, valid.

These pleas are that the burden of proof has been wrongly put by the Lower Appellate Court upon defendant, special appellant, and that the alienation by one brother without the direct participation of the father and in his lifetime was invalid.

Plaintiff sued for a house at Bhaugulpore, alleging title by a purchase from Gopee and Lal Beharee, the sons of one Luchmun. The original purchase was in the name of *Gopee* alone. Defendant is an auction-purchaser at a sale in execution of the rights

and interests of Luchmun, the father, and Lal Beharee, the son, both judgment-debtors.

The Lower Appellate Court, admitting that the family lived jointly at Mirzapore, states that it is not shown by defendant, special appellant, that the house at Bhaugulpore was connected with the joint family, or otherwise than separate.

But with the presumption arising from the status of the family being admittedly joint, it was not on defendant, but on plaintiff who sued for the house at Bhaugulpore as a separate property, to prove that it was so.

Nor could the property be alienated under Mitakshara Law by the sons without the consent of the father then living.

We, therefore, decree this appeal with costs. We reverse the decision of the Lower Appellate Court, and remand the case to be tried with reference to the above remarks.

The 3rd May 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Hindoo Law—Inheritance—Adoption—Maintenance—Widow.

Case No. 2768 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 20th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 18th December 1865.

Mussamut Rutna Dobain (Plaintiff), *Appellant,*

versus

Purladh Dobey and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboos Mohinee Mohun Roy and *Khettur Mohun Mookerjee* for Respondents.

A widow has no rights, beyond those of maintenance, in a case where a valid adoption makes the adopted son the legal heir.

Bayley, J.—The plaintiff, special appellant in this case, *now* pleads before us that she has a right under the Mitakshara Law to participate in the estate of the adopted son.

The special appellant plaintiff's case below was that there was *no* adopted son, and that, therefore, she was entitled to a share in her husband's estate.

The Lower Courts found that plaintiff, suing to set aside the adoption as no valid adoption, failed to prove her allegation to this effect, and therefore dismissed her suit.

The plaintiff's special appeal is *not* against the correctness of the finding that there was a valid adoption (the denial of which was plaintiff's, special appellant's, case below), but a new and totally different case and claim as set forth above.

Both on this ground, and because the uniform current of recognized decisions is to the effect that a widow has no rights beyond those of maintenance, in a case where a valid adoption makes the adopted son the legal heir, we dismiss this special appeal with costs.

The 4th May 1867.

Present:

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Limitation—Suit to set aside alienations by Hindoo widow.

Cases Nos. 2711 and 2712 of 1866.

Special Appeals from a decision passed by Baboo Gobind Chunder Sandyal, Principal Sudder Ameen of Sarun, dated the 4th July 1866, affirming a decision passed by Pundit Omurnath, Moonsiff of Sewan, dated the 10th June 1865.

Tiluck Roy and others (Defendants), *Appellants,*

versus

Phoolman Roy and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellants.

Baboo Doorga Doss Dutt for Respondents.

A suit to set aside alienations of ancestral property made by a childless Hindoo widow during her life-tenancy may be brought at any time within 12 years from the death of the widow.

The existence of a debt, liquidation of which is provided by lease of ancestral property, is no justification for alienation of such property by a Hindoo widow during her life-tenancy.

Hobhouse, J.—The facts in these cases are admitted, and are these:—

One Ram Churn, the ancestor of plaintiff, special respondent, died leaving a widow, Jankee.

This lady deceased without issue in 1272; but during the time of her tenancy of her husband's property, *i. e.*, in 1841 and 1842 A. D., she had, in two separate deeds of dates in those years, alienated that property.

Within twelve years from the death of Jankee, plaintiff sued to set aside these alienations, and the first contention on the part of special appellants is that, inasmuch as the suits were not brought within 12 years from the dates of the respective alienations, they are barred by the application of the Statute of Limitations.

We think that this contention is not good, for it has been repeatedly held by this Court that, in suits to set aside alienations of ancestral property made by a childless Hindoo widow during her life-tenancy, the suitor, who comes in within 12 years from the death of the widow, is in time.

The next objection taken is on the part of the special respondent, and he contends that the alienation of the 29th October 1842 was made without any justifying necessity.

We think this objection is, on the facts found by the Lower Courts, valid.

Special appellants relied on two documents as showing a justifying necessity: the first, a kubooleut of 29th January 1834; and the second, the deed of sale of 1842.

This kubooleut sets forth that Ram Churn is indebted to one Bheek Roy in the sum of Rupees 250; that, as security for the payment of this debt, he gives to Bheek Roy a farm of a certain property for a period of 7 years; that if, at the close of these 7 years, the Rupees 250 are re-paid, the farm lease shall lapse; but that, if the Rupees 250 shall not then be paid, then the farm lease shall hold good up to date of payment.

Then in 1842 the widow of Ram Churn sells the property in question for Rupees 600 in order to pay off this debt of Rupees 250.

Clearly, in our judgment, there was no necessity for this sale, for obviously this debt of Rupees 250 was a debt already provided for under the very terms of the farm lease, and not, therefore, a debt for which there was any necessity to alienate ancestral property.

In this view of the case, whilst we dismiss both these appeals with costs and interest thereon, we so far modify the decree of both the Lower Courts as to direct that plaintiff's, special respondent's, suits be decreed in full and with costs in all the Courts.

The 4th May 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Joint Hindoo Property—Presumption.

Case No. 3056 of 1866.

Special Appeal from a decision passed by Mr. G. G. Morris, Additional Judge of Jessore, dated the 31st August 1866, reversing a decision passed by Pundit Tara Kant Bidyasagur, Principal Sudder Ameen of that District, dated the 9th March 1866.

Sreeram Ghose and others (Defendants), *Appellants,*

versus

Sreenath Dutt Chowdhry and others (Plaintiffs), *Respondents.*

Mr. R. V. Doyne and *Baboos Onookool Chunder Mookerjee* and *Dwarkanath Mitter* for Appellants.

Mr. A. T. T. Peterson and *Baboos Rajendurnath Bose, Chunder Madhub Ghose,* and *Kalee Prosunno Dutt* for Respondents.

So long as no partition of a joint estate is proved, the presumption is that the property is joint. The fact that certain parcels are admittedly held in severalty does not rebut the presumption as regards the rest of the joint estate.

Macpherson, J.—It is contended in special appeal that the Lower Court erred in holding that there was a presumption in the plaintiff's favor which threw the *onus* of proof upon the defendants. It is argued that there is no presumption that the plaintiffs are entitled to the share which they claim, but that they are bound to prove their title distinctly, inasmuch as it is admitted by all parties that (although, as found by the Lower Appellate Court, there has been no actual formal partition) there has been separate enjoyment of certain portions of what originally belonged to the joint estate.

We think that the Lower Court is right; and that, so long as no partition is proved, the presumption is that the property is joint, and that the *onus* lies upon the defendants to prove the contrary. The fact that certain parcels are admittedly held in severalty does not, as it seems to us, do away with the presumption as regards the rest of what originally constituted the joint estate.

It is further contended that the Lower Appellate Court has wrongly viewed with suspicion the copies of quinquennial papers filed by the defendants. If this be a matter open to discussion in special appeal (which is doubtful), we are of opinion that the Judge was not wrong in the view he took of these papers.

We dismiss the appeal with costs; and we make the like order in the cases Nos. 3057, 3058, 3071, 3073, and 3074, which are governed by our decision in this case.

The 4th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Principal and Agent—Stamp-duty (objection by way of cross-appeal).

Case No. 2982 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 29th August 1867, modifying a decision passed by the Deputy Collector of that District, dated the 26th May 1866.

Mr. G. L. Fagan and others (Plaintiffs), *Appellants,*

versus

Chunder Kant Banerjee and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

In taking an account under Section 24 of Act X. of 1859, an agent is bound to account for all moneys received by him on account of his principal, but he may render such account either by showing that they were paid to the principal or for his benefit and by his authority. As a general rule, an agent or collector cannot discharge himself of moneys for which he is liable to account, by proving payments or advances to third parties, unless he can show that such payments or advances were made by the express authority of the principal or with his knowledge and consent.

An objection by way of cross-appeal will not be entertained except on payment of the stamp-duty required by Section 6 (E) of Act XXVI. of 1867, though a petition setting out the grounds of such cross-appeal on a stamp of Rs. 2 had been filed before the passing of that Act.

Norman, J.—This is an appeal by the plaintiff valued at Rupees 669.

The suit is brought against an agent employed in the collection of rents, under Section 24 of Act X. of 1859.

The defendant is bound to account to the plaintiff in this suit for all the moneys which he has received, but he may render such account either by showing that they were paid to plaintiff, or for his use *and by his authority*—as for repairs to his houses—payments for the feed and keep of his elephants, or to third persons at his request.

The Judge should, therefore, have enquired to what extent the defendant has actually discharged himself by payments for the repairs of the house, and the keep of the elephants.

As regards the payment of a dâk fine and some expenses connected with Shaikh Megoo's case, it is quite clear that these payments were for the use and benefit of the plaintiffs, and such as the defendant was authorized in making, because, if they had not been paid, probably the plaintiff's property might have been sold to satisfy the demands.

With respect to two items, Haut Kaligunge, and the wages of a servant named Okhoy, the Judge must record an intelligible finding. With regard to "howlats" and certain sums paid to Kasheenath Mullick, as a general rule, an agent or collector cannot discharge himself of moneys for which he is liable to account by proving payments or advances to third parties unless he can show that such advances or payments were made by the express authority of his master, or with his knowledge and consent. With reference to these items, the Judge will enquire whether the defendant in the present case had any such authority or not.

It was objected that the stamp in the appeal was insufficient, because the appellant by his appeal sought to open up accounts as to sums amounting to Rupees 2,300 and upwards. But we think that the appeal admits of the construction that, in respect of these items, a sum amounting to Rupees 669 has been improperly allowed, and, that being the plaintiff's claim, the stamp is sufficient.

The respondent sought to be allowed to take an objection by way of cross-appeal. He had put in a petition by way of cross-appeal in the month of April on a stamp of two rupees. We disallowed the cross-appeal, thinking that, under the provisions of Act XXVI. of 1867, Section 6 (E.), we were precluded from hearing the objection unless the respondent paid the additional stamp-duty under that Act.

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The 6th May 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Illegal Cess.

Case No. 56 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 27th September 1866, reversing a decision passed by the Moonsiff of that District, dated the 26th July 1866.

Sonnum Sookul and others (Plaintiffs), *Appellants,*

versus

Shaikh Elahee Buksh and others

(Defendants), *Respondents.*

Baboo Rajendronath Bose for Appellants.

Mr. R. E. Twidale for Respondents.

In the absence of a special agreement, a claim for an illegal cess cannot be recovered in a Court of Law.

Glover, J.—We see no reason to interfere with the Lower Appellate Court's order in this case.

The Principal Sudder Ameen has found on the evidence that the defendant pays a money-rent for his land to the special appellant, and that the latter claimed besides an illegal cess of so much *goor* on every maund manufactured.

It is urged in special appeal that this is of the nature of a rent paid in kind; but, on turning to the record, we find that the special appellant's karpurdauz and vakeel was himself examined, and he admitted that this cess of *goor* was over and above the regular money-rent paid for the land.

We think, therefore, that, as no agreement was entered into between the parties for this extra payment, the present claim is an illegal cess which cannot be recovered in a Court of Law.

The special appeal is dismissed with costs.

The 6th May 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Limitation—Suit for possession—Hindoo Widow.

Case No. 2735 of 1866.

Special Appeal from a decision passed by Mr. E. W. Molony, Officiating Judge of Moorshedabad, dated the 16th July 1866, affirming a decision passed by Baboo Digambur Biswas, Principal Sudder Ameen of that District, dated the 30th December 1864.

Ram Doollub Sandyal (Defendant), *Appellant,*

versus

Ram Narain Moiter and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

R purchased a putnee mehal, and devised it to his son *G*. *G* died after *R* childless and intestate, and leaving a widow *S*, who also died, neither of the three having ever taken possession of the mehal. Plaintiff, as *G's* nephew, sues to recover possession of the mehal. HELD that his cause of action did not arise until the death of *S*.

Markby, J., *dubitante.*

Markby, J.—The only question of law arising on this special appeal turns upon the Law of Limitation as laid down in Act XIV. of 1859.

The facts were that a certain putnee mehal was purchased by one Ram Ruttun, and devised by him to his son Gunga Gobind. The property was purchased in 1242, and Ram Ruttun died at some time prior to 1250.

Gunga Gobind died in 1251, childless and intestate, and leaving a widow Shibo Soonduree. The widow died in Pous 1269.

Neither Ram Ruttun, Gunga Gobind, nor Shibo Soonduree, ever took possession of the putnee mehal.

No explanation was given of this circumstance; but it was assumed in the argument, and I assume it for the purposes of this judgment, that the Statute began to run against Ram Ruttun from the date of the purchase in 1242.

The plaintiff is the nephew (it is not said whether brother's or sister's son) of Gunga Gobind, and his general title to succeed to the estate of his uncle is not disputed. He

now sues to recover possession of the putnee mehal, and, the defendants not having made out any title, the question is whether the plaintiff is barred by the Act.

This suit was instituted in Jeit 1271. The Act, by Clause 12 of Section 1, provides that the period within which a suit of this nature may be instituted "shall be twelve years from the time *when the cause of action arose.*"

The first position taken by the vakeel for the plaintiff was that, even assuming that the plaintiff's cause of action arose in 1242, still that he is in time, because, in computing the twelve years, the whole period during which the widow was in possession and the heir unable to sue for possession must be excluded.

But I am clearly of opinion that this position is untenable. *Contra non valentem agere non occurrit prescriptio* is a maxim largely adopted by the law, but it cannot prevail against the express provisions of the Legislature; and, if the words "when the cause of action arose" are to be considered as referring to the time when the cause of action arose to Ram Ruttun, then, as the person to whom the right accrued was under no disability at that time, the words of Section 11 expressly exclude the plaintiff from taking advantage of any subsequent disability.

But the vakeel for the plaintiff has taken another ground. He contends that the cause of action in the Act must mean the plaintiff's cause of action, and that the plaintiff's cause of action is not the same cause of action as that of Ram Ruttun and Gunga Gobind, but a different cause of action altogether.

This is a point upon which, if the question had been *res integra*, I should have had the greatest difficulty in giving an opinion. But there are two cases, in which it appears to me that this point has already been decided.

In the case of Wooma Churn Banerjee *versus* Haradhun Muzoomdar, reported in the 1st Volume of the Weekly Reporter, Civil Rulings, page 347, the plaintiff sued for possession of certain properties, on the allegation that they belonged to his maternal grandfather and maternal uncle, and, after their death, devolved on his grandmother Ram Koomaree. The defendants seem to have relied entirely on their possession, and called upon the plaintiff to prove possession by himself or by some person through whom he claimed within 12 years. This the plaintiff was unable to do; but he contended that the Statute did not begin to run against him until the death of his grandmother.

Upon this point, the Court say: "After "hearing the arguments of Counsel and "a careful consideration of the case, we "are clearly of opinion that limitation does "not bar the suit, *because the cause of* "*action arose only from the death of the* "*grandmother who had the life-interest.*"

The other case is that of Kumul Shah Bennick *versus* Ramjee Shah Bennick, reported in the 2nd Volume of the Weekly Reporter, Civil Rulings, page 276. In this case, the question was as to right of succession to the estate of one Radha Kisto, and the case was remanded in order that it might be ascertained what was the real state of the family. But, in making their order of remand, the Court say: "If, after the "death of Radha Kisto or his widow, his "daughter was entitled to succeed, and did "not hold possession after his or her death, "as the case may be, the sons of this daugh-"ter are entitled to sue for their own rights "within 12 years of the death of their own "mother, and to require the period of their "minority to be taken into consideration "according to the principles of Section 11, "Act XIV. of 1859."

It is clear from these remarks that the Court here concur with the view already expressed in the case of Wooma Churn Banerjee *versus* Haradhun Muzoomdar, namely, that the cause of action would only arise on the death of the widow, who took a limited interest.

Upon the authority of these two cases, and without expressing any opinion of my own, I hold that the plaintiff's cause of action in this case did not arise until the death of Gunga Gobind's widow; that this suit is not barred by limitation; and that the appeal should be dismissed with costs.

Kemp, J.—I am of opinion that the plaintiff's cause of action accrued when the succession opened out to him by the death of the widow; and, as the suit is in time dating from that event, the special appeal must be dismissed with costs and interest.

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The 6th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Suit (by Hindoo Widow during lifetime of adopted son).

Case No. 170 of 1867.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 11th December 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 13th March 1866.

Jannobee Chowdhrain (Plaintiff), *Appellant,*

versus

Dwarkanath Roy Chowdhry and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboos Dwarkanath Mitter and *Kishen Dyal Roy* for Respondents.

A widow cannot sue during the lifetime of an adopted son who has arrived at majority. A petition of the adopted son withdrawing an objection previously made by him to the suit being brought cannot cure the defect in her plaint.

Kemp, J.—This was a suit on the part of a widow, who, it is admitted, has an adopted son who has arrived at majority.

The lady sues for possession of a 6-anna share in a small fishery, alleging it to belong to her kharija talook of which she was in possession, and that her co-sharers in the julkur had ousted her; hence the suit.

The adopted son first objected to the suit being brought. He then withdrew his objection, and in this Court, though not made a respondent, and therefore not entitled to be heard, he, through his pleader, orally made no objection to the suit proceeding.

We think it is very clear that the plaintiff had no title to bring this suit. She originally, as stated by the Judge, set up a special plea that, under the will of her husband, a life-interest in his estate was reserved to her, although she had adopted a son. This plea she failed to prove.

The petition of the adopted son will not cure the defect in the plaint. This petition does not amount to a transfer of the title of the son to the widow, and the suit of the latter will not lie. *See* Weekly Reporter, Volume II., page 49, Civil Rulings. The adopted son is at liberty to sue if so advised.

The appeal is dismissed with costs and interest.

The 6th May 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Stamp-duty—Applications to High Court for copies of decree and judgment.

Application praying for a certified copy of the decree and judgment passed on the 29th May 1866, in Special Appeal No. 3115 of 1865.

Turif Biswas, *Petitioner.*

Baboo Khettur Mohun Mookerjee for Petitioner.

Applications to the High Court for certified copies of the decree and judgment may be engrossed on a stamp of one anna, under Clause 6, Article 10, Schedule B of Act XXVI. of 1867.

Deputy Registrar.—The pleader, Baboo Khettur Mohun Mookerjee, has filed this application for certified copies of the decree and judgment in the above case, on a stamp of the value of *one anna only.*

According to Section 4 of the new Stamp Act (XXVI of 1867), application on stamp-paper must now be made for such copies, and thus the practice that prevailed under the old Stamp Act, before the Civil Procedure Code came into operation, is revived (*see* Section 198).

The pleader urges that, according to the 6th Clause of Article 10, Schedule B, a stamp of the value of one anna is prescribed for such an application.

To me that Clause appears to provide for applications for copies when presented before the Lower Courts, &c. The 1st Clause is the one which provides for "any applications" presented to this Court, and includes, I presume, those for copies of decrees and judgments.

I beg the orders of the Judge presiding in the Miscellaneous Department on the point.

Jackson, J.—I think that the following words in the 6th Clause of Article 10, Schedule B, annexed to Act XXVI. of 1867, refer to the High Court as well as to the inferior Courts: "When presented to any "Civil, Criminal, or Revenue Court, or "any Board of Revenue, or any Commis- "sioner of Revenue or Circuit, or any "Chief Officer charged with the exe- "cutive administration of a division for "a copy, or for a translation of any "judgment, decree, or order, or other docu- "ment on record." The words any Civil Court certainly include the High Court; and, although in the first Clause of the same Article there is a provision of 2 rupees as stamp-duty on petitions generally presented to the High Court, there is also a provision of one rupee on petitions to the Board of Revenue, the Chief Commissioner, or Commissioners of Revenue or Circuit, and yet the Boards of Revenue and Chief Commissioners are equally included in the provisions of the 6th Clause. If, therefore, the High Court were to be excluded from the operation of the 6th Clause by reason of the stamp-duty of 2 rupees being specially provided for that Court, then the Board of Revenue or Commissioners would also have to be excluded by reason of a stamp-duty of one rupee being prescribed for them, and yet such exclusion would be contrary to the express words of the last Clause. Consequently, I think that the petition has been rightly engrossed on a stamp of one rupee.

This is, in fact, a special or reduced duty prescribed in the case of the High Court as well as other Civil Courts, in respect of the particular applications referred to.

The 7th May 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Limitation (Section 246, Act VIII. of 1859)—Claims to attached property.

Case No. 2948 of 1866.

Special Appeal from a decision passed by the Judge of Gya, dated the 28th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 15th January 1866.

Jugoo Lal Upadhya and others (Plaintiffs), *Appellants,*

versus

Mussamut Ekbaloonissa and others (Defendants), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

The plaintiff applied for the attachment of a property, and, on the objection of the defendant, the property was released from attachment. HELD that the plaintiff was bound, under Section 246, Act VIII. of 1859, to sue in the Civil Court to establish his right within a year from the order of release.

Jackson, J.—THIS was a suit asking for a declaration of the plaintiff's right to have 1th share of Mouzah Poorah brought to sale in execution of plaintiff's decree against one Ahmed Hossein deceased, and alternatively the right which he sought to enforce was described as a right to have the defendants made liable under that decree by reason of their having inherited the said fourth share of the mouzah in question, and the plaint also asked to set aside an order passed under Section 246 of the Civil Procedure Code.

The Lower Appellate Court held the suit barred as having been brought in the Court having jurisdiction, after one year had expired from the passing of the order.

In special appeal, it is contended—

1st.—That the limitation of one year did not apply.

But on this point we are clearly of opinion that the Judge was right. It was quite immaterial whether the plaint contained a prayer for the reversal of the summary order or no. The plaintiff had applied for the attachment of the mouzah, defendant had preferred an objection, and on that objection the mouzah, whether rightly or wrongly, was released from attachment. That order was binding on the plaintiff, and he had to do what in fact he did do, *viz.*, to bring a civil suit to establish his right, and the period limited for such suits is one year.

2nd.—That the Principal Sudder Ameen made no order under Section 246. But he clearly did make such an order, for he released the property, and the plaintiff himself manifestly regarded the order in that light, for he prayed that it might be set aside.

3rd.—That the plaintiff sought in the present suit to have the defendants made liable to satisfy the judgment in respect of their having inherited from the original judgment-debtor the very property in dis-

d

pute. But this is merely another way of stating the same matter.

A case has been cited from 7 Weekly Reporter, page 252, in which the Court held the limitation of one year not to apply. But that was a case clearly distinguishable from the present. An objection was made, and the Court executing the decree avoided any adjudication upon the subject-matter of the objection, and sold the property subject to the claim. Here the Court allowed the claim, and released the property. We think the decision of the Lower Appellate Court was right, and we affirm it with costs.

The 7th May 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Alluvial Land.

Case No. 94 of 1867.

Application for review of judgment passed by the Hon'ble Justices Bayley and Shumbhoonath Pundit, on the 25th January 1867, in Special Appeal No. 2408 of 1866.*

Doyá Moyee Dossee and others, Plaintiffs (Respondents), *Petitioners,*

versus

Luchmee Narain Shaha and others, Defendants (Appellants), *Opposite Party.*

Mr. J. W. B. Money and *Baboo Otool Chunder Mookerjee* for Petitioners.

No one for Opposite Party.

Where a person claims possession of an increment as by ancestral right, his suit must be brought within 12 years from the formation of the increment, and the possession of it by another party on adverse title.

Bayley, J.—In this case, Mr. Money, the learned Counsel for the applicant for review, argues that this Court has wrongly held that the cause of action arose in this case to the applicant (the plaintiff) when the new chur was created, and possession was withheld from plaintiff, admittedly for 20 or 25 years.

After fully hearing the learned Counsel, we are still of the opinion expressed in our judgment in the special appeal.

The learned Counsel urges that the cause of action could only arise to his client from such time as he became entitled by a decree of 27th September 1862 to the parent estate to which the new chur is an increment, and only from such time as he got possession under such decree. The learned Counsel refers to Clause 1, Section 4, Regulation XI. of 1825, as laying down the principle that new increments follow contiguous parent mehals, and that, consequently, till his client was in a position by possession *under the decree* referred to, to set forth that he *legally* held the parent estate, no cause of action arose to him as to the increment. Further that till then the possession of the farmer who held under settlement with the zemindar was a rightful possession, and therefore no cause of action could arise in that interval to another.

We cannot concur in this argument.

A settlement may give possession, and actual possession is the basis on which a settlement is ordinarily made. But a superior title by possession may be acquired under right declared by decree of Court to possession, overriding altogether the settlement made on mere possession only.

There was nothing to prevent plaintiff's action to obtain this declaration of right; but for 20 or 25 years another party has held possession of this new increment against plaintiff, that is to say, of that which plaintiff avers is his right by virtue of ancestral title, and against which title for 12 years before this suit another party kept plaintiff out of possession.

Nor do we agree in the plea that only separate new increment cannot be sued for at any time by a party then considering himself to have a right to it, by whoever, and under whatever title, it may be held. What the result of the action might be, is another matter, not affecting the point before us, and which will depend on the circumstances of each particular case as governed by the several provisions of Regulation XI. of 1825; but there is no legal reason in our opinion for the plaintiff to allow quietly and undisturbedly possession to another party of the increment for 12 years before suit all that time when he claims that increment as his by ancestral right. We may add that the cases cited do not cover the facts of this case, and that the English Law of Limitation re-

* See *ante*, p. 89.

lied on is not the Law of Limitation which we have to administer.

In this view we reject the application.

The 8th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Lakheraj—Onus probandi.

Case No. 183 of 1867.

Special Appeal from a decision passed by Baboo Nobin Kishen Paulit, Principal Sudder Ameen of Midnapore, dated the 19th November 1866, affirming a decision passed by the Moonsiff of that District, dated the 5th March 1866.

Ram Jeebun Chuckerbutty and others (Plaintiffs), *Appellants,*

versus

Pershad Shar and others (Defendants), *Respondents.*

Baboo Umbica Churn Banerjee for Appellants.

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Dwarkanath Sein* for Respondents.

When a plaintiff comes into Court to prove a lakheraj title, no proof of possession for years (unless it be carried beyond 1790) as apparent lakheraj can excuse him from proving his title.

Glover, J.—This was a suit by the special appellant to establish his title to certain land as lakheraj.

It appears that the zemindar, defendant, had sued certain ryots of the estate for enhanced rent under Act X. of 1859, and that the special appellant intervened in that case, urging that the land was not the zemindar's mal but the intervenor's lakheraj. The Collector, however, decided against the intervenor under Section 77 of the Act, and the latter was referred to a regular suit. This he has now brought.

Both Lower Courts dismissed his suit, the Principal Sudder Ameen holding that the plaintiff had failed to prove that the land was lakheraj.

The point taken in special appeal is that, under the circumstances of the case, the plaintiff was not bound to prove his lakheraj title, long possession as apparent lakherajdar being sufficient to throw the *onus* on the zemindar. The decision of the Full Bench of this Court in the case of Mun Mohinee Dossee *versus* Joy Kishen Mookerjee. Weekly Reporter, Special Number, 174, is quoted in support of the position.

This objection is not to be found in the grounds of special appeal, but we have allowed it to be argued. It is, however, worth nothing. In the first place, the Full Bench ruling has no connection whatever with the present case. In that suit the zemindar had ousted the tenant under the powers conveyed by Section 10, Regulation XIX. of 1793, on the ground that the lakheraj had been created after 1790 A. D., and it was held that the zemindar was bound to support his ouster by proving that the lakheraj had been so created. In this case, the ryot was ousted by the action of the Collector's Court which found that the land had been paying rent to the zemindar. The plaintiff came into Court to prove his lakheraj title, and, like any other plaintiff, was, of course, bound to do it, and, in fact, did try to do it, by filing a "char" and other documents in support of his alleged rent-free title. It is only here in special appeal that he abandons his previous position, and takes up new ground.

We have no doubt that, where a plaintiff comes into Court to prove a lakheraj title, no proof of possession for years (unless it be carried beyond 1790) as apparent lakheraj can excuse him from proving his title.

And, with regard to that proof, the Principal Sudder Ameen has found distinctly that it is altogether insufficient, and, moreover, that the land is proved to be mâl land of the zemindar's estate. We may remark, in addition, that the "char" on which the plaintiff relied had already, so far back as 1861 A. D., been pronounced spurious in a case referred to the Collector under Regulation II. of 1819.

In no point of view, therefore, do we see any ground for special appeal in this case, and we reject the application with costs.

The same remarks apply to special appeal No. 191, which is dismissed for the same reasons.

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The 8th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Clause 6, Section 23, Act X. of 1859—Suit to recover possession.

Case No. 192 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 30th November 1866, reversing a decision passed by the Moonsiff of that District, dated the 26th June 1866.

Seraj Mundul and others (Plaintiffs), *Appellants,*

versus

Bistoo Chunder Roy and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Debendro Narain Bose for Respondents.

Clause 6, Section 23, Act X. of 1859, refers to suits by a tenant against his landlord, and not to suits by a tenant against a third party, between whom and the tenant the relation of landlord and tenant does not exist.

Kemp, J.—In this suit the Principal Sudder Ameen held that he had no jurisdiction to try it, inasmuch as a suit under Clause 6, Section 23, Act X. of 1859, for the disputed tenure, and to which the present plaintiff and the defendant were parties, had been decided by the Revenue Courts.

In special appeal it is contended that Clause 6, Section 23, refers to suits by a tenant against his landlord, and not to suits by a tenant against a third party between whom and the tenant the relation of landlord and tenant does not exist. This contention is correct, for the special appellant is not the tenant of the special respondent, but claims to hold a jumma under the lakherajdars; whereas the defendant, special respondent, claims to hold by purchase from one Goburdhun, the lessee of the lakherajdars.

The Principal Sudder Ameen is referred to a decision of the Full Bench, dated 22nd February 1867, page 186, Weekly Reporter, Volume VII., No. 8.

The suit is remanded for trial. Costs to follow the result.

The 8th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement—Fair rates for talookdars.

Case No. 201 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 28th December 1866, affirming a decision passed by the Deputy Collector of that District, dated the 28th May 1864.

Huro Soonduree Chowdhrain and others (Defendants), *Appellants,*

versus

Anund Mohun Ghose Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboos Chunder Madhub Ghose and *Kishen Dyal Roy* for Respondents.

A talookdar's rent cannot be enhanced to the same rate as that paid by cultivating ryots; the talookdar is entitled to some reasonable profits.

Kemp, J.—This was a suit for enhancement, and the only point taken in special appeal refers to the rates which, it is contended, are not fair and equitable.

We think that the suit must be remanded. The zemindar treated the defendant as a talookdar. This is clear from the notice which would have been wholly informal had such not been the case. The evidence upon which the Judge bases his finding as to the rates proves the rates paid by cultivating ryots, and not the rates paid by a talookdar.

The special appellant is, beyond doubt, an intermediate holder between the zemindar and the occupant ryots. The Judge, in adopting the rents payable by cultivating ryots, has not, in our opinion, fixed a fair and equitable rate. The special appellant, as talookdar, is entitled to some reasonable profits; but, if he has to pay to the zemindar at the same rate as the ryots pay to him, it cannot be said that the assessment is either fair or equitable.

The suit is remanded. The Judge will endeavour to fix what is a fair and equitable rate of rent suitable to the intermediate position which the special appellant holds between the zemindar and the occupant ryots.

The 8th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Recognition of Tenancy—Receipt of Rent—Fraud.

Case No. 194 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 27th November 1866, reversing a decision passed by the Moonsiff of Radhanuggur, dated the 24th July 1866.

Gudadhur Banerjee (one of the Defendants), *Appellant,*

versus

Khettur Mohun Surmah and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Juggodanund Mookerjee for Appellant.

Baboo Nil Madhub Sein for Respondents.

HELD that a zemindar, by taking the rent of the plaintiff's purchased lands after the rent was deposited by him in the Collector's treasury, virtually admitted the plaintiff's status as purchaser from the former ryots, and that he had attorned to him as landlord; and that, as this payment was made long before the zemindar sued the former ryots for enhanced rent under Act X. of 1859, the decree obtained in that suit must have been collusive.

Glover, J.—THIS was a suit for a declaration of the plaintiff's title by purchase to certain plots of land within the defendant's zemindaree.

It appears that the zemindar (special appellant in this suit) sued the former ryots of these lands, and got a decree for enhanced rent under Act X. of 1859, and special respondent sues to have this decree cancelled, on the ground that the land was, at the time of the suit, his own, and that the decree was the result of collusion between the zemindar and the former ryots, plaintiff's vendors.

The zemindar defends the suit by declaring that the plaintiff never registered his name in the mutation-books of the zemindaree, and that, in consequence, he never recognized him as his tenant, but sued the old occupants.

Both Courts found for the plaintiff.

It is urged specially that, supposing the zemindar to have received the rent of the land from the plaintiff, that does not alter the former's position, but that the plaintiff must prove that the decree against the old ryots was fraudulent.

On this objection it is enough for us to say (the genuineness of the special appellant's kobalah being found, as a fact, by the Lower Appellate Court) that the zemindar, by taking the rent of the plaintiff's purchased lands, after that rent was deposited by him in the Collector's treasury, to all intents and purposes, admitted the plaintiff's status as purchaser from the old ryots, and that he had attorned to him as landlord; and, as this payment was made long before the Act X. suit for enhanced rent, it follows, almost as matter of course, that the decree obtained in that suit must have been collusive.

At all events, there is no ground for this special appeal, the Principal Sudder Ameen having committed no error of law in his judgment.

The application is dismissed with costs.

The 8th May 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Special Appeal—Fine—Recusant witnesses.

Lowazima Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 22nd November 1866, affirming a decision passed by the Moonsiff of that District, dated the 22nd March 1866.

Pran Kisto Deo (Plaintiff), *Appellant,*

versus

Kalee Doss Deo and others (Defendants), *Respondents.*

Appellant present in person.

No one for Respondents.

The refusal of a Moonsiff to inflict a fine upon recusant witnesses is no ground for special appeal.

THE petitioner comes up in person with an application to prefer a special appeal, which application is not certified by a vakeel of the Court.

The ground on which he seeks to appeal specially is that the Lower Appellate Court has refused to reverse the decision of the Moonsiff on this objection, namely, that, whereas the petitioner, being plaintiff in the suit pending before the Moonsiff, had named certain witnesses, and those witnesses, after a service of summons upon them, had omitted to appear, and proclamation had been issued for their appearance, and their goods had been attached, the petitioner having ap-

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plied to the Moonsiff to fine the recusant witnesses, the Moonsiff refused to do so, and afterwards dismissed the plaintiff's suit.

It appears to me that this is not a valid ground of appeal. Section 167 of the Code of Civil Procedure provides "that any person "who shall be summoned to appear and give "evidence in a suit, shall be bound to attend "at the time and place named in the sum-"mons for that purpose." That being so, any person, intentionally omitting to attend upon such summons, commits an offence under Section 174 of the Indian Penal Code. By Section 168 of the Code of Civil Procedure, if any person, on whom a summons to give evidence has been served, shall, without lawful excuse, fail to comply with the summons, the Court may order such person to be apprehended. If such person abscond, so that he cannot be apprehended, his property shall be liable to attachment and sale in the mode prescribed by Sections 159 and 160 of the same Act. Section 160 provides that, "after such attachment and "proclamation, it shall be lawful for the "Court to order the property attached or "any part thereof to be sold for the pur-"pose of satisfying all costs incurred in "consequence of such attachment, together "with the amount of any fine which the "Court may impose upon such witness or "other person under the provisions of any "law for the time being in force for the "punishment of a witness who may abscond "or keep out of the way in order to avoid "the service of a summons." At the time of the passing of Act VIII. of 1859, Act XIX. of 1853 was in force, and by Section 24 of that Act, Civil Courts were empowered to impose upon witnesses on whom summons had been served, who omitted to appear upon such summons, a fine not exceeding 500 rupees. That Act has been repealed as regards proceedings under Act VIII. of 1859, except only the Sections 19 and 26, and the Civil Court does not appear at present to have any power to inflict a fine upon witnesses who fail to appear after service of summons. And, under Section 168, Chapter 11 of the Code of Criminal Procedure, prosecutions in such cases must be instituted before the Magistrate, with the sanction or on the complaint of the Court concerned. And, under Section 26, Act XIX. of 1853, any person to whom a summons to attend and give evidence shall be personally delivered, and who shall, without lawful excuse, neglect to obey such summons, is still liable to the party at whose request the summons shall have been issued for all damages which he may sustain in consequence of such neglect or refusal, to be recovered in a civil action. Section 30 of the same Act expressly provided that it should not be necessary to postpone the hearing or decision of a case for the non-production of a document, or for the evidence of a witness who may neglect to attend beyond such period as shall appear proper to the Court. This latter Section is no longer in force in respect of proceedings under Act VIII. of 1859. On the other hand, there is a rule of law which prescribes that the hearing or decision of a case should be postponed by reason of the non-attendance of a witness. Nor is there anything which requires the Civil Court in such a case to institute a prosecution before the Magistrate, nor, if that were obligatory on the Civil Court, would the result of such prosecution affect the result of the civil suit.

It appears to me, therefore, that the refusal of the Moonsiff to inflict a fine upon the witnesses in this case can, in no sense, afford a ground for special appeal, and that this application must be refused.

The 8th May 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Stamp-duty.

Lowazima Special Appeal from a decision passed by the Judge of Chittagong, dated the 23rd February 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th March 1866.

Aradhun Dey and another (Defendants), *Appellants,*

versus

Gholam Hossein Maloom and others (Plaintiffs), *Respondents.*

Baboo Sreenath Banerjee for Appellants.

No one for Respondents.

Where, owing to an irregularity, a petition of appeal was returned before the new Stamp Act, XXVI. of 1867, came into force, and the appeal was not filed until after that Act came into force—HELD that the appeal must be filed on a stamp of the amount prescribed by the new law.

Deputy Registrar.—This petition was re-filed yesterday with the wanting copy of the decree; and being within 90 days, it might have been received, were not the new Stamp Act in operation.

Owing to an irregularity, the appeal was returned; and the filing in the first instance became thereby void, so that, if it had not been re-filed within time, it would have been treated, notwithstanding that it had been filed originally within 90 days, as out of time, and would have been liable to rejection, unless sufficient cause to the satisfaction of the Court were shown for the delay.

This being the effect as to time, the question arises whether the appeal should not *now* be treated as coming under the operation of the new Stamp Act (XXVI. of 1867) in respect of the stamp on which it is engrossed. The stamp used is of the value of Rupees 50, and this under the old Stamp Law would be sufficient; but, under the new Stamp law, there would be a deficiency of Rupees 80, between the value of the stamp used and that of the stamp required.

I beg to refer the point for the orders of the Judge presiding in the Miscellaneous Department.

Jackson, J.—I think the Deputy Registrar is right. As the appeal was not "filed" until to-day when the new Stamp Law is in operation, it must be filed on a stamp of the amount prescribed by that law.

The appellant will be allowed one week's time to put in the deficient amount of the stamp-duty.

The 9th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Oral Evidence—Prescriptive title.

Case No. 212 of 1867.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 10th December 1866, modifying a decision passed by the Moonsiff of that District, dated the 28th April 1866.

Meharban Khan (Plaintiff), *Appellant,*

versus

Muhboob Khan and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Mohendro Lall Shome and *Obhoy Churn Bose* for Respondents.

Oral evidence, if credible, is legally sufficient to prove a prescriptive title.

Glover, J.—THIS was a suit by the special appellant to be restored to the office of Furash in a Mahomedan shrine, and to receive certain perquisites in cash and kind attached to the situation.

The defendants, who are the "khadims" or managers of the endowment, averred that the plaintiff was their servant, and, as such, could be dismissed at their pleasure. They did not make any defence on the subject of the perquisites, or set up a title to them.

Both the Lower Courts found that the plaintiff's office was hereditary; but the Judge considered that plaintiff had made out no claim to the perquisites, and dismissed his case so far.

Plaintiff appeals specially on this point, and we think that the decision of the Court below was wrong. Had the Judge stated that he *disbelieved* the plaintiff's evidence on the matter of the perquisites and offerings, we should not, in special appeal, have been justified in interfering; but he does not disbelieve that evidence—he merely states that oral evidence is not sufficient to prove a prescriptive title, a proposition of law which we are by no means disposed to agree to. Oral evidence, if credible, would be legally sufficient to prove such a right. And, as the special respondents nowhere denied the special appellant's right to enjoy the perquisites, but contented themselves with saying that he was their private servant, it follows that these perquisites must be presumed to accompany the office of Furash to which special appellant has been found to have an hereditary title.

We, therefore, decree the appeal, and reverse the judgment of the Court below, with costs on the special respondents.

The 9th May 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Stamp-duty—Objection under Section 348, Act VIII. of 1859.

Sreenath Roy Chowdhry, *Petitioner.*

Baboo Bykuntnath Paul for Petitioner.

Where notice of an objection to be taken by a respondent under Section 348, Act VIII. of 1859, at the hearing of the appeal, was given before Act XXVI. of 1867 came into force, but the objection was taken after that Act came into force—HELD that the objection could not be taken without payment of the proper stamp-duty prescribed by Clause 9, Article 11, Schedule B of Act XXVI. of 1867.

Jackson, J.—It appears to me that Baboo Bykuntnath Paul, who appears for the respondent, is not entitled to be heard in objection to the decision appealed against under Section 348, Act VIII. of 1859, in respect of a part of the case not comprised in the appellant's appeal, unless, under Clause 9, Article 11, Schedule B, annexed to Act XXVI. of 1867, he pays in the proper stamp-duty prescribed by that Article. The ruling of the Full Bench referred to, which is reported at page 102, Volume VI., Weekly Reporter, has really no bearing upon this point. That ruling simply laid it down that there was no objection to a respondent who intended to take an objection at the hearing of the appeal, giving notice of such objection, by a writing lodged in the Registrar's office. That notice, however, will not be the objection itself; the objection must be taken, if at all, at the hearing. As the hearing has taken place to-day when the new Stamp Act is in force, and the objection is now proposed to be taken at the hearing, it evidently falls within the provisions of the new law. We are informed that this point has been ruled in the same sense by another Bench of this Court.*

Markby, J.—I am of the same opinion.

The 10th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Lease—Agreement—Notice—Principal and Agent.

Case No. 3227 of 1866.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 11th August 1866, affirming a decision passed by the Moonsiff of Pothna, dated the 30th November 1865.

Nuddear Chand Sein (Plaintiff), *Appellant,*

versus

Kishoree Lal Chuckerbutty and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboos Bungshee Dhur Sein and *Umbika Churn Banerjee* for Respondents.

A, the registered holder of a dur-mokurruree lease which he took without notice of an agreement previously made by his lessor to grant a lease of the same property to *B*, was held to have a perfectly good title as against *B*.

Semble per Norman, J.—A person, who has authority to conduct the negotiation respecting a lease, is such an agent that a notice to him may be noticed to his principal.

Norman, J.—In this case no grounds have been shown to us for supposing that the decision of the Lower Courts is not correct. The defendant, Mr. Erskine, appears to have taken a dur-mokurruree lease in ignorance of an agreement made by his co-defendant Ram Jadub, some fourteen days previously, to grant a lease of the same property to the plaintiff.

Mr. Erskine's dur-mokurruree pottah has been duly registered, and he, having taken the lease without notice of the previous agreement with his co-defendant, has a perfectly good title as against the plaintiff, and therefore there was good ground for dismissing the suit.

There is one point in the case which has not been adverted to or pressed upon us by the appellant's pleader, as it might have been. It is this, namely, whether or not notice to a servant of Mr. Erskine, Koylash Chunder Bhuttacharjee, who is described by the Lower Appellate Court as *his Dewan*, was not sufficient notice to Mr. Erskine himself.

Now, there are very many cases upon this point which would go to show that, if this person had authority to conduct the negotiation respecting the lease, he would have been such an agent that notice to him would have been notice to his principal. *See* Story's Equity Jurisprudence, § § 408 and 408A, and Sugden's Vendors, Chapter 24, § 1.

But the appellant's pleader has not shown us that Koylash Bhuttacharjee was such an agent that notice to him would have been notice to his principal, and we cannot act upon any mere conjecture as to what his authority may have been.

We observe that the decision of the Lower Appellate Court affirms that of the first Court, and, if the point above referred to had been taken below, there would doubtless have been some allusion to it in their decisions.

We dismiss the appeal with costs and interest.

Seton-Karr, J.—I concur with my learned colleague in dismissing the appeal. The judgment of the Principal Sudder Ameen is supported by several precedents of Benches of this Court (*see* Weekly Reporter, Volume VI., Civil Rulings, page 234: Vol. III., Civil

* *See* ante, p. 452.

Rulings, page 64; and Sudder Dewanny Adawlut Reports of 1859, page 1445).

The point as to any possible liability of Mr. Erskine to be dispossessed by reason of the knowledge of Koylash, as being the Dewan or otherwise the agent for that gentleman, was never taken before us either in writing or verbally, and I must decline expressing any opinion as to what my judgment would have been had the point been taken.

The 16th May 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Review of judgment.

Cases Nos. 774 and 775 of 1866.

*Applications for a second review of judgment passed by the Hon'ble Justices Loch and Seton-Karr on the 9th July 1866, in Cases Nos. 426 and 427 of 1865, on review of judgment passed on the 26th April 1865 in Miscellaneous Appeals Nos. 55 and 56 of 1865.**

Taranath Roy (Decree-holder), *Petitioner,*

versus

Rajbullub Bhunje (Judgment-debtor), *Opposite Party.*

Baboo Romesh Chunder Mitter for Petitioner.

Baboo Oopendur Chunder Bose for Opposite Party.

A second review of judgment was refused as not contemplated either by the law itself or the Full Bench Ruling of 12th February 1866; the first review being neither appealed against nor shown to be wrong.

Loch, J.—This application for review of judgment of our order passed on 9th July 1866 is, in reality, an application for a review of our order of 26th April 1865, by which the decree-holder was held to have done nothing to keep his decree alive, a simple petition for execution being insufficient for that purpose. It is now urged that the Courts were wrong in holding the execution in this case barred, because the petitioner had done sufficient to keep the decree alive; for, beside the application for execution, he had put in tulubanah, and this was sufficient to show the *bona fides* of his application, and he produces an authenticated copy of the nazir's receipt, showing that the tulubanah had been deposited. It cannot, however, be said that the plea now taken, and the evidence produced to support it, is a discovery of new evidence which was not within the petitioner's knowledge, or could not have been adduced by him at the time when the former order was passed. But it is said that, though the Court, on 26th April 1865, found against him on the point that the presentation of a petition was not sufficient to keep alive a decree, yet the Court allowed the decree to be executed, considering that the application had been made within time according to the provisions of Act XL. of 1861. This part of the order of the 26th April 1865 was set aside by the subsequent proceeding of 9th July 1866, and there remains only so much of the order as rejected his present application as out of time, his petition for execution presented in June 1863 being held to be infructuous, and he now shows that the conclusion the Court came to on that point was wrong, as the petitioner did more than file a petition for execution. He deposited tulubanah for the service of a notice, and it was through the neglect of the Court that notice was not issued. As, however, my colleague, for reasons given in his separate judgment, does not think that any grounds exist for admitting a review, this application must be rejected with costs.

Seton-Karr, J.—In these cases the judgment-debtor first appealed against the order of the Judge ruling that the mere presentation of a petition was sufficient to keep the decree alive.

We then held this ruling to be erroneous; but we rejected the appeal, and allowed the decree to be executed, because we thought the decree-holder entitled to the benefit of Section 21 of Act XIV. of 1859, and because he had filed his application within three years from the time when that law came into operation.

On the first application for review, we reversed the above order, and held that the decree-holder could not get a fresh start from the beginning of 1862 when Act XIV. of 1859 came into operation, and that, therefore, the decree could not be executed.

We are now asked to review, *not* this order, but the part of the earlier order which said that a mere presentation of a petition could not keep the decree alive, and this we are asked to do, on the ground that the applicant can show that he did do some-

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* *See* Vol. 6 (Mis.), p. 30, and Vol. 3 (Mis.), p. 2.

thing else beside make an application, and that he actually deposited tulubanah with the nazir.

I am of opinion that his application should not be granted, and that no further litigation on this point of execution should be allowed.

In the first place the order on the first review still stands good. It says that the decree cannot be executed, and the applicant does not even pretend to ask us to displace, annul, or amend it in any way.

As long as it stands good, it is not easy to see how the decree could be executed; and the request is, therefore, practically to ask us to allow a decree to be executed on some other ground, while an order under our own hands exists, ruling that it cannot, and must not, be executed, as barred by time.

In the next place, the matter of the *tulubanah* was one fully within the applicant's knowledge from the first; and though he was respondent on the two first occasions when the case was heard, he still might easily have brought this fact to our notice at an earlier period.

But the main reason for my inability to grant the review is that we are not shown that our order of the 9th of July 1866, in favor of the judgment-debtor, is in any way improper, incorrect, or illegal; and, while it exists, it bars the judgment-holder effectually.

It is also somewhat remarkable that what the applicant now asks us to do is *not* to alter the earlier judgment of the 26th of April 1865, which was actually in his favor, but to allow him to show that certain expressions used therein were not in accordance with the strict facts of the case. This request is wholly beside the matter, as long as the second order, passed on the first review, stands good.

The applicant, moreover, on the first occasion, brought his petition on the very last day of the three years allowed him for execution, and I have no particular desire to aid a person whose whole course of proceeding is marked by such laches.

Altogether, I am of opinion that the review ought not to be granted, and that such an application is not contemplated either by the law itself, or by the well-known Full Bench Ruling* which expounds the law as to second reviews.

* *See* Vol. 5, p. 93.

The 16th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Ghatwallee Land—Resumed Lakheraj—Right of suit—Settlement Limitation.

Case No. 385 of 1866.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Gya, dated the 31st July 1866.

The Government (one of the Defendants), *Appellant.*

versus

Tekait Pokharun Singh (Plaintiff), *Respondent.*

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Appellant.

Messrs. R. V. Doyne and *C. Gregory* for Respondent.

Suit laid at Rupees 15,129-15.

Case No. 407 of 1866.

Maharajah Joy Mungul Singh (one of the Defendants), *Appellant,*

versus

Tekait Pokharun Singh (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellant.

Messrs. R. V. Doyne and *C. Gregory* for Respondent.

Suit laid at Rupees 15,129-15.

A ghatwallee tenure was resumed by the Government under Regulation II., 1819. After the resumption, *H.N.*, the former holder of the tenure, claimed settlement as proprietor. The Government denied his title, but offered him a lease on his giving security. On his failure to find security, the Government in 1841 made a temporary settlement with *J. S.*, who entered into possession of the land. No malikana was reserved to or ever paid to *H. N.* In 1862 the Government settled the land permanently with *J. S.* The heir of *H. N.* then brought a suit in the Civil Court, praying that this settlement should be set aside, and for a declaration of his right to have a settlement concluded with him.

HELD that, supposing *H. N.* ever to have had any legal right to a settlement as proprietor, the suit to enforce such right was barred by limitation, he having been effectually dispossessed, and the cause of action, if any, having accrued in 1841.

Note.—The Court appeared to consider that, in fact, *H. N.* never had any right to maintain an action in the Civil Court to compel the Government to make a settlement with him.

Seton-Karr, J.—THESE two appeals arise out of a case in which the plaintiff sued the Government and Rajah Joy Mungul Singh, in order to recover possession and obtain the settlement of Mouzah Bissenpore and Mouzah Jaseeban, which had constituted a ghatwallee tenure.

The facts of the case are not denied, and are as follows: The first mouzah was resumed by Government on the 19th of August 1825, under Regulation II. of 1819, and the second on the 4th of April 1837, for the reason that the ghatwallee services were no longer performed by Tekait Hurdi Narain, the ancestor of the plaintiff, or required by the Government.

After resumption, the tenure was farmed out to different parties for different periods, to one Sumrun Singh for the years 1234 and 1235 Fuslee; to Jeeb Lall Singh from 1236 to 1238; to the Tekait himself, from whom the tenure had been resumed, for the years 1239 to 1245. After 1245, the temporary settlement was again offered to the Tekait on condition of his giving security, but, on his failing to do so, the farm was given to Jeeb Lall by a temporary lease from 1248 to 1267.

Subsequently a Permanent Settlement was concluded by Government with Rajah Joy Mungul Singh by the proceedings of the Collector, dated the 21st of July 1862, and of the Commissioner, dated the 19th of December of the same year, which proceedings were finally confirmed by the Board of Revenue on the 3rd of August 1863.

In this state of things, the plaintiff, as cousin and heir of the original Tekait Hurdi Narain, has sued claiming as a right that the settlement made with the Rajah be annulled, and that a permanent settlement be concluded with him. The main ground of his claim is that settlements of such resumed ghatwallee jagheers have always been concluded with the ghatwals in possession.

The Government and the Rajah made common cause in defending the action, though both parties filed separate written statements. The sum and substance of their main pleas may be set down as follows:—

1st.—The special Law of Limitation, three years, bars the suit, the same not having been instituted within three years from the date of the Commissioner's order of December 1862.

2ndly.—That the plaintiff having sued for the property of Hurdi Narain Singh, his claim to it was rejected on the 29th of July 1852.

3rdly.—General limitation of 12 years, the plaintiff never having been in possession for any part of that time.

The Principal Sudder Ameen drew up several issues in bar and on limitation, but got over them all by simply holding that the plaintiff had sued within three years from the order of the Board of Revenue confirming the Permanent Settlement, and was therefore in time; and further that *res judicata* could not apply, as the widow, whom the plaintiff had formerly sued, was not then in possession of the property in dispute.

On the issue of fact, the Principal Sudder Ameen referred to certain proceedings of the Revenue authorities, of August 1849 and June 1859, and drew from them the inference that persons in the category of the plaintiff, were entitled, as proprietors, to claim a Permanent Settlement, and that the temporary farms made with other parties could not annul and avoid the plaintiff's rights.

In appeal against this judgment, both the defendants take the objections of special and general limitation and of *res judicata*, and wholly impugn the decision on the merits.

In a case of such importance, looking to the particulars of the claim, we are compelled to say that the decision of the Principal Sudder Ameen is very meagre and unsatisfactory, and that it is by no means creditable to his penetration or judgment.

The case has been argued before us by Baboo Kishen Kishore Ghose for the Government followed by Mr. Allan for the Rajah: and Mr. Doyne for the respondent has endeavoured, with much ingenuity and earnestness, to uphold the decision of the Lower Court in favor of the plaintiff.

The special Law of Limitation does not seem to have any bearing on the case. Granting that it did apply, the plaintiff would be in time, he having sued within three years from the date of the final order of the Board of Revenue, or the 3rd of August 1863, confirming the perpetual settlement made with the Rajah.

Neither does the claim appear barred by the maxim *res judicata*, or by Section 2 of Act VIII. of 1859. When the plaintiff sued the widow of the Tekait, the property now

in dispute was not in the widow's possession, and no adjudication was or could be made regarding the same.

Some stress was laid by the pleader for the respondent on a decision of the Additional Judge of Behar, dated the 22nd of January 1850, which ruled that a certain suit by the widow of the Tekait against the farmer of the tenure, Jeeb Lall and the Government as defendants ought to be dismissed. The widow claimed that the settlement should be made with her; but the Judge held that she had no proprietary title to the settlement, and that, as her husband had failed to comply with the Collector's order to furnish security, he had lost the settlement which had been concluded with Jeeb Lall, a third party and the defendant in the suit.

This decision is not without its significance, but it does not appear to be a complete bar to an adjudication of the plaintiff's claim to have the permanent settlement made with him, whenever the Revenue authorities might think fit to resort to such a measure.

It appears to me that the plaintiff's claim ought to have been dismissed on two main and substantial grounds: In the *first* place, he has never been in possession for 12 years, and he has not sued within 12 years of the date of his cause of action; and, in the *next* place, he has not shown that he has any decided and preferential claim to a Permanent Settlement of the tenure, such as the Civil Courts are bound to recognize and enforce.

By Section 8 of Regulation XIX. of 1793, the Board of Revenue, with the sanction of Government, were empowered to make rules for the assessment of lands which had been resumed or declared to belong to Government, and, if the proprietor should refuse to agree to the assessment, the lands might be held khas.

By Section 5, Regulation XIII. of 1825, Government, in the case of tenures resumed under Regulation II. of 1819, were empowered to direct the continuance in possession of the actual occupant of the land, though he might not be the actual zemindar, talookdar, or malik, and to direct an engagement to be made with him for the future assessment on such terms as might be prescribed by Government.

Neither in the above laws, nor in any other, do we find any provision recognizing the absolute and indefeasible right of a lakhcrajdar or jagheerdar whose lands had been resumed, to the settlement. A discretion appears to have been vested in the Government to deal with the former owner or the occupant, as it might think fit, and though, admittedly, the general rule of the Revenue authorities has been that settlement should be offered, at half jumma, to the rent-free holder or jagheerdar, whose tenure had been resumed, it is nowhere shown that the Revenue authorities were bound to recognize that right, or to admit the old proprietor to settlement under all circumstances whatever.

Mr. Doyne desired, in the course of argument, to put in attested copies of a letter from the Commissioner of Patna, dated the 13th of July 1849, and of one from the Board of Revenue in reply, dated the 27th of the same month.

As these letters are referred to in the Vernacular proceedings of the Collector, dated the 9th of August 1849, to which the Lower Court has adverted, and on which it has laid some stress, we ordered the copies to be admitted and filed on the record. The Commissioner in 1849 had referred the case of a person from whom a mouzah had been resumed, and the former possessor of which, though offered the settlement, had refused to give security. As there were many estates in a similar position, the Commissioner wished to know whether the parties from whom the land had been resumed were to be considered maliks or merely as having a claim to settlement consequent on long possession. The Commissioner felt disposed to recognize their right to settlement on the ground of long possession, but not as maliks. The Board's reply was to the effect that "without doubt "the settlement should be made with the "parties found in possession against whom "the resumption-suit was instituted, and that "they should be treated as maliks, and not "required to give security." "Should they "refuse," the Board added, "they will be "entitled to malikana, and the estate may "be farmed out for ten years."

This letter, in my opinion, though it evinces the tendency of the highest Revenue authorities to treat the old proprietors or possessors of resumed lands with consideration and indulgence, does not advance the plaintiff's case.

At no time during any of the various temporary settlements concluded with different parties for the mouzahs in dispute was any reservation of *malikana* rights made in the plaintiff's favor. Security was demanded from him and from other parties, and, on his failing to give security after

1845, he lost the farm. The demand for security does not seem to me consistent with the existence of an undoubted and a preferential claim to the Permanent Settlement. And, if the right to have such a Permanent Settlement concluded with him was inherent in the plaintiff's position, it was a right which could be exercised at all times, one which he might have insisted on at once after the resumptions of 1825 and 1837, or after the expiration of his farming lease in 1245, and one for which he need not have waited for the action of the Revenue authorities in 1862 and 1863 when, after farms had been tried and had, apparently, failed to give satisfaction, a recourse was had to the ulterior measure of a Permanent Settlement.

The right of suit, if it really existed in the plaintiff, by virtue of his position as a dispossessed jagheerdar, was independent of the Board's action, and, at the time when the plaintiff at last thought fit to call on the Civil Courts to recognize the same, he had not been in possession since 1841, or a period of more than 20 years.

It seems altogether out of the question in the case of a person so situated to admit that he can claim as a right what the Revenue authorities and the Government had at other times granted to parties found in possession, from pure motives of indulgence, and not even to *such* parties from any rights which Courts can be called on to recognize.

It is true that cases have been instituted in our Courts by parties who claim the settlement. The case of the widow of the Tekait decided by the Additional Judge of Behar, and already alluded to, is one in point. And a decision of the Sudder Dewanny Adawlut for 1850, page 407, rules that such suits may be entertained. That decision quoted the case of Hur Gobind Ghose, from the summary decisions, Sudder Dewanny Adawlut, page 131, in which it was laid down that the Resumption Courts were the Courts to pronounce on the validity or invalidity of a tenure, while the Civil Courts might still entertain a suit between parties claiming the proprietary right and desirous of being admitted to enter into the settlement with Government.

On the whole case, then, reviewing the Resumption Laws, the position of the plaintiff, the practice of Government, and the various proceedings as either admitted or shown by the correspondence in this case, I am unable to find any ground for the main doctrine contended for by Mr. Doyne, *viz.*, that the temporary and farming leases and the Permanent Settlement are two distinct rights, and that the latter, which, as it were, had been dormant, was called into existence only when the Revenue authorities came to the resolution of putting an end to farms, and of settling the revenue of the mehal permanently.

The plaintiff has not been in possession for 20 years, and his temporary possession as a farmer was lost by his own refusal to furnish security; and, in my opinion, if he had any right or title, he ought to have instituted his suit within 12 years from the time he lost possession which, admittedly, he has not done. Since 1841, the possession of other farmers has been adverse to him.

As regards the merits of his claim, moreover, I would say that no law or invariable practice such as binds the Revenue authorities irrevocably, or such as would lead the Civil Court to bind those authorities, has been shown to us and, in this view on the merits, the plaintiff's case should fail even if he had sued in time. The plaintiff has not shown that he can claim to force himself on the Government as a tenant.

The appeals are admitted, and the decision of the Principal Sudder Ameen is reversed with all costs; Government and the Rajah will each get their costs.

Norman, J.—I concur in thinking that the decision of the Principal Sudder Ameen must be reversed with costs, and generally in the judgment of Mr. Justice Seton-Karr.

It appears to me clear that the suit is not maintainable. The plaintiff was put out of possession by the proceedings under Regulation II. of 1819. It is true, no doubt, that the Government, after resumption, usually make a settlement with the party in possession prior to the resumption. But it is quite another question whether the party has a right enforceable by suit. By Regulation XIII. of 1825, Section 5, it was enacted as follows: "In modification of the existing "rules contained in Regulations XXXVII. of "1793, &c., or any other Regulation in force, "relative to the settlement of resumed ja- "gheer, altumgha, mududmash, ayma, and "other grants of land termed Badshahee or "royal; and generally in qualification and "explanation of all the rules in force relative "to the resumption of lakheraj tenures and "the future assessment of lands composing "the same, it is hereby declared that, when- "ever such tenures may be pronounced "invalid or extinct by a Revenue Board, or "other authority empowered to investigate "the lakheraj title in such tenures, under

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"the provisions of Regulation II. of 1819, "or of any other Regulation in force, *it "shall be competent to the Governor-Gene- "ral in Council, on a special report of the "circumstances of the case when it may "appear just and proper*, in consideration of "the long possession of the actual occupant "of the land or of his ancestors, to direct his "continuance in possession, though not the "zemindar, talookdar, or other malik of the "land, on his engagement for the future as- "sessment on such terms as may be prescrib- "ed by Government," &c.

By Regulation XIX. of 1793, Section 8, if a proprietor refused to agree to the assessment of the lands described in Section 7, they were to be let in farm or held khas under the rules prescribed in Regulation VIII. of 1793. By Section 44 of Regulation VIII. of 1793, proprietors who declined engaging for the jumma proposed to them, and whose lands are let in farm or held khas, are to receive malikana at the rate of 10 per cent. on the sudder jummas, if let in farm, or collections, if held khas.

Hurdeo Narain's title as proprietor was distinctly denied by the Government Settlement Officers in rejecting his petition on the 5th of September 1840, and on appeal on the 28th of February 1841. No malikana was ever allowed to him as proprietor. The plaintiff's present suit is not for malikana. If it were, it would be barred by limitation. If Hurdeo Narain was a proprietor, if it could be said that, as such, he ever had any rights under Regulation XIX. of 1793, the Government and their lessees have held adversely to him and his heirs at least since 1840, and his claim is therefore barred by limitation. If, as is apparently the case, Hurdeo Narain was not talookdar, zemindar, or malik, it would seem that his case would fall under Regulation XIII. of 1825. It was, no doubt, within the competency of the Governor-General in Council to permit him to continue in possession, but such permission would be a matter of favor, and not of right.

Mr. Doyne attempted to argue that Hurdeo Narain acquired a fresh right to demand a settlement at the expiration of each temporary settlement. That argument might possibly have some foundation, if he had been allowed to receive malikana during the temporary settlement. In the present case he was completely evicted and put out of possession once for all by the making of a settlement with Jeeb Lall in 1838, under which nothing whatever was reserved to Hurdeo Narain or his heirs.

The 16th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Res judicata—Possessory suit by ryot—Suit for confirmation of title by intervenor.

Case No. 147 of 1867.

*Application for review of judgment passed by the Hon'ble Justices C. B. Trevor and F. A. Glover, on the 13th January 1866, in Special Appeal No. 2620 of 1865.**

Tara Chand Ghose, Plaintiff (Appellant), *Petitioner,*

versus

Radha Monee Dossee and others, Defendants (Respondents), *Opposite Party.*

Baboos Dwarkanath Mitter and *Hem Chunder Banerjee* for Petitioner.

Baboo Dwarkanath Mookerjee for Opposite Party.

A possessory suit under Clause 6, Section 23, Act X. of 1859, by a ryot against his zemindar, cannot bar a suit for confirmation of title by the intervenor in that suit.

Kemp, J.—We think that the former judgment of this Court, treating this suit as barred under Section 2, Act VIII. of 1859, was erroneous.

The applicant for review was an intervenor in a suit brought by a ryot against his zemindar for illegal ejectment in the Collector's Court under Clause 6, Section XXIII., Act X. of 1859. Such a suit is a possessory suit, and the question of title is not gone into. The ryot was cast; he appealed, but did not make the present applicant a respondent. The present suit is by the applicant, intervenor in the suit before the Revenue Court, for confirmation of his title. Clearly this was a wholly different cause of action, and cannot be said to have been the subject-matter of the suit before the Collector.

The suit is remanded to the Lower Appellate Court, who will try it on the merits.

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* *See* Vol. 5 (Act X.), p. 9.

The 17th May 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Suit to contest notice of enhancement—Fixing of proper rent.

Case No. 97 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 3rd October 1866, modifying a decision passed by the Deputy Collector of Raneegunge, dated the 10th March 1866.

Gora Chand (Plaintiff), *Appellant,*

versus

Gudadhur Chatterjee and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Oopendur Chunder Bose for Respondents.

In a suit by a tenant under Section 14, Act X. of 1859, to contest the landlord's right of enhancement, the question of rates may be decided, whether at the instance of the tenant or landlord.

Pundit, J.—THE special appellant sued, under Section 14 of Act X. of 1859, to contest the claim of the landlord, defendant, who had served the special appellant with a notice demanding certain rents for lands alleged to have been held by the plaintiff in excess of the quantity originally leased to him.

Plaintiff brought his claim on the ground that he did not hold more land than was originally leased. He raised no question regarding the fairness of the rate of rent demanded from him.

The Lower Appellate Court decided against the plaintiff on the question of area, and on the evidence produced on both sides determined the rent for which plaintiff was to be liable for the quantity of excess land.

Plaintiff appealed against this decision without questioning the propriety of the decision of the first Court as to the rate of rent payable by the plaintiff.

The Lower Appellate Court modified the decision of the first Court as regards quantity, and also as to rates to some extent, but otherwise upheld the judgment below.

Plaintiff now urges in special appeal that, in this suit on his (plaintiff's) failure to prove that he did not hold lands in excess, his plaint should have been dismissed, and that the Lower Courts were not authorized to decide in this case any question except that of the quantity of lands held by the plaintiff. Plaintiff further pleads that the Lower Courts have not decided his plea regarding two beegahs of the alleged excess lands being held by the plaintiff under another proprietor.

We observe that this last plea was disposed of long previously by a previous judgment of the Lower Appellate Court when it had occasion to remand the case. It was then decided that plaintiff had failed to identify the lands he claimed as held separately, and excluded from this tenure.

As to the first plea, we hold, as was decided in the case reported at page 91, Volume II., Sutherland's Weekly Reporter, 28th of March 1865, that the question of rates can be decided in cases brought by a tenant under Section 14.

We have simply to add that the question can be decided either at the request of the tenant or of the landlord, and there is no doubt that in this case both parties offered evidence upon the issue of rates. But we have no occasion to decide in this case whether, under the wording of Section 14 of Act X. of 1859, in *any* case brought by a tenant when the question of rate of rent is disputed, the Revenue Court must determine and decide what is the proper rent to be paid by the tenant to his landlord.

We reject this special appeal with costs.

The 17th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Set-off—Cross-decrees.

Case No. 2606 of 1866.

Special Appeal from a decision passed by the Judge of Purneah, dated the 21st August 1866, reversing a decision passed by the Moonsiff of that District, dated the 17th May 1865.

Syud Talub Hossein (Defendant), *Appellant,*

versus

Mr. R. Walker (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. R. T. Allan for Respondent.

The right of set-off in the case of two cross-decrees is not affected where the assignment of one of them has been found to be fraudulent.

Quære.—Whether, had the assignment been a *bonâ fide* one, *i. e.*, for a valuable consideration, the assignee would have taken the decree subject to the equities or liabilities of the decree-holder to the judgment-debtor.

Kemp, J.—IN this case it appears that Haseemoollah obtained a decree against Mr.

Walker for Rupees 261-15, and Mr. Walker against Haseemoollah for Rupees 88-13-3. These decrees, being between the same parties and of the same Court, could be set off one against the other, the lesser being absorbed in the larger decree.

Haseemoollah sold his decree; and Mr. Walker, apprehensive of being deprived of his right of set-off, sued to set aside the assignment by Haseemoollah as fraudulent, and being without consideration.

The Judge has found that the sale was fraudulent, and that no consideration passed.

Such being the case, and the finding being one which cannot be questioned, it follows that Haseemoollah's original claim stands, and that no assignment has taken place. The right of set-off, therefore, clearly remains intact, and, when either party takes out execution, the provisions of Section 209, Act VIII., must be applied.

Mr. Twidale for the special appellant contends that the plaintiff, Mr. Walker, had no cause of action, as his right of set-off has been found to exist; but such is not the case, for it appears doubtful, and there are conflicting decisions of this Court on the point, whether, had the assignment by Haseemoollah been a *bond fide* one, *i. e.*, for a valuable consideration, the assignee would have taken the decree subject to the equities or liabilities of the decree-holder Haseemoollah to the judgment-debtor, Mr. Walker, or not; but, as the assignment has been found to be fraudulent, there is no conflict of decisions, and it is beyond question that Mr. Walker had a good cause of action. Such being the case, and as there has been no legal assignment, the two cross-decrees remain as they were originally passed, and can be set off, the one against the other, in the execution department.

This appeal is dismissed with costs and interest.

The 17th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Section 77, Act X. of 1859—Intervenor—Jurisdiction—Suit to establish title.

Case No. 110 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 5th September 1866, affirming a decision passed by the Moonsiff of Kulnah, dated the 22nd March 1864.

Taranath Bhuttacharjee (one of the Defendants), *Appellant,*

versus

Obhoy Churn Holdar and others (Plaintiffs) and others (Defendants), *Respondents.*

The Appellant appeared in person.

Baboo Bama Churn Banerjee for Respondents.

A jotedar or ryot, having a right of occupancy, evicted by the judgment of a Collector in favor of the person entitled to receive rent from him upon an intervention by such person under Section 77 of Act X. of 1859, may, under the latter Clause of that Section, sue in the Civil Court to establish his title to be restored to possession.

Norman, J.—This case was remanded by the High Court to the Lower Appellate Court, in order that the Lower Appellate Court might pronounce a distinct and definite finding on the nature of the tenure of the plaintiff.

The Lower Appellate Court finds that the plaintiff is in possession under a mokurruree pottah. From that finding, a special appeal is now presented to this Court upon the ground that the pottahs relied upon by the Lower Appellate Court have been accepted without any legal evidence of their authenticity.

We are of opinion that the objection taken by the special appellant, who appears before us in person, is well-founded.

The plaintiff has produced the pottahs, but has given no evidence as to their history. He never appeared as a witness himself, or attempted to say, "I have been in possession of these pottahs since I succeeded my predecessors in the jote." Of the three witnesses examined on his behalf, namely, Jadub Chowkedar, Teen Cowree Bagdee, and Kanhya Ghose, Judub Chowkedar and Teen Cowree Bagdee say no more than that, about 40 or 42 years ago, Kalee Doss Bhuttacharjee granted a mokurruree pottah to plaintiff's father, Neel Monee Holdar, of 1 beegah and 2 cottahs of land at a rent of 6 sicca rupees, and the plaintiff's ancestors were in possession of that property under that pottah. These witnesses do not identify the pottahs produced; they are not attesting witnesses; and, in fact, the documents produced are not attested by any witnesses. The pottah has never been produced in any Court; and there is nothing to identify it as the pottah to which Teen Cowree Bagdee and Jadub Chowkedar refer.

The plaintiff has put in a quantity of dakhilas with his plaint, but he brought no witnesses to say that he or his father paid rent, and that these were the dakhilas for those rents.

There is no legal evidence whatever to show that the pottah produced in Court is the pottah under which he holds. That being so, the plaintiff wholly fails to prove his mokurruree title. It appears, however, that the plaintiff has been in possession for many years paying 6 sicca rupees. On the other hand, the defendant has wholly failed to establish the justification which he set up for dispossessing the plaintiff. He has not proved the alleged relinquishment. Therefore, though the plaintiff has failed to prove his mokurruree right, he has a right to be put into possession, and the only question is whether he ought to get a decree for that purpose.

Now, it appears that he was in possession, and was suing a ryot when the present defendant intervened under Section 77 of Act X. of 1859, and, the defendant having succeeded in obtaining a decree, the plaintiff was compelled to bring this suit to establish his title to be restored to possession under the latter Clause of that Section.

We think that, if he is a jotedar or ryot having a right of occupancy, such a right gives him a sufficient title to maintain an action under the provisions of the 77th Section.

On the whole, then, neither party has succeeded. The plaintiff has failed to prove his mokurruree tenure, and the defendant the relinquishment alleged by him.

We, therefore, declare that the plaintiff will be entitled to have a decree to be restored to possession, and each party will bear his own costs.

The 17th May 1867.

Present :

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Presumption under Section 4, Act X. of 1859.

Case No. 165 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 20th December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 31st August 1866.

Poolin Beharee Sein and others (Plaintiffs), *Appellants,*

versus

Neemaye Chand (Defendant), *Respondent.*

Baboo Ishur Chunder Chuckerbutty for Appellants.

No one for Respondent.

When a ryot alleges that he has paid rent at a uniform rate for forty years, and claims the benefit of the presumption under Section 4, Act X. of 1859, it is not necessary, in order to entitle him to a decree, that he should expressly state that rent has been paid at the same rate from the time of the Permanent Settlement.

Norman, J.—We are of opinion that there are no grounds for this special appeal. The suit was for enhancement of rent. The defendant in the Deputy Collector's Court stated in the first instance that the rent paid for the land was 2 rupees annually from the year 1836; and that his grandfather had built a house on the land.

On examination of the parties, the defendant's agent, repeating this allegation, claimed the benefit of Section 4 of Act X. of 1859, and, accordingly, the Deputy Collector framed an issue whether the rent of the disputed land was liable to be enhanced. He tried the cause, and gave plaintiff a decree.

On appeal, the Judge, being dissatisfied with the manner in which the case had been tried by the Deputy Collector, remanded the case for trial.

On special appeal it is objected that the issue above mentioned was not raised by the defendant, either in his written statement or in the examination of his agent, as it was not expressly alleged that the land had been held at a fixed rate from the time of the Permanent Settlement, and, therefore, it was contended under two precedents cited before us, one of the 26th November 1863, and the other of the 1st September 1865,* that there was no ground shown for trying the issue whether the defendant was entitled to the presumption under Section 4 of Act X. of 1859.

We think that there is no ground whatever for this contention. The defendant stated his title as well as he could, alleging payment of rent at an uniform rate from 1236 B. S., that is to say, 1829 A. D., nearly 40 years ago, as far, no doubt, as his recollection can go, and says in effect, "I claim the presumption that the rate was fixed from an earlier period, that is to say, from a time prior to the Permanent Settlement.

* *See* Vol. 4 (Act X.), p. 15.

Looking to the fact that, in proceedings under Act X., the defendant is obliged to answer on oath or solemn affirmation, and to say nothing but what he knows and believes to be the fact and strictly true, we cannot construe the statements of the parties with the same strictness with which Courts of Justice construe pleadings in which a man states, not only what he knows of his own knowledge, but also every thing that he hopes to be able to prove. We think that no presumption arises against the defendant, who merely states that which is within his own knowledge; and that, if he proves his allegation, he ought to have the benefit of the presumption claimed.

The cases cited do not apply to the present case. In those cases, it does not appear that the defendant directly or indirectly claimed the benefit of the presumption, or alleged, directly or indirectly, that the tenure had been held at fixed rates from a period prior to the date alleged.

The appeal will be dismissed, but without costs, no one appearing for the respondents.

The 17th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Suit for rent—Kubooleut—Agreement.

Case No. 193 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 23rd November 1866, affirming a decision passed by the Assistant Collector of that District, dated the 27th July 1865.

Baboo Dhunput Singh (Plaintiff), *Appellant,*

versus

Mrs. M. Mills (Defendant), *Respondent.*

Baboos Romanath Bose and *Kishen Dyal Roy* for Appellant.

Baboo Kalee Kishen Sein for Respondent.

A suit for rent is cognizable only by the Collector under Clause 4, Section 23, Act X. of 1859, whether it be based upon a kubooleut, or agreement, or neither.

Kemp, J.—This was a suit for the rent of the years 1270-1271 Fuslee. The plaintiff sued two parties, Lall Jha and Mrs. Mills.

The Judge has found that the lease of Lall Jha determined in 1269, and that he is not liable for the rents of 1270 and 1271. Lall Jha was therefore absolved.

With reference to the claim against Mrs. Mills, the Judge held that the plaintiff's suit was not cognizable in the Revenue Court, but in the Civil Court, as the ikrarnamah executed by Mrs. Mills was in the nature of a bond, and not a kubooleut.

The pleader for the special appellant has read the ikrarnamah to us. By the terms of this document, and which the plaintiff relies upon, it is clear that the tenancy of Lall Jha determined in 1269, and that Mrs. Mills undertook to pay the rents of 1270 and 1271—in short, placed herself in the position of tenant to the plaintiff in lieu of Lall Jha.

The Judge was, therefore, clearly right in absolving Lall Jha.

Now, even admitting that this ikrarnamah is not drawn up in the form usual for kubooleuts (though there are terms in it such as payment of interest on lapsed kists, terms incidental to a kubooleut), still it must be admitted that the special respondent, Mrs. Mills, undertook to pay rent to the plaintiff for the years 1270 and 1271 in lieu of his former tenant Lall Jha, from whom Mrs. Mills had apparently obtained a sub-lease.

The present suit is for rent, and such a suit, whether based on a kubooleut or not, is cognizable by the Collector under Clause 4, Section 23, Act X. of 1859, and by him alone.

The ikrarnamah provides for the payment of rent, and the form of the document is immaterial.

The case is remanded. The Judge will try whether any and what balance is due from the special respondent, Mrs. Mills. Costs to follow the result. The appeal, as against Lall Jha, is dismissed with costs and interest.

The 17th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Waste Lands (Right of purchaser of)—Suit—Compensation.

Case No. 141 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 19th November 1866, affirming a decision passed by the Deputy Collector of that District, dated the 12th June 1866.

Magun Pollan (Plaintiff), *Appellant*,

versus

Lieutenant-Colonel E. Money (Defendant), *Respondent*.

Baboo Sreenath Banerjee for Appellant.

Mr. R. E. Twidale for Respondent.

A purchaser of land sold as waste land under Act XXIII. of 1863 cannot be compelled to grant a pottah to a person alleging himself to have been in occupation of the land before the sale. If the claimant has omitted to come in due time to stay the sale, and the land has actually been sold, his only remedy is by a suit under Section 18 for compensation, making the Collector a defendant.

Norman, J.—THIS is a suit by the plaintiff, who claims a pottah of 5 droons of land within a tract which has been sold to the defendant by Government as waste land. The suit was brought in the Collector's Court. It was dismissed by the Deputy Collector, and his dismissal was affirmed by the Judge on appeal, upon the ground that, under the provisions of Act XXIII. of 1863, the defendant, having purchased the land absolutely, did not hold it subject to any claim such as that now preferred by the plaintiff.

We are of opinion that that decision was perfectly correct. The Act referred to, after reciting that "it is expedient to make special provision for the speedy adjudication of claims which may be preferred to waste lands proposed to be sold or otherwise dealt with on account of Government, and of objections taken to the sale or other disposition of such lands," enacts as follows: By Section 1 that, "when any claim shall be preferred to any waste land proposed to be sold or otherwise dealt with on account of Government, or when any objection shall be taken to the sale or other disposition of such land, the Collector of the District in which such land is situate, or other officer performing the duties of a Collector of land-revenue in such district, by whatever name his office is designated, shall, if the claim or objection be preferred within the period mentioned in the advertisement to be issued for the sale or other disposition of such land, which period shall not be less than three months, proceed to make an enquiry into the claim or objection."

By Section 3: "Pending an enquiry into any claim or objection under the last preceding Section, the Collector, or other officer as aforesaid, shall postpone the sale or other disposition of the land; and, if he shall order that such claim or objection be rejected, he shall further postpone the sale or other disposition of the land to allow the claimant or objector to contest the order of rejection in the manner hereinafter provided."

By Section 4: "If the Collector, or other officer as aforesaid, shall consider the claim or objection to be established and that the sale or other disposition of the land should not take place, he shall stop the sale or other disposition of the land," &c.

By Section 7, it is provided that "the Local Government shall constitute in every district, in which there may be any waste land capable of being sold or otherwise dealt with on account of Government, a Court "as therein described; of the constitution of which by Section 8 notice shall be given by a written proclamation, copies of which shall be affixed in the several Courts, and in the offices of the several Collectors and Magistrates of the district; and, from the date of the issue of such proclamation, no other Court shall be competent to entertain any claim or objection belonging to the class of claims or objections for the trial and determination of which such Court is constituted."

By Section 18: "No claim to any land or to compensation or damages in respect of any land sold or otherwise dealt with on account of Government as waste land shall be received after the expiration of three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with. If, within three years after any lands have been delivered by the Government to the purchaser or otherwise dealt with, any claimant or objector shall prefer a claim to the land so delivered or otherwise dealt with, or an objection to such sale, or to compensation or damages in respect thereof, in the Court constituted under this Act for the district in which the land is situate, and shall show good and sufficient reason for not having preferred his claim or objection to the Collector or other officer as aforesaid, within the period limited under Section 1 of this Act, such Court shall file the claim or objection, making the claimant or objector plaintiff, and the Collector of the district, or other officer as aforesaid, &c., the defendant in the suit."

By Section 19: "In any case in which the land has been sold, if the Court

"shall be of opinion that the claim of the "claimant is established, the Court shall "not award the claimant possession of the "land in dispute, but shall order him to "receive from the Government Treasury, "by way of compensation, a sum equal to "the price at which the land was sold, in "addition to the costs of suit."

The result of these enactments is, that an objector or claimant coming in due time, as provided by Section 1, may stay a sale; but if he does not come within such time, and if he allows the land to be sold, then he can only lay claim to *compensation* under the Act, making the Collector a defendant, and he will then recover, not the land, but compensation from Government through the Collector or other officer.

It is, therefore, clear that plaintiff, in suing Colonel Money, has quite misconceived his remedy, and his suit in both the Lower Courts was properly dismissed.

His appeal also must be dismissed with costs and interest.

The 18th May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Mooktearnamah under seal (Admissibility of).

Petition of the Maharaja of Burdwan, praying that the Judge of the 24-Pergunnahs may be directed to receive and act upon a vakalutnamah presented by his general mooktears.

Baboos Juggodanund Mookerjee and *Chunder Madhub Ghose* for Petitioner.

A mooktearnamah under seal is as valid as a mooktearnamah under signature. A Judge is not bound or authorized to require proof of the genuineness of the seal.

A similar petition was presented on behalf of the Maharaja to the Judge presiding in the Miscellaneous Department on the 3rd December 1866, when the following order was passed by—

Jackson, J.—It does not appear precisely from the Judge's order whether he intended to disallow the vakalutnamah filed on behalf of the Maharaja. It seems that he requires to have a mooktearnamah produced bearing the Raja's signature. If the Maharaja of Burdwan is in the habit of executing mooktearnamahs and other documents authenticating them only with his seal, and not his signature, or if the mooktearnamah under which the vakalutnamah in question was granted was attested and treated as sufficiently authenticated by the Judge of East Burdwan, where the Maharaja resides, there appears no reason why the Judge of the 24-Pergunnahs should refuse to accept the vakalutnamah. A copy of this order should be sent to him.

The Judge of the 24-Pergunnahs having again refused to act upon the mooktearnamahs, a further petition was presented, on behalf of the Maharaja, to L. S. Jackson and Markby, JJ., on the 27th April 1867, when a rule was ordered to issue calling upon the Judge to show cause on Saturday, the 18th May 1867, why an order should not issue directing him to file the vakalutnamah.

On the 2nd May 1867, the Judge wrote the following letter to the Registrar:—

"With reference to the order passed by the High Court on the 27th ultimo on the petition of the Maharaja of Burdwan, I have the honor to observe that my reasons for refusing to receive a mooktearnamah offered on behalf of the Maharaja were recorded on his petition, which was returned to him. No copy was retained, but the original will, of course, be produced by the petitioner, if the High Court so desire.

"As far as I remember, the mooktearnamah was refused, because there was no evidence to show that the Maharaja had authorized any one to sign the document or to attach his seal to it. There was evidence that his seal had been attached to it; but whether this had been done with or without his authority was not shown."

The matter having come on for consideration on the 18th May before Peacock, C. J., and Jackson, J., the following judgments were delivered:—

Peacock, C. J.—I think that the Judge ought to file the vakalutnamah and to act upon it, unless it be proved that the vakeel has not been duly and properly appointed.

Apparently, the vakeel was appointed by a mooktear deriving his authority from the Maharaja by a mooktearnamah under the seal of the Maharaja. The Judge seems to think that it is more necessary to prove that the seal is genuine than it would have been to prove the signature to be genuine if the document had been under a signature purporting to be that of the Maharaja. The

Judge says: "Where there is the genuine "signature of that person, it follows that he "has executed it." But how can you act upon a signature as genuine without proof, any more than you can act upon a seal as genuine without proof? If it is necessary to prove that the deed was sealed by the Maharaja or by his authority, it would have been equally necessary to prove that it was signed by the Maharaja or by his authority, if it had purported to be signed by him. It may be that the Judge is personally acquainted with the character of the Maharaja's signature; but the rule applicable to this case must also be applicable to others in which the Judge might not be acquainted with the character of the writing. It appears to me that a mooktearnamah under seal is as valid as a mooktearnamah under signature, and that the Judge was not bound or authorized to require proof of the genuineness of the seal, and that it was affixed by the authority of the Maharaja. The case falls within the rule of the late Sudder Court of the Lower Provinces of Bengal and of the Sudder Court of the North-Western Provinces, dated 1843, which is to be found in the Circular Orders by Carrau at page 300: "The following rules of practice, which have "been adopted by the Courts of Sudder "Dewanny Adawlut, are prescribed for the "guidance of the Zillah Courts and the "Courts subordinate to them: Vakalutna- "mahs, whether executed by principals, or "their attorneys or agents, and mooktear- "namahs under the authority of which vaka- "lutnamahs are executed, shall not hereafter "require to be verified on oath. The re- "sponsibility in regard to all such documents, "being properly and correctly executed, shall "rest entirely with the vakeels." According to that order, it would not be necessary to prove a seal any more than it would be to prove a signature. But it appears that the parties, in order to satisfy the Judge, did actually produce to the Judge an authentication of the mooktearnamah by the Judge of Burdwan.

It appears to me that, under the rule of the late Sudder Court, the Judge was bound to act upon the vakalutnamah without proof of the authority under which that vakalutnamah was given.

An order will be issued to the Judge to file the vakalutnamah and to act upon it.

Jackson, J.—I entirely concur. I cannot help thinking it unfortunate that the petitioner should have had the trouble of making a further application to this Court upon the subject. The Judge should have been aware of the existence of the order referred to by his Lordship the Chief Justice.

I cannot also abstain from remarking on the character of the two orders recorded by the Judge in this matter. The first order, which is in the Vernacular language, did not refer to any doubt in the Judge's mind as to the real execution of this document by the Maharaja. It simply adverted to the fact that the mooktearnamah was not signed but sealed, and ordered that the party should produce a mooktearnamah signed by the Maharaja's own hand, thereby, of course, implying that the Judge would not entertain any mooktearnamah which was authenticated by a seal. There was, I think, no authority of law for such a proposition, namely, that it was necessary to authenticate a mooktearnamah or vakalutnamah by signature rather than by seal. On the contrary, the early Regulation on this subject, Regulation XXVII. of 1814, expressly provided that a vakalutnamah might be authenticated by seal or signature. It is true that, on the second occasion of this matter coming before the Judge, he states as an abstract proposition that the fact of the seal being affixed to the document is no evidence of its having been executed by the party whose seal it bears. The Judge does not state that there was any doubt in his mind as to the execution of this particular mooktearnamah by the Maharaja: nor does it appear that there was any suggestion that the mooktearnamah had not been so executed. It seems to have been an entirely gratuitous objection, and more especially so when we consider the Circular Order which was then and is still in force upon this subject.

The 18th May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt. Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Building—Possession—Transfer of property.

Reference to the High Court by Mr. C. D. Linton, Judge of the Court of Small Causes of Chooadangah.

Sreehurry Roy, *Plaintiff*,

versus

Mr. James Hills, *Defendant*.

h

Baboo Rash Beharee Ghose for Plaintiff.

Baboo Hem Chunder Banerjee for Defendant.

Where a party, partly with his own funds, and partly with 100 rupees subscribed by the village, erected a building for a school, never gave the property to the school, and never even acquiesced in the managers of the school entering upon it—HELD that the managers entered upon it as trespassers, and that, although the proprietor acquiesced in their having taken possession, he did not thereby convey every property in the school to the subscribers, and was not bound to repay that portion of the money which he expended himself in building the house, or to do more than return that portion of the funds which were subscribed by the village.

∴ * *Case.*—THIS was an action in form trover and trespass, to recover from the defendant the sum of Rupees 500, after abandoning an excess of Rupees 106-13-9.

In this case I granted a new trial, and Mr. Furlong had returned to India, and he was a material witness to prove whether or not the school built by him at Koorulgachee was built by aid of subscriptions, or solely with defendant's funds. Having taken this evidence under a commission, I find, as a fact (in addition to the facts found in the case which accompanied my letter No. 47, dated 8th August last, and which I beg may be considered as part of the present case), that the school was built by aid of subscriptions obtained from plaintiff and others; that the school, when built, cost Rupees 300, and that the greater portion of this sum was given by Mr. Furlong on defendant's behalf; and that the subscriptions given by plaintiff and others could not have exceeded more than Rupees 100. I have, therefore, given judgment in plaintiff's favor for Rupees 190 subject to the opinion of the High Court on the following point:—

Whether the plaintiff, on the facts as now found, is entitled to recover greater damages than Rupees 190 which have been awarded to him.

It has been argued on the part of the plaintiff that, as it is now found, as a fact, that the school was built with aid of subscriptions, the plaintiff is entitled to recover the full damages mentioned in the plaint, and that it is immaterial to consider whether or not the plaintiff took possession of the building with the leave and license of the defendant, as the defendant himself contributed towards the erection of the same, and by his conduct and acts acquiesced in such possession, and thereby gave up all rights and title to the building—in short, made a gift of the building to the school.

For reasons set forth in the case which accompanied my letter, and as it is admitted that the land whereon the school was built belongs to defendant, I am of opinion that the plaintiff, according to the maxim "Quicquid plantatur solo solo cedit," is only entitled to recover Rupees 190 from the defendant, *viz.*, Rupees 100 being the amount of subscriptions paid by plaintiff and other parties towards the erection of the school, and Rupees 90 for the loose materials which were lying in the school, and taken away by defendant's servants and agents.

The judgment of the High Court was delivered as follows:—

Peacock, C. J.—I do not think that the facts now stated make any difference.

Originally it was found that Mr. Furlong, the manager of the defendant, with the defendant's funds and for the express purpose of a school, built this house in the year 1265; that the Police and some Deputy Collectors occupied it for a short period, and that Government aid was not obtained till 23rd June 1863, when the school was established in the said building; that there was no possession given by defendant to plaintiff or any other party on his behalf of the said building; that the plaintiff entered into possession of the said building without leave or license of defendant, but that defendant by his conduct and acts acquiesced in such possession.

Now, the alteration in the finding is that Mr. Furlong, the manager of the defendant, partly with defendant's funds, and partly with 100 rupees which were subscribed by the village, erected this building. There is nothing to show that Mr. Furlong was bound to pay the manager of the school that portion of the outlay which exceeded the subscriptions. He never gave the property to the school; he never even acquiesced in the managers of the school entering upon it. They entered upon it as trespassers, and, although he acquiesced in their having taken possession, he did not thereby convey any property in the school to the subscribers.

It appears to me that Mr. Hills is not bound to repay that portion of the money which he expended himself in building the house, and that he is not bound to do more than return that portion of the funds which were subscribed by the village. Therefore, he is not liable to any damages

* *See* Vol. 6 (Civil References), p. 21.

beyond the amount which the Judge of the Small Cause Court has awarded to plaintiff, *viz.*, 100 rupees being the amount which the village subscribed, and 90 rupees which were given before on account of the loose materials which Mr. Furlong took away.

Jackson, J.—I am of the same opinion.

The 17th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Duty of Judge—Evidence (Mode of recording).

Case No. 157 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 24th January 1867, reversing a decision passed by the Moonsiff of that District, dated the 12th March 1866.

Prosunno Chunder Banerjee and others (Defendants), *Appellants,*

versus

Gouree Dass Bhuttacharjee (Plaintiff), *Respondent.*

Baboos Kishen Kishore Ghose and *Greeja Sunkur Muzoomdar* for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

A Judge ought not to make a case for a plaintiff which he does not make for himself.

Remarks on the careless and incorrect manner in which the first Court allowed the evidence to be recorded.

Seton-Karr, J.—THE plaintiff in this case sued to recover possession of a house in the city of Patna held under an hereditary pottah, together with 50 rupees as rent, alleging that his cause of action arose on the 5th of January 1865, when he served the notice on the defendants.

The principal defendant replied that the plaintiff never had had possession of the house for a much longer period than 12 years; that the land and house belonged to one Gopeenath Mookerjee, who sub-let the house and dealt with it as he liked; and that, after the death of Gopeenath, Brij Lal, his grandson, gave the house to the defendant.

The Moonsiff drew up several issues, of which we need only notice the issue on limitation, and issues Nos. 3 and 4, which sufficiently raise the question of the title of the plaintiff on the one hand, and that of the defendant, derived through Gopeenath, on the other.

The Moonsiff held that the issue of limitation ought to be tried with that of the proprietary right, and, on the whole evidence, the Moonsiff found that the plaintiff had not made out his case; that the evidence of his witnesses was discrepant and confused, and that it was not made out that the plaintiff's father had erected the house or received the rent. The Court further held that the plaintiff had not proved his pottah, nor a certain *zamin-i-namah*, or deed of trust, on which he relied, and that the plaintiff had actually admitted the possession of Gopeenath; and so the Court dismissed the case.

In appeal the Judge stated that the suit was brought on an allegation by the plaintiff of trust on the part of Gopeenath, both by writing and implication, and that the deed of trust, in his opinion, was not proved. But the Judge ruled that it was proved that the land including the house in dispute and another not in contest had been held by Kamulakant, the plaintiff's father, who had always paid rent for it; that Gopeenath had added to and completed the house which had been built, in the first instance, by Kamulakant; that it was not shown that Kamulakant had transferred his own right or interest to Gopeenath; that there had been a marriage between the daughter of Kamulakant and the son of Gopeenath; that Gopeenath had not held any adverse possession of the building for 12 years; and that, Gopeenath's possession merely arising out of a trust, the exact nature of which could not be defined, the plaintiff was entitled to a decree.

From this decision the defendant appeals, and we have heard a full argument on both sides, and we have spent a great deal of time on the case which is not a very complicated one, simply owing to the peculiar manner in which it has been treated by the Judge in appeal.

We are quite clear that the decision of the Judge in its present shape cannot possibly stand.

One great and signal fault in it is that the Judge has made a case for the plaintiff which he did not make for himself. In his own plaint and written statement, the plaintiff does not set up that Gopeenath was executor of Kamulakant, or appointed to be his guardian, and, as such, acted as trustee for

him. He does not attempt to bring the case within Section 2 of Act XIV. of 1859, nor does the Judge appear to rely on that Clause. Indeed, if there ever was such a trust, on the plaintiff's own showing by his written statement, it has long since ceased, and the parties have been dealing with each other independently.

The plaintiff came into Court with a long recital of the facts in which he mentioned very few dates. He said that the houses and land belonged to Kamulakant, his father; that Gopeenath resided in one of the houses as his father's tenant; that Chunder Monee, the daughter of Kamulakant, married Umanath, the son of Gopeenath; and that the plaintiff entrusted the larger house of the two to Gopeenath under a deed, dated 1238, empowering him to let the same, to pay the zemindar's rent, and to execute the repairs; that the plaintiff subsequently went away to Lower Bengal, and, on his return, received the rent; that, after the attainment of majority, the plaintiff let the house to one Bhenee Madhub Mookerjee, and that afterwards Prosunno Mookerjee had it; that afterwards the plaintiff's sister resided in the same; that both the houses remained under the management of Bhenee Madhub; and that, finally, Brij Lal, the son of the plaintiff's sister, first leased the house, and then made it over as a gift to Nubin Chunder, the principal defendant.

Both Prosunno Chunder Banerjee and Nubin Chunder flatly denied the above allegations, and pleaded that the house belonged to Gopeenath, that it was held afterwards by his daughter-in-law Chunder Monee, and that her son Brij Lal made it over to him as a gift in Phalgoon 1271.

On the contention raised by the above conflicting statements, the Moonsiff appears to us to have drawn the issues correctly, and to have entered properly into the merits. The real point at issue was, whether the plaintiff had made out that the proprietary right was in his father, and that Gopeenath had only resided in the house by permission or as a tenant.

We have only one fault to find with the Moonsiff, and that relates to the very careless and incorrect manner in which he has allowed the evidence to be recorded. We have heard considerable portions of that evidence read, not, of course, with any view of testing its actual credibility or deciding the case on it, but in order to see what, if credited, it legally supported; and we find that, in several sentences, words necessary to complete the sense have been omitted; that there is an absence of accusative cases which should be indicative of the persons to or for whom acts are done; that there are some obvious errors of grammar, and that the whole is taken down in a slovenly fashion calculated to perplex those at a distance, who have only the dead record to trust to, and who cannot put questions to elucidate points left in obscurity or doubt. The Judge will furnish the Moonsiff with an extract of our remarks bearing on this subject for future guidance, and he will himself endeavour to check this tendency to take down evidence incompletely and obscurely, which we have noticed on more than one occasion in other appeals from different parts of the country.

The first thing that the Judge should have done, on appeal by the dissatisfied plaintiff, was to see if he had proved his title and his case, on the issues as framed and decided by the Moonsiff. If the Moonsiff had drawn the issues incorrectly, or had failed to draw the proper issues, the Judge might have framed additional issues. But the issues drawn by the Moonsiff seem to us fairly to embrace the whole contention between the parties.

The Judge finds the deed not proved. The deed, as alleged, put Gopeenath in the position of a contracting party, not of trustee. Probably, the Judge would have done right to say that the entire case of the plaintiff was based on the contract contained in the deed, and, as that case was not proved, that the suit must be dismissed. But, if he thought proper to raise a new issue for the plaintiff, it behoved him to scrutinise carefully the other evidence on which he thought fit to give the plaintiff a decree.

Now, though we do not, as we have said, offer any opinion as to the credibility of the witnesses, we feel bound to point out to the Judge that the testimony of the witnesses for the plaintiff is often mere hearsay; that the witnesses do not say how they came by their alleged knowledge of certain facts in the history of the family; that they do not appear to have witnessed payments of rents to the zemindar on behalf of the plaintiff; and that, altogether, when a deed of trust has been decided not to be proved, and when the transactions extend over a long period of time, the oral evidence to entitle a plaintiff to a decree should be precise and clear, should be that of persons speaking to facts which they had every opportunity of knowing, and should be well and

carefully weighed by the Judge of the Appellate Court, especially when the same, for apparently good reasons, has been pronounced unsatisfactory by the first Court.

The Judge should also consider the weight and effect of the evidence for the defendant.

The Judge's decision is set aside altogether, and the case is returned to him for a fresh judgment.

The Judge will re-try the appeal on the issues drawn by the Moonsiff, and without taking any fresh evidence in the case. He will see, first, whether the title of Kamulakant is clearly proved, and, if so, whether Gopeenath was all along in possession, by his permission and consent, or as his tenant. If these facts be clearly found on good evidence, and if house-rents have been either paid to the plaintiff, or ground-rent accounted for to the zemindar on plaintiff's behalf, up to a date within 12 years before the institution of the suit, the plaintiff may get a decree.

If these facts are found otherwise, the decision of the Lower Court should stand good, for the simple ground that there could be no reason for reversing it.

The plaintiff's plea that his cause of action commenced on the issue of his notice is untenable except on the theory that there was a tenancy-at-will which *subsisted* until determined by that notice. Unless that position be distinctly made out, it would seem that there is no bar to the plea of limitation clearly pleaded by the defendant.

Case remanded to the Judge with reference to the above remarks.

The 18th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Cross-decrees—Section 209, Act VIII. of 1859.

Case No. 322 of 1866.

*Application for review of judgment passed by the Hon'ble Justices E. Jackson and F. A. Glover, on the 16th June 1866, in Regular Appeal No. 53 of 1866.**

Ram Coomar Ghose (Respondent), *Petitioner,*

versus

Gobindnath Sandyal (Appellant), *Opposite Party.*

* *See* Vol. 6, p. 21.

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter* and *Nuleet Chunder Sein* for Petitioner.

Baboo Onookool Chunder Mookerjee for Opposite Party.

The provisions of Section 209, Act VIII. of 1859, apply only to cross-decrees of the same Court between the same parties, or to cross-decrees between the same parties, though of different Courts, which have found their way for execution to the same Court.

Kemp, J.—THIS is an application for a review of the judgment of this Court, dated the 16th June 1866, present Justices E. Jackson and Glover.

It appears that Gobindnath Sandyal and others had obtained as far back as in 1828 a decree against the Bhuttacharjee party. In execution of this decree, the Sandyals caused certain properties of their judgment-debtors to be sold, and, becoming themselves the purchasers, took possession. The judgment-debtors, the Bhuttacharjees, then brought a suit to set aside the sale, and were successful, and a decree was passed restoring them to the possession of their estates with mesne-profits. For some time, and pending adjustment of accounts, it was very doubtful whether the Bhuttacharjees were indebted to the Sandyals, or the Sandyals to the Bhuttacharjees on account of the claim of the latter to wasilat. It was at length decided that the Bhuttacharjees were indebted in a large sum to the Sandyals. While this enquiry, which was a protracted one, was pending, the applicant for review, who is also a judgment-creditor of the Bhuttacharjees, applied to execute his decree against them by attachment of the decree obtained by them against the Sandyals for possession of the estates sold in satisfaction of their decree and for mesne-profits.

After some litigation in the Summary Department, it was decided that the present applicant for review was at liberty to attach the decree obtained by the Bhuttacharjees against the Sandyals. The latter party, apprehensive that this step would prejudice their claim to set off the decree obtained against them by the Bhuttacharjees against their decree for the larger sum against the Bhuttacharjees, brought a regular suit to have the summary order declaring the right of attachment to exist set aside, and for a declaration of their right of set-off.

In the first Court their suit was dismissed. In appeal, their right of set-off under Section 209 was declared.

An application for review was then made by Ram Coomar Ghose and others, and after

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hearing their learned Counsel, Mr. Doyne, the following order was passed on the 2nd of March 1867, *viz.*, that notice be served on the opposite party to show cause why the application for review should not be admitted on the ground that Section 209 of Act VIII. of 1859 was not applicable to the position of the two cross-decree-holders—the Sandyals on the one side, and the Bhuttacharjees on the other. A decision of a Full Bench of this Court, dated the 24th August 1866, was quoted in support of the application.

The case has been fully argued by Mr. Doyne and Baboo Dwarkanath Mitter for the applicant, and by Baboo Onookool Chunder Mookerjee for the opposite party.

We are of opinion that the former judgment of this Court, viewed with the ruling of the Full Bench quoted above, was erroneous, and that the opposite party, the Sandyals, are not entitled under the provisions of Section 209, Act VIII. of 1859, to the right of set-off.

The two decrees, that is to say, the one obtained by the Sandyals against the Bhuttacharjees, and the other by the Bhuttacharjees against the Sandyals, were not decrees of the same Court, the one being a decree of the Provincial Court, the other a decree of the Principal Sudder Ameen. The provisions of Section 209 apply to cross-decrees of the same Court between the same parties, or to cross-decrees between the same parties, though of different Courts, which have found their way for execution to the same Court.

The decree of the Provincial Court was not sent to the Principal Sudder Ameen for execution, but to the Judge's Court. The case, therefore, does not fall within the provisions of the Section 209. This view of the law is the one taken by the Full Bench in their decision published in the Weekly Reporter, Volume VI., page 72, Miscellaneous Rulings, dated the 24th August 1866.

It has been attempted to show that the Ghoses, in suing out attachment of the decree obtained by the Bhuttacharjees against the Sandyals for possession and mesne-profits for the period the latter were in possession, have placed themselves in the shoes of the Bhuttacharjees, and must be held to be cross-decree-holders as against the Sandyals; and that the provisions of Section 209 apply, and the decree of the Sandyals against the Bhuttacharjees, being for the larger sum, must first be satisfied. But we are of opinion that this contention is not tenable, for the Ghoses are third parties; they are not parties to the cross-decrees between the Sandyals and the Bhuttacharjees, and it is only to cross-decrees between the same parties that the provisions of the Section 209 are at all applicable. In this view of the case, we reverse the decision of this Court, dated the 16th June 1866, and restore that of the Court of first instance, the result being that the suit of the Sandyals to have their right of set-off declared is dismissed with costs and interest of all the Courts including this application. The question of whether the attachment of the Ghoses by reason of its priority, if such be established, entitles them to any preference in obtaining satisfaction of their decree against the Bhuttacharjees before that obtained by the Sandyals against the Bhuttacharjees remains open; it is not now before the Court.

The 18th May 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Pleaders (Appointment of).

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 1st April 1867.

Shaikh Nubee Buksh, Mooktear, *Petitioner.*

Mr. R. E. Twidale for Petitioner.

Not merely authorized mooktears, but other persons generally, are at liberty to appoint pleaders by vakalutnamahs.

THIS is an application on the part of Nubee Buksh, who appears to have been authorized under the special rule of the High Court to practise as a mooktear in the Criminal Courts of the district. He complains that, by an order of the Zillah Judge of Tirhoot, dated the 1st April last, he and other persons similarly placed have been restrained from making appointments of pleaders under mooktearnamahs which they hold, the Judge having ruled that vakeels are at liberty to accept such vakalutnamahs only from three specified persons who have been qualified, and have received certificates to act as mooktears under the general provisions of Act XX. of 1865. This order is evidently based upon a misconception on the part of the Judge. Mooktears, who formerly had no legal status in the Civil Courts, were competent to execute vakalutnamahs on behalf of their principals, and Act XX. of 1865 has made no alteration in the law in that

respect. The order, therefore, which the Judge has made restricting the power of signing vakalutnamahs to three specified mooktears, must be withdrawn.

At the same time it is necessary to provide against two misconceptions which appear to exist in the mind of the petitioner himself. One of these is that he has authority (under the particular certificate which he holds) to act in the Civil Courts. Section 11 of the Act states that "Mooktears duly admitted and enrolled as aforesaid may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear and act in any Civil Court." But this petitioner has no certificate authorizing him to appear in any Civil Court; he has only, under special circumstances, an authority to practise in the Criminal Courts of the district. He is not, therefore, *qua* mooktear, authorized to do any act in the Civil Courts.

The second misconception in his mind is, *qua* mooktear under Act XX. of 1865, that he is authorized to appoint a vakeel. That is a mistake. Any person may hold a power of attorney, and, as such attorney, may sign a vakalutnamah and appoint a pleader to appear for his principal.

The Judge's order will, therefore, be set aside, and he will take care to let it be understood that, not merely authorized mooktears, but that other persons generally, are at liberty to appoint pleaders by vakalutnamah.

The 20th May 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Sections 16 and 19, Act XXIII. of 1861—Forgery and Perjury.

Hurronath Roy and others, *Petitioners.*

Baboo Kalee Mohun Doss for Petitioners.

Under Sections 16 and 19, Act XXIII. of 1861, Civil Courts have power to refer to Magistrates or to make commitments to the Sessions in cases of perjury or forgery, only when they have come to some conclusion in respect of the guilt of the party concerned, or the truth or otherwise of the document or evidence.

THIS is an application of Hurronath Roy and others, who were defendants in a suit brought by Sreeshteedhur Doss. The plaintiff, alleging himself to be a mokurrureedar, sued to have his mokurruree right declared. On the special appeal of the defendants, this Court remitted the suit to the Lower Appellate Court (the Principal Sudder Ameen) in order to determine whether the document filed by the plaintiff was a fabrication. The Principal Sudder Ameen, it seems, thought it necessary, without first determining the appeal, to institute an enquiry, as he says, whether the document filed by the plaintiff was a forgery, or the written statement put in on behalf of the defendants, and verified on their behalf by their mooktear was untrue, and he required the attendance of the mooktear. The mooktear not attending, the appeal was struck off the file, and the defendants were required to appear in person.

A special appeal has been preferred against the order striking the appeal off the file, and the petitioners now come before this Court by way of motion, seeking to have the order for their personal attendance quashed.

By Section 16, Act XXIII. of 1861, "when, in any case pending before any "Court, any witness or other person shall "appear to the Court to have been guilty "of an offence described in Sections 193, "194, 195, 196, 199, 200, 205, 206, 207, "208, 209, or 210 of the Indian Penal "Code, the Court may commit such person "to take his trial for the offence before the "Court of Session, or, after making such "preliminary enquiry as may be necessary, "may send the case for investigation to any "Magistrate having jurisdiction," &c. And Section 19 of the same Act provides that, "when, in any case pending before any "Court, there shall appear to the Court "sufficient ground for sending for investiga-"tion to the Magistrate a charge described "in Sections 463, 471, 475, or 476 of the In-"dian Penal Code, which may be preferred in "respect to any deed or paper offered in evi-"dence in the case, the Court may send the "person accused in custody to the Magis-"trate," &c.

Under these two Sections, Civil Courts have power to refer to the Magistrate, or to make commitments to the Sessions in cases coming under the XIth or the XVIIIth Chapter of the Indian Penal Code, but they are to make orders of that kind when a witness or other person "shall appear to the Court" to have been guilty of any offence, or when there shall "appear to the Court sufficient ground "for an investigation."

It seems quite clearly, I think, the meaning of these Sections that the Civil Court must come to some conclusion in respect of the guilt of the party concerned, or the truth or otherwise of the document or evidence. If, on hearing the appeal in this case, the

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Principal Sudder Ameen had been of opinion that the plaintiff had produced a forged document, or that the defendants had knowingly tendered a false written statement, he might have proceeded under the 16th or 19th Section as the case might be. As the case stands, he has come to no conclusion. He has proposed to himself, as a subject for enquiry, whether the plaintiff or defendants have committed one or other offence. Without coming to any conclusion, he has struck the appeal off the file, and proceeded with the criminal investigation. It appears to me that the order is clearly irregular, and not consistent with the meaning of the two Sections cited from Act XXIII. of 1861.

A special appeal has been preferred against the order striking the case off the file. It appears to me that the whole matter will be more conveniently considered when that special appeal comes to be heard; but that, in the meantime, the order directing the personal attendance of the defendants ought to be suspended. I, therefore, direct that the order be suspended, and that the records of the case be forwarded to this Court without delay.

The 21st May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Money-decree—Subsequent purchaser—Mortgage—Marshalling securities.

Case No. 1425 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 22nd February 1866, reversing a decision passed by the Moonsiff of Bistopore, dated the 19th August 1865.

Bishonath Mookerjee and another (Plaintiffs), *Appellants,*

versus

Kisto Mohun Mookerjee (Defendant), *Respondent.*

Baboo Bungshee Dhur Sein for Appellants.

No one for Respondent.

Per Seton-Karr, J.—Case remanded for the Lower Court to find whether, when property hypothecated for a bond has passed to a *bonâ fide* purchaser, the same can be declared liable to satisfy such part of a money-decree on the bond as cannot be satisfied from any other source.

Per Norman, J.—If *A* has a mortgage on two different estates for the same debt, and *B* has a mortgage on one only of the estates for another debt due from the same party, *B* has a right in equity to throw *A* in the first instance for satisfaction upon the security which he, *B*, cannot touch, *where it will not prejudice A's rights or improperly control his remedies.*

A purchaser of one of the estates has the same equity as a mortgagee.

Seton-Karr, J.—In this case the plaintiff sued to confirm a deed of sale by which he purchased certain land from one Kanto Mudduk in Bysack 1268. The defendant, Kisto Mohun Mookerjee, denied the genuineness of the plaintiff's deed of sale, and pleaded that the land purchased by the plaintiff had been pledged as a security for a bond, dated the 4th of Falgoon 1263, and it appears that a suit was brought on this bond, in 1270, by Kisto Mohun, and a decree given *on confession of judgment.*

Both the Courts have found the purchase of the plaintiff to be a valid purchase; but the Principal Sudder Ameen has held that the property so purchased was hypothecated for the bond on which it appears that execution has been taken out, and the Principal Sudder Ameen has directed that the same be held liable to satisfy such part of the decree on the bond as cannot be satisfied from any other source.

The plaintiff appeals, and, no one appearing for the respondent, it is urged on us that the Principal Sudder Ameen has not entered sufficiently into the *bona fides* of the mortgage which he all along impeached as collusive, and to which he was no party. He also quotes a decision of the Full Bench, page 315, Volume I. of the Weekly Reporter, ruling that a person obtaining a simple money-decree, though certain property be pledged for his debt, cannot execute it, but must proceed by a separate suit against a subsequent purchaser.

I was at one time inclined to think that it might be unnecessary to remand the case for any more distinct finding as to the collusiveness or genuineness of the proceedings referred to in the bond. The Principal Sudder Ameen does certainly seem to have thought that the proceedings in the bond-case were all regular, but he does so, simply because the stamp-paper was bought by the obligee, and without really trying the point.

The case of the Full Bench quoted seems to me in point with the present, and under it we might perhaps be justified in reversing the decision of both the Courts, in directing that the decree cannot be executed against the property purchased by the plaintiff, and in ruling that the holder of the decree on the bond might, if he thought

fit, bring a fresh suit against the plaintiff, in order to enforce his decree on the property purchased.

Kisto Mohun, though summoned as a witness, has never appeared, and has not thought fit to appear as respondent before us; and, looking to the peculiarities of this litigation, I am not prepared to reverse the decree at once. I would remand the case for the Principal Sudder Ameen to find clearly, *first*, whether the transaction on the bond is regular, genuine, and *bond fide;* and, *next*, if it be so, whether, under the decree, the defendant can have a lien on the property which it is now found has passed to another and a *bond fide* purchaser.

Norman, J.—If I understand the facts of this case rightly, of which I am not quite certain, they are that the defendants, having obtained a common money-decree on a bond, dated the 4th Falgoon 1263, against Kanto Mudduk, sought to execute it against certain property.

The plaintiffs intervened under Section 246, and their intervention was rejected by the Principal Sudder Ameen.

They then brought this suit, alleging that they had purchased the property from Kanto Mudduk under a deed of sale in 1268, and praying that their rights might be declared as purchasers. The first Court says that the suit is for possession.

The Principal Sudder Ameen, on appeal, found that the plaintiff's purchase and the instalment-bond of the defendants are genuine, but, as other items of property are pledged under the instalment-bond by Kanto Mudduk to the defendant, the Principal Sudder Ameen declared that the plaintiffs' possession should be confirmed on their paying so much of the debt as would remain due after the properties comprised in the bond should have been sold by the defendants.

It is quite possible that the order of the Principal Sudder Ameen may be strictly just and equitable. The facts may be such as to bring the case within the rule stated in Story's Equity Jurisprudence, §§ 633, 642, 643. He says: "The general principle is "that one party has a lien on or interest "in *two funds* for a debt; and another "party has a lien or an interest in one only "of the funds for another debt; the latter "has a right in equity to compel the former "to resort to the other fund in the first "instance for satisfaction, if that course is "necessary for the satisfaction of the claims "of both parties, whenever it does not "trench upon the rights or operate to the "prejudice of the party entitled to the "double fund."

"If *A* has a mortgage upon two different "estates for the same debt, and *B* has a mort-"gage upon only one of the estates for an-"other debt, *B* has a right to throw *A* in "the first instance for satisfaction upon the "security which he, *B*, cannot touch, at "least where it will not prejudice *A's rights* "*or improperly control his remedies.*"

Of course, a subsequent purchaser of one of the estates has just as great an equity as an incumbrancer.

As to the third point taken in the grounds of appeal, *viz.*, that the defendant could not bring the property to sale in execution of a simple money-decree supposing the defendant's purchase to be ineffectual as is apparently the case under the precedent cited, his right as a pledgee under the instalment-bond still subsists. An issue on that right has been tried and found in his favor, and therefore the decree must declare his right.

The Principal Sudder Ameen has made a declaration which may be substantially just and right as to the respective rights of the parties. The doubt I have is, whether, in doing this, he has not gone beyond the issues raised before him. I am not satisfied that he enquired or had an opportunity of ascertaining whether, by declaring that the defendant must resort in the first instance to the other properties, he was not *prejudicing his rights or improperly controlling his remedies.*

On the other hand, no appeal has been presented specifically against this portion of the Principal Sudder Ameen's order except so far as the last ground touches it.

We might vary the decree of the Principal Sudder Ameen by declaring the plaintiff's rights under his deed of purchase, to be subject to the lien and right of the defendants under the bond of 1263, leaving those rights to be afterwards adjusted between the parties.

But, on the whole, we think it best to remand the case to the Principal Sudder Ameen, as we are not quite satisfied that the genuineness of the defendant's bond has been fully tried.

Should the Principal Sudder Ameen make a special decree as he has done here, instead of simply declaring the rights of the parties, he should record his reasons for doing so.

The 22nd May 1867.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Section 206, Act VIII. of 1859—Adjustment through Court — Instalment.

Case No. 13 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 3rd December 1866, reversing an order passed by the Sudder Ameen of that District, dated the 10th April 1866.

Muddun Mohun Mitter (Decree-holder), *Appellant,*

versus

Bibee Peer Bukshun (Judgment-debtor), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Moulvie Syud Murhumut Hossein for Respondent.

The suing on a kistbundee in Court does not necessarily make it the instrument of a public adjustment through the Court within the meaning of Section 206, Act VIII. of 1859.

Bayley, J.—The Lower Appellate Court is, we think, wrong in this case. The suing on a kistbundee in Court does not necessarily make it the instrument of a public adjustment through the Court, such as is contemplated by Section 206 of Act VIII. of 1859. "Such adjustment," says the law, "must be "made through, or be certified to, the Court "by the person in whose favor the decree "has been made, or to whom it has been "transferred." Neither of these processes have been observed here.

Further, the very kistbundee which the debtor now puts in in satisfaction, and which the Lower Appellate Court has accepted, was that kistbundee of which, in the decree-holder's suit upon it, the debtor denied execution, the result being the dismissal of the decree-holder's suit as against this debtor.

We think the decision of the Judge is wrong, and accordingly reverse it, decreeing the appeal with costs.

The 22nd May 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Possession — Title.

Case No. 3340 of 1866.

Special Appeal from a decision passed by Mr. W. Wright, Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Cuttack, dated the 25th September 1866, affirming a decision passed by the Moonsiff of Dhamnuggur, dated the 22nd December 1865.

Gopeenath Doss and others (Defendants), *Appellants,*

versus

Dyanidhee Soondura Mohapattur (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellants.

Baboo Mohinee Mohun Burdhun for Respondent.

A person in possession with a bad title is entitled to remain in possession until another person can disclose a better title.

Glover, J.—The plaintiff in this suit holds a decree against one of three brothers. The defendant has a decree against the remaining two. The plaintiff sued to recover possession of his judgment-debtor's share of the property which was admittedly in the defendant's possession.

The defence was that the plaintiff's decree was a collusive one. But the Principal Sudder Ameen, upholding the decision of the Court of first instance, held that the defendant, whose own decree had been found by the Moonsiff to be collusive, was not in a position to allege fraud on the part of the plaintiff, being *in pari delictu.*

The ground of special appeal is that the Principal Sudder Ameen ought to have tried the point, and we think that the objection must be allowed. The special appellant is admittedly in possession, and the special respondent seeking to oust him from possession is bound to prove a better title. The title he produces is his decree, and this is impugned by the defendant, appellant. Clearly, the special appellant had a right to have this question decided; for, if his decree were proved to be collusive, plaintiff would have no case, and the defendant, however bad his own title might be,

would be entitled to remain in possession until some one disclosed a better title than he. It would be no answer to defendant's allegation of fraud to show that he was himself in no better position, because he, being in possession of the thing sought to be recovered, is for the time master of the situation, and can only be ejected on the strength of his assailant's title, and not on account of the weakness of his own right.

This case must go back for a decision on this point; if it be found that the plaintiff's title on the decree is good, he will be able to recover from the defendants, whose decree has been found to be collusive, but not otherwise. Costs will follow the result.

The 22nd May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Pre-emption—Evidence.

Case No. 2314 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 4th June 1866, affirming a decision passed by the Moonsiff of that District, dated the 17th August 1865.

Hunsraj Singh (Plaintiff), *Appellant,*

versus

Choka Singh and others (Defendants), *Respondents.*

Mr. A Sevestre for Appellant.

Baboo Nil Madhub Sein for Respondents.

In a suit to enforce a right of pre-emption, where there is evidence in support of the pre-emptor's statement of price, the Court is justified in proceeding on that evidence alone without calling on the purchaser to take oath to the amount of purchase-money.

Glover, J.—THE only question involved in this special appeal is one regarding the Mahomedan Law of Pre-emption. Mr. Sevestre for the special appellant contends that, according to the Hedaya, where a purchaser and a claimant differ as to their statements of the price fixed on the property, the assertion of the purchaser should be verified on oath, and preference given to it.

This contention appears to us to be in no way warranted by Mahomedan Law. No doubt, it is laid down in the Hedaya (Volume III., page 577) that, where there is no other evidence, the assertion of the purchaser must be credited in preference to that of the claimant, and that only the purchaser need be put on his oath.

But, in this case, there was evidence in support of the pre-emptor's statement of price, and the Principal Sudder Ameen was, therefore, justified in proceeding on that evidence alone, without calling on the purchaser to take oath to the amount of purchase-money.

His decision on this point was one of fact, with which we cannot interfere in special appeal.

The case of Hunsraj Singh *versus* Rash Beharee, 7 Weekly Reporter 211, is analogous to this, and was decided by a Division Bench of this Court on the 20th February last. Following this precedent, we dismiss this special appeal with costs.

The 22nd May 1867.

Present:

The Hon'ble W. Markby and C. P. Hobhouse. *Judges.*

Forma pauperis—Stay of proceedings in Appeal.

In the matter of the petition of Khodejoonissa, defendant, appellant, in Regular Appeal No. 292 of 1866, praying for a rule on the plaintiff, respondent, to show cause why all further proceedings in this suit should not be stayed, and why the said plaintiff, respondent, should not be dispauperized.

Mr. R. T. Allan for Petitioner.

Where a respondent is allowed in the Lower Court to sue *in formâ pauperis*, the High Court will not set aside that order on motion, on the ground that it has been improperly obtained.

Nor will the High Court, on the application of the defendant, stay all proceedings in the appeal, on the ground that the plaintiff has no interest in the suit, that being a question which can more properly be raised in the suit or appeal itself.

Markby, J.—I THINK both these applications ought to be refused.

The first, which Mr. Allan has made, is that the defendant should be dispauperized, on the ground that facts have been discovered since the permission to sue *in formâ pauperis* was granted, which show that he is not, and never was, entitled to carry on any proceedings as a pauper. Now, it appears that no order whatever, permitting the

plaintiff to sue or carry on any proceedings *in formâ pauperis*, has been made by this Court, because he appears here not as appellant, but as respondent; and the only order that has been made in the case is the order in the Court below that he should be allowed to carry on the suit there as a pauper. It is, therefore, clear that the only rule which we could grant would be to show why the order in the Lower Court should not be set aside. That, I think, we have no power to do. That order is expressly declared by Section 311, Act VIII. of 1859 to be not subject to appeal; and, if that order was obtained improperly, the proper course is to apply to the Court which made the order. We have no jurisdiction to set aside the final order of a Lower Court on any such ground.

The other application made by Mr. Allan was to stay all proceedings in the appeal, on the ground that the plaintiff has no interest in the suit. That is, in fact, asking us to try on this rule a question which goes to the merits of the whole suit. I do not think we ought to do that. If there is anything in the allegations which Mr. Allan has made to show that the plaintiff has no interest in the suit, there are proper recognized modes for bringing them forward in the course of the regular proceedings in the suit or the appeal. But I do not think that we ought, or indeed that we could, by a collateral proceeding of this kind, try a question which can only properly be raised in the suit or the appeal itself.

Hobhouse, J.—I concur with my learned colleague, and have nothing further to add on the question as to the plaintiff being allowed to sue *in formâ pauperis*.

On the other point I wish to add just a few words. They are to this effect: Under the law certain objections must be made in appeal before the Appellate Court; and, though I understand that these objections have not been taken in this instance in this particular form, yet, of course, Mr. Allan, or whoever acts for the appellant, will be at liberty to state these objections at the time when the case comes on for hearing; and if the Court, which then hears the case, should think fit to admit these objections, then there would be a new objection taken, and that objection would be tried and determined by the Court at that time. Such an objection cannot be tried by this Court simply as a preliminary question.

The 22nd May 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Deposit of rent under Act VI. of 1862 B. C. (to what cases applicable).

Case No. 227 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 4th December 1866, affirming a decision passed by the Deputy Collector of that District, dated the 5th June 1866.

Shaikh Mahomed Shuhuroollah Chowdhry (Plaintiff), *Appellant,*

versus

Mussamut Roomya Bibee and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Mr. R. T. Allan for Respondents.

Act VI. of 1862 (B. C.) applies to cases where the amount which the ryot thinks due is deposited by him, and the landlord may either accept it or sue for whatever he himself may deem due to him for the same period for which the deposit is made; but not to suits for rent for the year preceding that for which the deposit is made.

Bayley, J.—In this case special appellant had caused the putnee of his putneedar to be sold for arrears of rent due to him for the year 1224 Mughee.

The putneedar sued for the reversal of this sale, and deposited the rents of the year 1225 in the Collectorate under the provisions of Act VI. of 1862 of the Bengal Council.

The sale being reversed, special appellant sued in this case for the rents of the year 1224 within three years of their becoming due, but after *six months* from the date of the deposit by the putneedar of the rents of 1225.

The Lower Courts dismissed the special appellant's suit, on the ground that under the law, when any such deposit is made for any rent due *before* the time of the deposit, no actions can be entertained for rents preceding the date of deposit, unless instituted *within six months of the deposit.*

After hearing Counsel and referring to the provisions of the law, we are of opinion that the Lower Appellate Court is wrong in the interpretation and application of the law in this case.

Act VI. of 1862 was intended to apply to ordinary cases where landlords and tenants differ as to the amount of rents due for any

particular period, either with reference to *rates* or to the amount of previous payments alleged to have been made, and denied to have been received—to cases, in other words, where the amount which the ryot thinks due is deposited by him—and the landlord may either accept it, or sue for whatever he himself may deem due to him *for the same period for which the deposit is made.*

In this case, no deposit was or could be made for the year 1224. The deposit was for the subsequent year 1225, and the landlord could not sue for the rents of the year 1224 before the sale (caused by him with a view of realizing those rents) had been reversed. But, if such sale were not reversed before the expiration of six months from the date of the deposit for the subsequent year made by the tenant, the landlord is not to lose his rents, because he did not sue, as, under such a state of facts, he had no occasion to sue.

It is clear, then, that Act VI. of 1862 does not apply to this case. The rent is sued for within three years allowed by law, and therefore we remand the case to the Court of first instance to re-try it on its merits with reference to the above remarks.

The 22nd May 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Hindoo Law (Mitakshara)—Partition.

Case No. 118 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 3rd October 1866, affirming a decision passed by the Moonsiff of that District, dated the 22nd March 1866.

Lalla Sreepershad (Plaintiff), *Appellant,*

versus

Mussamut Akoonjoo Koonwar and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Roopnath Banerjee* for Appellant.

Baboos Sreenath Doss and *Kishen Succa Mookerjee* for Respondents.

Under the Mitakshara Law, there may be a partition of an estate without a regular separation and actual division of lands.

Bayley, J.—THE plea on special appeal here is that the plaintiff has sufficiently proved that he was a joint sharer in the property in dispute.

The Lower Appellate Court finds, as a fact, that special appellant has entirely failed to prove that his ancestor or he himself ever held any property *jointly* with the ancestor of the deceased father of the female defendant, or with her father. It is found in distinct terms that the father of the female defendant and *his* ancestors held distinctly and separately their own property without intervention or share on the part of the plaintiff and his ancestors.

It is to be observed that plaintiff claims to inherit the property of the father of the female defendant to her exclusion, on the plea of there being a joint family property.

Plaintiff, the special appellant, quotes two precedents of the Agra Sudder Court, page 357, Volume 9 of 1854, page 379, 29th June 1865, ruling that, in a family governed by Mitakshara, in order to entitle a female to succeed, the *partition* required by the law must be a regular separation and division of lands, and not simply a division of estate and proceeds. We always pay the utmost deference to the decisions of that Court, but legally we are not bound to follow them, and decline to go to the length it has done in those cases.

The special appellant also quotes a case decided by this Court, entered in page 78, Weekly Reporter, Volume V. It does not, we think, go to the extent of the decisions of the Agra Sudder Court as to necessity for definite partition of all lands, but, if it did, the facts are not as shown to the facts of this case.

There is, however, a still stronger case against special appeal not cited to us by special respondent, Weekly Reporter, Volume VI., page 139, which goes through all the cases.

Under these circumstances, we dismiss this special appeal with costs.

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The 23rd May 1867.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Mahomedans—Onus probandi—Purchase in son's name during father's lifetime—Appeal—Additional evidence.

Case No. 3244 of 1866.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Principal Sudder Ameen of Fureedpore in Dacca, dated the 4th October 1866, affirming a decision passed by Baboo Umbika Churn Mitter, Moonsiff of that District, dated the 19th May 1866.

Golam Mukdoom (Defendant), *Appellant,*

versus

Mussamut Hafeezoonissa (Plaintiff) and others (Defendants), *Respondents.*

Mr. W. M. Bourke and *Baboo Kalee Mohun Doss* for Appellant.

Baboos Pearee Lal Roy and *Issur Chunder Chuckerbutty* for Respondents.

Semble.—Among Mahomedans, where a purchase is made during a father's lifetime in the name of his son while living in the father's house, there is no such presumption as arises in the case of a similar purchase made in the lifetime of the father of a joint Hindoo family; and the *onus* is not on the son to prove that the purchase was not made really for and by the father, but by the son for himself and with his own funds.

The parties in an appeal are not entitled as of right to put in additional evidence. The Appellate Court may allow additional evidence in certain cases; but a special appeal will not lie in the event of the Court refusing to allow it.

Macpherson, J.—THE plaintiff in the original suit (a respondent before us now) claimed certain property as inherited by her from her deceased husband, a Mahomedan.

The appellant (one of the defendants) is a son of the deceased. He pleaded a will which he alleged his father made; and he also pleaded, as to certain parcels of property specially named, that they never had belonged to his father, but were the absolute property of him, the defendant, acquired by his own separate means.

Both the Lower Courts decided in favor of the plaintiff; and the Lower Appellate Court directed that the appellant should be criminally prosecuted for uttering a forged document (the alleged will), and for giving false evidence.

In special appeal, it is contended that, as regards the property claimed as his own by the appellant, the Lower Court has erred in this—that it has arrived at the conclusion that the property in question belonged to the father, by wrongly treating the case as if it were one between Hindoos, and throwing on the appellant the *onus* of proving that the purchases made during the father's lifetime in the name of his son, the appellant, and while he was living in his father's house, were purchases not made really for and by the father, but were purchases made by the son for himself and with funds which belonged to himself. If the Lower Court had, in truth, dealt with the case in this manner, there is no doubt it would have been wrong. But we think it quite clear that it has not so dealt with it. The Court, after referring to certain bills of sale (relating to the properties in question) made out in the appellant's name, says: "But these documents have "no witnesses, or rather no witnesses had "proved that the lands covered by the "documents were bought with the funds "supplied by Gholam Mukdoom (the appel-"lant); nor is there evidence enough that "he held these lands apart from his father's "property. There is sufficient evidence on "record that he lived in commensality with "his father, who was in the habit of purchas-"ing property in the name of his son. The "Moonsiff was right in not giving him any "lands on the strength of the aforesaid "documents." The Moonsiff, whose decision is thus approved of by the Appellate Court, was of this opinion: "That these properties "were acquired during the lifetime of the "deceased, and were under his management, "while the aforesaid defendants (appellant "and his wife) lived in commensality with "him, and that these properties were held "in possession by Cassim Ali (the father) "as long as he lived, has been proved by the "evidence of witnesses; and these facts the "defendants cannot deny." Further on the Moonsiff says: "The one circumstance of "these documents bearing the names of the "defendants (appellant and his wife) does "not establish that these properties belong to "them. It has been proved by the evidence "of witnesses that Cassim Ali (the father) "acquired properties in the name of his son "(the appellant) from the time when he "was young."

It appears to us that the Lower Appellate Court endorsed and adopted the finding of the Moonsiff, and that it was not upon the application of any principle of Hindoo Law that the question was decided. Both the Courts held that upon the evidence it was proved that the property belonged to the

father. And we think they were quite right in treating the property as the father's, without any special evidence that the funds with which the purchases were made were his own, if the facts proved were such as the Moonsiff and the Lower Appellate Court have found them to be.

The next objection is that the Lower Appellate Court was wrong in not allowing the appellant to file a document which had not been put in evidence in the Moonsiff's Court, and which the appellant prayed the Court to admit under Section 355 of the Code of Civil Procedure. But the parties in an appeal are not entitled as of right to put in additional evidence. The Appellate Court may allow additional evidence in certain cases; but a special appeal will not lie in the event of the Court refusing to allow it. This point has been expressly decided already in the case of Beckwith *versus* Kisto Jeebun Buckshee (Marshall's Reports, page 278), and we entirely concur in the decision of the Court in that case.

As regards the last objection raised by the appellant, we shall only say that we fail to see that the Lower Court has put any interpretation upon the documents in question, which they do not fairly and legitimately bear.

The appeal is, therefore, dismissed with costs.

The 27th May 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Plea of non-jurisdiction—Costs.

Case No. 243 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 11th December 1866, reversing a decision passed by the Moonsiff of that District, dated the 6th November 1865.

Nobeen Kishen Mookerjee (Defendant), *Appellant,*

versus

Shib Pershad Pattack (Plaintiff), *Respondent.*

Baboos Umbika Churn Banerjee and *Nubo Kishen Mookerjee* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

The plea of non-jurisdiction may be taken at any stage.

Where the plea was taken in special appeal, each party was made to bear his own costs.

Bayley, J.—This is a case brought in a Civil Court for restoration to possession; and, on a comparison of the plaint, we find that the relationship of landlord and tenant, and all such other particulars as render this a case to be tried under Clause 5, Section 23, Act X. of 1859, and in the Revenue Courts, are apparent on the face of the plaint.

We consider, therefore, that there has been no jurisdiction whatever in the Lower Courts.

It is urged, on the other hand, that the plea of non-jurisdiction was not taken at any previous stage.

But the plea is one which the concurrent decisions of the High Court have held may be taken at any stage.

In this view, we reverse the decision below; but we think that it is a case where each party should bear his own costs.

Judgment below reversed; each party to bear his own costs.

Markby, J.—I concur in this judgment.

The 27th May 1867.

Present:

The Hon'ble W. Markby and C. P. Hobhouse, *Judges.*

Joint Hindoo Family—Loan—Ancestral debt.

Case No. 3026 of 1866.

Special Appeal from a decision passed by the Judge of Sarun, dated the 13th August 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st August 1865.

Buldeo Ram Tewaree (Plaintiff), *Appellant,*

versus

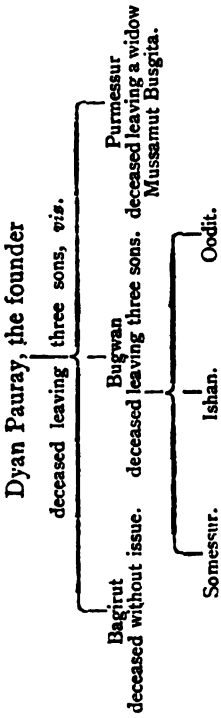
Somessur Pauray and others (Defendants), *Respondents.*

Baboos Kalee Kishen Sein and *Mohesh Chunder Chowdhry* for Appellant.

Baboos Tarucknath Sein and *Chunder Madhub Ghose* for Respondents.

Where money was borrowed by a near relative of a joint Hindoo family, holding part of the ancestral property and appearing before the world as a co-parcener of the family, to pay off a *bond-fide* ancestral debt, the loan was held to be a family and not a personal debt.

Hobhouse, J.—DEFENDANTS, special respondents, are members of a Hindoo family under the Mitakshara form as by the following family-tree:—



In case No. 203 of 1863, decided in regular appeal by this Court on the 19th January 1864, by which all parties to this present suit are bound, it was found that the above family had lived in commensality and jointness of estate.

This fact being so it is admitted, that, during the co-parcenership of Bugwan and Purmessur, certain debts were incurred for the purposes of the joint family; that decrees of Court were outstanding in satisfaction of these debts; and that, in execution of these decrees, certain portions of the joint-family estates were advertized for sale.

At this juncture, Bugwan and Purmessur were deceased, and the joint family was, therefore, made up of the three sons of Bugwan and of Busgita, the widow of Purmessur, and these four persons were recorded as judgment-debtors.

This being so, Busgita had recourse to plaintiff, special appellant, Buldeo Tewaree, and on the 17th September 1860 executed an ikrarnamah in his favor by which she purported to borrow Rs. 1,200 from him on this wise.

For private purposes ...	...	Rs. 324-5
To save the joint-family estate advertized for sale.	...	„ 875-11
	In all,	Rs. 1,200

According to the agreement, the plaintiff deposited the Rupees 875-11 in Court to the joint credit of Busgita and the three other judgment-debtors, but, by a series of proceedings which it is not necessary to detail, whilst the joint-family estate was not saved from sale, the Rupees 875-11 were yet paid to one Nordessur Pershad and another in satisfaction of other ancestral debts due from the joint family.

Plaintiff's money having been thus applied in payment of the ancestral debts of a joint family, he sues to recover it, *i. e.*, the Rupees 875-11, from the representatives of that family, *i. e.*, from Somessur and the other two brothers and Busgita, defendants.

The Courts below have found, *first* of all, that the suit is barred by the application of the Statute, *res adjudicata*, Section 2, Act VIII. of 1859; and, *secondly*, that the debt, having been contracted by Busgita alone, is not a debt for which the representatives of the joint family are liable.

The point in dispute in the suit No. 203 of 1863 was whether or not Bugwan and Purmessur had lived in co-parcenership or in partition, and this was the only point determined.

The point in dispute now is, whether or not Bugwan and Purmessur having lived in co-parcenership, and Busgita, as one of the members of a joint family, having borrowed money to satisfy, and which did satisfy, an ancestral debt of that family, the representatives of that family, having received ancestral assets sufficient, are liable for the debt, *i. e.*, whether or not it is a charge upon the joint estate.

Whilst, therefore, it is clear that the respective causes of action in this present and in the former suit are different, and that the point at present in issue now has not been before heard and determined, and so that the suit is not barred by the application of Section 2 of the Statute, it remains for us to deter-

mine whether or not the Court below was in error in its finding on the point now in issue.

To clear the way, I find, as facts admitted, *first* of all, that there was and is and ever has been a joint family; *secondly*, that Bugwan and Purmessur were at one time the representatives of this family; *thirdly*, that during the co-parcenership of those persons a debt, represented by a sum of Rupees 875-11, was incurred for the purposes of the joint family; *fourthly*, that this debt was outstanding when Busgita and the other present defendants became the representatives of the joint family; *fifthly*, that Busgita borrowed the money to pay this debt; *sixthly*, that the money was actually expended in such payment; and, *lastly*, that defendants have ancestral assets to meet the debt.

These facts being so, the only point to be decided seems to me to be this, *viz.*—Is the act of Busgita in borrowing the money binding on the other members of the joint family; or is it only binding on herself? Is the debt a personal or family debt?

I think that the debt is a family debt, and is binding as such.

I would observe, in the first place, that, amongst the obligations that are most binding upon heirs of a Hindoo family is the obligation of an ancestral debt, and that, amongst families governed by the Mitakshara, this obligation is regarded as well a sacred as a legal obligation.

And it seems to me to follow from this that, if there is one purpose more than another for which a member of a joint Hindoo family, especially under the Mitakshara, might pledge the family credit, it would be for the purpose of paying the ancestral debts.

I am aware that, under the Mitakshara and under the special facts of the case, Busgita is not and never was, in the sense of co-parcenership, a member of the joint family—as a childless widow she was simply in the position of a pensioner, entitled to maintenance.

But still she was *de facto* a member of the family, and at the time of contracting the loan she was an active and ostensible member; for she was, as it is admitted, then in possession of a part of the family property, and stood before the world as one of several judgment-debtors, all the members of the same family.

Then, to the best of my consultation of authorities, I find that, in the case of joint families, debts *bonâ fide* contracted for the legitimate purposes—and it is not for a moment contested that there was not such a purpose here—of a joint family are, by whatsoever member contracted, binding on the whole, and some authorities go to the extent of declaring that such debts, contracted even by a servant or dependant of the family, are binding.

Strange, Chap. VIII., pp. 166-67.
Vivada Chintamoni, pp. 33, 39, and 40.
Vyavasta Durpana, pp. 541 et seq. and paras. 223-227.

If, then, this may be so—I do not say that it is so—in the case where the debt is contracted by a servant or dependant, the case is *à fortiori* far stronger where the person contracting is, as in this case, a *de facto* relative and member, taking an active public part in the family concerns at the time of the contract.

I think, then, that, looking to the facts that there was a *bonâ fide* valid ancestral debt outstanding; that the money in question here was borrowed to pay that debt; that it was actually expended in such payment, and that the position of the person who borrowed the money was, at the time of borrowing, that of a near relative of the joint family holding part of the ancestral property, and appearing before the world as a co-parcener of the family, the Court below was in error in finding this to be a personal, and not a family debt.

I would carefully abstain from laying down any general rule; but I would say that, in this particular case, the money was borrowed legitimately by a *de facto* member of a joint family, for the proper uses of the family, and was, therefore, a debt due from the family, and not simply from the individual borrowing personally; and in this view of the case I would reverse the judgment of the Courts below, and would decree this special appeal with costs in all the Courts and interest thereon.

Markby, J.—I concur in thinking that the plaintiff is entitled to a decree in this case. The mere fact that the money was applied for the benefit of the defendants would not create any liability as between them and the plaintiff. Nor is there any evidence in this case either of any express authority given to Mussamut Busgita by the defendants to borrow the money, or of any subsequent ratification on their part of the loan. If, therefore, the plaintiff can recover

at all, the case must belong to that exceptional class in which one person can volunteer the performance of a service to another, and thereby cast upon him a liability without his consent. Such cases are very rare. But they are not unknown in the English Law, as, for instance, where a tradesman supplies necessaries to a man's wife living apart from her husband; and I agree with my brother Hobhouse that the authorities which he has referred to go so far as to show that, under the Hindoo Law, a person in the position of Mussamut Busgita could, without any authority or ratification, impose upon the joint family the liability of repaying this loan under the circumstances of this case.

The 27th May 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Claim to attached property—Mortgage.

Case No. 47 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of East Burdwan, dated the 21st November 1866.

Kishen Kishore Ghose (Decree-holder), *Appellant,*

versus

Sreemutty Gaetree Debia (Judgment-debtor) and another (Objector), *Respondents.*

Baboos Romesh Chunder Mitter and *Mohesh Chunder Chowdhry* for Appellant.

Mr. C. Gregory for Respondents.

An objector, who wishes to save mortgaged property from sale, is bound to pay whatever the mortgagor is liable to pay under the decree.

Loch, J.—We think the order passed by the Principal Sudder Ameen is wrong. If the objector, whose claim has been disallowed, wished to save the mortgaged property from sale, he was bound to pay whatever the mortgagor was liable to pay under the decree. We reverse the order of the Principal Sudder Ameen with costs.

The 28th May 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Right of occupancy—Holding under one of several co-proprietors—Parties to a suit—Evidence (statements in verified written statement).

Case No. 238 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 7th December 1866, modifying a decision passed by the Moonsiff of that District, dated the 30th November 1865.

Mookta Keshee Dossee and others (Plaintiffs), *Appellants,*

versus

Koylash Chunder Mitter and others (Defendants), *Respondents.*

Baboo Mutty Lall Mookerjee for Appellants.

Baboo Poorno Chunder Shome for Respondents.

A holding for 12 years under one of several co-proprietors gives a right of occupancy under Section 6, Act X. of 1859, provided the tenant has paid the rent, which payment he may, in the absence of fraud, make to any one of the co-proprietors whom he chooses.

A Court cannot treat as a plaintiff, and compel the other parties to accept as a plaintiff, a party who remains on the face of proceedings as a defendant.

Statements made in a verified written statement of a party are not admissible in evidence (Bayley, J., *dubitante*).

Markby, J.—In this case the plaintiffs alleged that they were in possession of 3 beegahs 8 cottahs of land conjointly with one Bykuntnath and one Hurish Chunder, and that they had been dispossessed by the defendant, Mookta Keshee Dossee, in Bysack 1264. For some reason or other, which to me is quite unintelligible, they made Hurish Chunder a *defendant* in this suit.

The real defendant, Mookta Keshee Dossee, alleged that Hurish Chunder let the lands to her at a rent of Rupees 8 per annum in the year 1259, and that they had been in possession since that time.

So far as this allegation was relied on as a statutory bar to the plaintiff's suit for possession, it failed in the first Court, because the defendant failed to prove that he had been in possession for more than 12

years. But the defendant (as far as I can gather) seems to have contended that, if Hurish Chunder did not let the lands to him so long ago as 1259, still he had been in possession, and paid rent to the joint proprietors, whereby the relation of landlord and tenant had been created between the joint proprietors and himself.

In support of this latter view, the defendant produced certain dakhilas signed by the plaintiff, Bykuntnath Roy; but (as I understand the judgment of the first Court) neither the defendant nor any single witness on his behalf gave evidence that these documents were genuine, and on this ground the first Court rejected them.

The decision in the first Court was in favor of the plaintiffs. The defendant appealed, and the Lower Appellate Court came to a different conclusion. The important words of the judgment are these: "Indeed the appellant (defendant) has not "succeeded in bringing any pottah in "respect of the disputed land; but from the "dakhilas produced by him, and the evi-"dence of the respectable witnesses, "Shumboo Chunder Mitter, Brojo, and "others, whom they have examined, it is "established that defendant's father, and on "his death the defendant, held possession "of the disputed land for upwards of 12 "years, and several respectable witnesses, "*viz.*, Gyaram Chuckerbutty, Taruck "Chuckerbutty, and others, have supported "the aforesaid fact. Under such circum-"stances, the mere inability of the defendant "to produce a pottah cannot be a ground for "ousting them. In the written statement "filed by Hurish Chunder Roy, a co-sharer "of the plaintiffs, living in commensality "with them, he admits having let out the "disputed land to defendant's father in "1264. As to the said settlement having "been made for a term of nine years, Hurish "Chunder's statement was that the land was "let to the defendant's father at a jumma "of Rupees 8 for a term of 9 years; it is "simply an allegation. The said Hurish "Chunder appears to live in commensality "with the plaintiff, respondent, and the "Court is, therefore, apt to think that the "object of making the aforesaid allegation "is to benefit the plaintiffs." And the Principal Sudder Ameen then proceeds to state his opinion that Hurish Chunder, though made a defendant, was colluding with the plaintiffs, and concludes thus: "As it is established that the defendant was "in possession of the disputed land for "upwards of 12 years, the plaintiffs cannot "deprive them of that possession—*vide* "Section 6 of Act X. of 1859."

It has been objected on the part of the plaintiffs, the special appellants before us, *first*, that the Principal Sudder Ameen was wrong in relying upon the dakhilas which were not proved by evidence; and, *secondly*, that the Principal Sudder Ameen was wrong in relying upon the allegation made by Hurish Chunder in his written statement as any evidence against the plaintiffs; and, even if such a statement could be relied on at all, they contend that it must be taken as a whole, namely, that it was a letting for a fixed term of 9 years only.

With regard to the *first* objection, it is admitted before us that there was no evidence in support of the dakhilas, and that they ought not to have been received as evidence; but the defendant relies on the provision contained in Section 57 of Act II. of 1855, which is that "the improper "admission of evidence shall not be ground of "itself for new trial or reversal of any decision "in any case, if it shall appear to the Court "before which such objection is raised, "that, independently of the evidence objec-"ed to and admitted, there was sufficient "evidence to justify the decision."

It is extremely difficult for this Court, sitting in special appeal, to apply the provisions of this Section, because we have no means of ascertaining how far the Court below would have come to the same conclusion, if the objectionable evidence had not been received.

I am clearly of opinion, however, that in this particular case it would be impossible for us to come to a satisfactory conclusion without the assistance of the Lower Appellate Court, and I think, therefore, we ought to remand the case for re-consideration upon the evidence, exclusive of the dakhilas.

With regard to the *second* objection, I am at a loss to conceive upon what conception or misconception of the rules of procedure Hurish Chunder was made a defendant in this suit, which was a suit for khas possession by certain of Hurish Chunder's co-proprietors. It was as *plaintiff* only that he could possibly be a party to such a suit. But the Principal Sudder Ameen has taken a very peculiar course. He considers (upon what evidence is not very clear) that Hurish Chunder is colluding with his co-proprietors, and therefore, although nominally a defendant, he treats him virtually as a plaintiff;

and, upon that ground, considers that his statements are to be taken as admissions, binding on his co-sharers, the actual plaintiffs in the suit. But I do not think that this can be done. I think it would lead to endless confusion, if the Court could treat as a plaintiff, and compel the other parties to accept as a plaintiff, a party who remains upon the face of the proceedings as a defendant.

But then it is said that, though not an admission, still the written statement of Hurish Chunder, having been verified, is evidence in the cause. This is not the way in which it has been treated; but, as the case is to be remanded, it will be as well to give our opinion on this point.

By Section 123 of Act VIII. of 1859, it is provided that a written statement "shall be "confined, as much as possible, to a simple "narrative of the facts which the party, by "whom or on whose behalf the written "statement is made, believes to be material "to the case, and which he believes he will "be able to prove, if called upon by the "Court." And the party making the written statement is required to verify it by declaring that what is stated therein "is true to the best of his information and belief" (*see* Section 27).

Considering these words, it is clear that the party making the written statement may, without incurring the penalties of perjury, insert in the written statement in the form of direct allegations any fact whatever which he hopes to be able to prove at the trial, and which upon the merest rumour he believes to be true.

I can hardly think there can be a doubt that statements made with so little security, for their accuracy as this, are not receivable as evidence in any Court of Justice, and that is my opinion.

One other objection has been taken on this special appeal, and that is that the Principal Sudder Ameen was wrong in holding that the defendant had acquired a right of occupancy against the plaintiffs by reason of his holding under a letting by one co-proprietor only. We do not see that the Principal Sudder Ameen finds that there was a letting by one co-proprietor only. But, even supposing that in this case the letting was by Hurish Chunder only, still a holding for 12 years under one of several co-proprietors is sufficient to satisfy the requirements of Section 6 of Act X. of 1859, provided the tenant has paid the rent, which payment he may, in the absence of fraud, make to any one of the co-proprietors whom he chooses.

I think, therefore, that this case ought to be remanded to the Lower Appellate Court to consider upon the evidence, exclusive of the dakhilas and exclusive of the written statement of Hurish Chunder Roy, whether the defendant has cultivated the land in question for a period of 12 years, and whether he has paid the rent payable on account of the same within the meaning of Section 6 of Act X. of 1859. And I also think that the costs should abide the event.

Bayley, J.—I think that, in this case, there is evidence exclusive of the verified statement of Hurish Chunder. I would not bind myself to say that, under all and every circumstance, the uncontradicted statement of a party verified on oath is positively no evidence. (*See* Marshall's Reports, page 181, at foot, Rajah Nursingh Deb's case.)

I concur in the remand order proposed.

The 28th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Dower.

Case No. 440 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 4th September 1866.

Mussamut Huseena (Defendant), *Appellant,*

versus

Mussamut Husmutoonissa Bibee (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Moonshee Ameer Ali* for Appellant.

Mr. C. Gregory and *Baboos Unnoda Pershad Banerjee* and *Kalee Kishen Sein* for Respondents.

Suit laid at Rupees 7,099.

The very best description of oral evidence is absolutely necessary to support a claim for dower where no kabinamah is produced.

Glover, J.—THIS was a suit by Mussamut Bibee Husmutoonissa, widow of Bakhur Ali Khan, to recover from her sons and daughters, the defendants Nos. 1, 2, 3, and 4, the sum of Rupees 48,533-5-4 claimed by her as dower. The dower was alleged to have been fixed at sicca Rupees 50,000 and 100 gold denars, and the suit was for $\frac{7}{8}$ths of this sum with interest, the remaining one-eighth share being, as alleged, in plaintiff's possession as one of the heirs of her deceased husband.

The daughter defendants, as they may be called, Kaberoonissa and Huseena, denied their mother's claim, and alleged that the amount of her dower was only 1,000 sicca rupees with 1 gold denar. They stated that the suit had been concocted with the assistance of the two sons of the plaintiff to nullify a suit brought by the daughter Huseena for her share of the ancestral estate, the amount of dower claimed being more than sufficient to absorb the entire property left by Bakhur Ali.

The son defendants, Sujaut Ali and Vilayat Ali, admitted their mother's claim to a great extent; they stated the dowry to have been fixed at sicca Rupees 40,000 and 10 gold denars, but urged that certain articles of jewellery and other property ought to have been deducted from the amount.

The Principal Sudder Ameen, for reasons given in his judgment, held the dower of sicca Rupees 50,000 and 100 gold denars to be proved, and gave plaintiff a decree for the full amount claimed.

One only of the defendants, *viz.*, Mussamut Huseena, appeals and pleads the general issue, that there is no reliable proof that Husmutoonissa's dowry was ever fixed at sicca Rupees 50,000 and 100 gold denars.

The evidence offered in support of the claim is that of the plaintiff herself and of three witnesses, whose depositions it will be necessary to notice in some detail.

Husmutoonissa's evidence consists of a few words only. In answer to the Principal Sudder Ameen's question, she stated that she had instituted the suit of her own accord, and that her dower was sicca Rupees 50,000 and 100 gold mohurs. She was not examined as to the circumstances under which the dower was promised, nor was any question asked that could tend to show whether or no she was speaking truth. The evidence is simple assertion, and goes for nothing either way.

Afzul Khan, the first witness, who gave his age as 72 years, and who is employed as a gomashta at 5 rupees a month, deposed to having been present at the marriage some 45 years ago, and that a verbal arrangement was then entered into by Bakhur Ali Khan granting a dower of 50,000 sicca rupees and 100 gold mohurs. He further stated that the bride, although a major, was represented by vakeel, and that there was a considerable difficulty with Bakhur Ali regarding the amount of dower, the lady's vakeel demanding 80,000 rupees, and Bakhur being unwilling to give even the 50,000 rupees. This witness added that he was a connection of Bakhur Ali Khan, and that, on the occasion of the marriage of Mujhur Ali, a brother of Bakhur Ali, which took place on the same day, the dower granted was Rupees 50,000 with 100 gold mohurs. The dower agreed upon by Bakhur Ali Khan was "mowujjul," or deferred dower.

Delshar Ali and Jehan Khan gave evidence of a similar character. They are said to be connections of Bakhur Ali Khan, and to have attended at his marriage by invitation.

On this evidence the Principal Sudder Ameen has given the plaintiff a decree. But, taking all the circumstances of the case into consideration, we are not disposed to give it unqualified credit, or to take it as proving anything beyond the fact that the marriage of Bakhur Ali Khan with the plaintiff took place at the time and place stated. As to the evidence itself, it is that of old men, between 70 and 80, speaking of events which occurred nearly half a century ago, and which were of themselves of no manner of importance. That these witnesses should, at this distance of time, be able to speak as confidently as they do, to the altercation which took place regarding the amount of Husmutoonissa's dower, and of the different persons who took part in the proceedings is of itself a very unusual circumstance; and there is nothing in the character or position of the witnesses to mark them out as persons of trust. Two of them at least are almost menial servants, one being a chaprassy and the other a gomashtah on 5 rupees a month.

To prove a claim of this kind, a claim easily asserted, and (at this distance of time) with difficulty refuted, a claim which depends solely on the memory of the parties deposing, the very best description of evidence should be given, the evidence of men of character and position, of men who can

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give reasons for their belief and for their remembering events which happened so long ago and under such very peculiar circumstances.

Again, does this evidence fit in with the admitted circumstances of the case?

Dower is defined (*see* Baillie's Mahomedan Law, page 91) to be the property given by a husband in exchange for the usufruct of the wife, and is in almost every case divided into two portions, one part "mojul," or immediately exigible, and the other "mowujjul," or deferred, the first part being paid before the marriage is consummated, and being, in fact, a payment to the woman by the husband for the enjoyment of marital rights. In the present case, the whole of the large sum of sicca Rupees 50,000 with 100 gold mohurs is said to have been given as deferred dower, with no part of it immediately exigible. We do not say that such a thing never happens, but that it is most unusual, and is another reason for doubting the credibility of the plaintiff's witnesses.

Again, in the very great majority of cases, and specially when the sum given is large, it is customary to reduce the agreement to writing in the form of a kabinnama duly attested and registered. No reason is given for departing from the usual course on the present occasion; whilst, as the plaintiff's witnesses all declare that there was a great deal of haggling between the bride's vakeel and Bakhur Ali as to the amount payable, there was a very sufficient reason why the contract should have been reduced to writing, and not left to depend on the memory or honesty of the bystanders.

Again, the allegations of the plaintiff's witnesses regarding the amount of dower given by other members of Bakhur Ali's family and by Bakhur Ali himself on the occasion of his second marriage with a dancing girl, are distinctly opposed to Mahomedan Law. It is the position of the wife that fixes the amount of dower, and not that of the husband. And there is no evidence on the part of the plaintiff to show that Husmutoonissa was of rank sufficient to have a dower of more than half a lac of rupees; whilst there is a mass of testimony the other way, *viz.*, to the effect that the marriage-dowry usual for the females of Husmutoonissa's family was no more than 1,000 rupees with one gold mohur.

Then, again, we have the evidence of two witnesses, old men, who were present at the marriage, and one of whom at least was a relative, which declares that the dower agreed on by Bakhur Ali was 1,000 rupees and 1 gold mohur. We do not, of course, place any particular reliance on this evidence standing alone, it being open to the same objections as those recorded against the oral evidence given by the plaintiff; but it is corroborated so far by the evidence as to the custom of the bride's family in the matter of dower, and is not opposed by any of those proofs which we should, had the claim been a just one, have expected to see on the part of the claimant.

As to the amount of dower paid by Bakhur Ali on the occasion of his second marriage, we need only remark that the matter was one for his own consideration. The lady, being a dancing woman, would not have been in a position to make any claim at all. And Bakhur Ali, by granting a disproportionately large dower, desired, no doubt, to elevate his new wife in the social scale, and to enable her hereafter to boast that she had had a dowry of no less than 10,000 rupees.

On the whole case, we are of opinion that, to support a claim like that preferred by the plaintiff, very satisfactory evidence indeed was absolutely essential; that the evidence given is of a very uncertain and weak description; and that on it we should not be justified in depriving Bakhur Ali's daughter Huseena, of the entire property left by him, which would be the effect of upholding the claim to dower advanced by the plaintiff.

On the other hand, we find it proved that the usual dower for females of the plaintiff's family was Rupees 1,000 with one gold mohur, and, as there is no contention that this dower was ever paid to Husmutoonissa, she will be entitled to recover her share of the same from the appealing defendant.

The other daughter and the sons have not appealed, and no order is, therefore, made as regards them. None probably would have been necessary under any circumstances, for we are strongly impressed with the conviction that the present case was originally got up in collusion with the sons to enable the plaintiff to acquire under the claim for dower the entire property of her deceased husband, and so to defeat Huseena's right to a one-eighth share of the same.

The Lower Court's order is modified accordingly, with costs in proportion.

The 28th May 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Rights (with regard to water-courses).

Case No. 236 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 29th November 1866, reversing a decision passed by the Moonsiff of Doobrajpore, dated the 29th December 1865.

Khetturnath Ghose (Plaintiff), *Appellant,*

versus

Prosunno Ghose Gowalah (Defendant), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Kalee Kishen Sein for Respondent.

Exposition of the right of discharging the rain-fall on one's land through a water-course over another's, and of the abandonment of such right.

Markby, J.—In this case the plaintiff brought a suit on the allegation that a water-course flowed on the south-east of his putnee talook; that the water of a considerable area of his land drained into this water-course, and used to find an exit in a certain direction over the defendants' land, but that the defendants had erected a bund across the water-course by means of which the water had been diverted into another channel, and so into the plaintiff's tank, whereby the plaintiff was injured; and the plaintiff prayed for a decree that this bund might be removed.

The bund in question was erected by the defendants in that part of the water-course which was on their own land.

It is not very clear on what grounds the judgment of the Lower Appellate Court in favour of the defendants proceeded; but it is found, as a fact, that the bund was in existence at least as long ago as the year 1252.

Whether or no the water-course is a natural or artificial one, is not found.

But, in either view of the case, I think the plaintiff's suit must fail.

If the water-course be a natural one, then the plaintiff would have a right to have discharged through it by natural agency the rain-fall on his lands; and, even though the water-course passed through the defendants' land, they could not erect a bund on it so as to interfere with this right. Such a right with respect to a natural water-course, though a right in *alino solo*, is an ordinary incident of property not acquired by long and continuous user, and in no way dependent on the consent, express or implied, of the owner of the land through which the water-course passes. It is sometimes called a *natural* right in contradistinction to rights acquired by grant or user.

But this right may be abandoned; and the abandonment may be either by express agreement between the owner of the dominant land (*i.e.*, the land which derives benefit from the exercise of the right) and the owner of the servient land (that is, the land which has to suffer the exercise of the right); or the abandonment may be implied from a long and continuous interruption on the part of the owner of the servient land submitted to by the owner of the dominant land.

In this case, the Lower Appellate Court has found that the bund has been in existence since before the year 1252. If, therefore, the water-course be a natural one, the plaintiff's exercise of his ordinary right of property or natural right has been continuously interrupted for so long a period that the Lower Appellate Court might and ought to have drawn the inference that this right of the plaintiff had been abandoned.

If, on the other hand, the water-course be an artificial one, then the plaintiff's right to discharge the rain-fall on his land through it would not be a natural right, or one of the ordinary incidents of property, but a right which the plaintiff might acquire either by express grant, or by long and continuous user submitted to by the defendants.

But, again, this acquired right may, like the natural right, be abandoned; and the abandonment of it may be either by express agreement between the owner of the dominant land and the owner of the servient land, or it may be implied from a long and continuous interruption on the part of the owner of the servient land submitted to by the owner of the dominant land.

It is very doubtful in this case whether, assuming this to be an artificial water-course, the plaintiff gave any evidence to show that he had acquired by long and continuous user, or by grant, the right to discharge the rain-fall on his lands through this water-course over the defendants' lands. But this may have been conceded, as it appears to have been assumed in the Court below, that the right did once exist. Still, however,

in my opinion, the plaintiff must fail; for it is found that the exercise of this right has been continuously interrupted by the defendants from a period prior to the year 1252. The Lower Appellate Court might, therefore, and ought to infer an abandonment of this right on the part of the plaintiff.

Whether, therefore, the water-course be natural or artificial, I think the plaintiff's right to discharge his water through it over the defendants' land does not now exist; in other words, the right of the plaintiff to have this bund removed is not made out.

For these reasons, I think the decree of the Lower Court, dismissing the plaintiff's suit, was right, and that this appeal ought to be dismissed with costs.

Bayley, J.—I am of the same opinion.

The 28th May 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Limitation—Suit to recover moveable property seized under sham decree against third party.

Case No. 214 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 10th December 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 28th August 1866.

Kazee Nuseeutoollah (Defendant), *Appellant,*

versus

Roop Sona Bebee (Plaintiff) and others (Defendants), *Respondents.*

Baboos Debendro Narain Bose and *Romanath Bose* for Appellant.

Baboo Obhoy Churn Bose for Respondents.

A suit to recover moveable property seized under a sham decree against another is governed by the limitation prescribed by Clause 16, Section 1, Act XIV. of 1859.

Markby, J.—In this case it does not appear to me necessary to state more of the facts than (as found by the Lower Appellate Court) that the defendant, having obtained a sham decree against a dependant of his own, proceeded under color of executing his decree (in the language of the Lower Appellate Court) "by fraudulent means to plunder" certain articles of moveable property belonging to the plaintiff.

The seizure took place on the 16th of Falgoon 1269, and the only question before us is whether this suit, which was brought more than a year after that date, is barred by the provisions of Clause 2, Section 1 of Act XIV. of 1859.

It may be conceded that the cause of action arose on the date of the seizure. The words of the Clause which are relied on are those which provide that the period of limitation applicable to suits "for damages for injury to the person and personal property" shall be one year.

But this is not a suit for damages for injury to personal property, but for the recovery of personal property, leading to such a decree as is contemplated by Section 200 of Act VIII. of 1859. For such a suit, no period of limitation is expressly provided; the case, therefore, falls under the general provision of Clause 16, which gives six years as the period of limitation in all cases not expressly provided for. That period had not elapsed when this action was commenced.

In this view of the case, it is unnecessary to express any opinion on the question whether or no, under the circumstances of this case, the question of limitation could be raised at all in favor of the defendant.

I think that this appeal ought to be dismissed with costs.

Bayley, J.—I concur.

The 29th May 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Hindoo Law (Mithila)—Kritima Adoption—Rights of adopted son.

Case No. 532 of 1866.

Application for review of judgment passed by the Hon'ble Justices Loch and Macpherson, on the 23rd July 1866, in Regular Appeal No. 101 of 1866.

The Collector of Tirhoot, on behalf of the Court of Wards, Plaintiff (Respondent), *Petitioner,*

versus

Huropershad Mohunt, Defendant (Appellant), *Opposite Party.*

Mr. R. V. Doyne and *Baboo Kishen Kishore Ghose* for Petitioner.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Opposite Party.

Under the Hindoo Law current in Mithila, a Hindoo widow has power to adopt a son in the kritima form with or without her husband's consent; but such son would not, by virtue of such adoption, lose his position in his own family; nor would he succeed to the property left by the husband of his adoptive mother, but would be considered her son and entitled to succeed to her only.

Loch, J.—HAVING heard the parties for, and against the admission of, an application for a review of our judgment passed on 23rd July 1866, I think that the application must be admitted, and the judgment of this Court set aside, and that of the Lower Court affirmed for the following reasons. It appears that the appellant before the Court, Huropershad, was adopted by Beepeen Koer, under the kritima form of adoption—a circumstance not brought to our notice when the case was before us, though the vakeel for the respondent is known to be thoroughly versed in Hindoo Law. Huropershad appears to have been adopted by Beepeen Koer after the death and without the permission of her husband Sheopershad. Beepeen had, under the law current in Mithila, power to adopt a son in the kritima form, with or without her husband's consent; but such son would not, by virtue of such adoption, lose his position in his own family; nor would he succeed to the property left by the husband of his adoptive mother, but would be considered her son and entitled to succeed to her property only. Macnaghten, speaking of the kritima form of adoption, remarks in Volume I., page 75, Hindoo Law: "Another peculiarity of this "species of adoption is that a person "adopted in this form by the widow does not "thereby become the adopted son of the "husband, even though the adoption should "have been permitted by the husband;" and again in pages 100-101, he says: "But "it does not appear that the prohibition in "Mithila which prevails against her receiving "a son in adoption according to the Datta "form, even with the previous sanction of "her husband, he being dead, extends to her "receiving a boy in adoption according to the "kritima form—and the son so adopted will "perform her obsequies, and succeed to her "peculiar property, though not to that of her "deceased husband."

It is not contended before us that Huropershad was not adopted in the kritima form. He throughout calls himself the "kurta pootro" of Beepeen Koer, nor is it contended that the position of a son adopted under the kritima form is other than as described by Macnaghten; but it is now urged that the property sought to be attached was the separate property of Sheopershad, and never devolved upon Gooroopershad, the natural father of Huropershad, but has come into the possession of Huropershad as next legal heir of Sheopershad after his widow Beepeen Koer's death. This allegation is altogether opposed to the contention raised before us when the case was first heard in appeal. Then the allegation was that the appellant was entitled, and had succeeded to, the property of Sheopershad by virtue of adoption by his widow Beepeen Koer, by which act of adoption he had been entirely separated from his own family, and was possessed of none of the property which belonged to his father—that having gone to his widow Chooharo, the mother of the appellant. Owing to the neglect of the respondent's pleader to point out to the Court that the adoption was in the kritima form, and that the effect of such adoption was not as urged by the appellant, the Court, finding the fact of the adoption proven, was led to accept the view taken by the pleader for the appellant as correct, and, no doubt, by so doing, the Court was led to look at the case in a very different light from what it would have done had the nature of the adoption been properly put before it.

The position of the appellant is now this. As the kritima or kurta pootro of Beepeen Koer, he is entitled to succeed to her property, but not to that of Sheopershad; and if he plead that the property of Sheopershad was separate, and that he has succeeded to it as next legal heir, then he must prove that there was a separation between Sheopershad and Gungapershad, or between Sheopershad and Gooroopershad, or else the property of Sheopershad must, under the Law of Inheritance, have devolved upon Gooroopershad, and the widow of Sheopershad would have been entitled only to maintenance. It is urged by the learned Counsel for the respondent that the appellant nowhere distinctly alleges that a separation has taken place; that the burden of proving the fact of separation is upon him, and that the Court have erred in requiring the plaintiff to prove non-separation; that the Court, in weighing the evidence on both sides, has not distinctly pronounced that the defendant, appellant, proved the fact of separation; but, referring to the evidence given by plaintiff to prove that the family continued to be a joint family, the Court has held that plaintiff has failed to prove his allegation; that a reference to the evidence given by the witnesses called by the appellant to prove separation will show that there never was any separation; and that the Court's estimate of the evidence of the witnesses called by plaintiff is wrong, inasmuch as there is no real contradiction in that evidence, each person stating what he knows, but all agreeing in the fact that the family remained a joint family, and the witnesses gave good and sufficient reason for their knowledge. Further, it is urged that, though separation is now alleged to have taken place, yet Gooroopershad, the father of the appellant, was admittedly in possession of the whole property, partly, it is said, in his own right, and partly as manager for Beepeen Koer; and it was under cover of his pretended position as manager that the collusive bond and deed of sale, dated respectively 29th Bysack 1251 F. S. and 21st Bhadro 1260 F. S., were prepared, and the *ex-parte* decree of 15th December 1852 (1260) was obtained by Beepeen; that this *ex-parte* decree obtained by Beepeen Koer against Gooroopershad was only in furtherance of the fraud; and that the Court was wrong in holding that, at the time when he executed the bond in favor of Beepeen, Gooroopershad was not in a state of indebtedness, for it is apparent that at that time he was indebted to Meer Abdoollah in whose favor he, on a settlement of accounts, executed a bond, bearing date 13th January 1851, for Rupees 21,600. That bond recites the history of money-dealings between Meer Abdoollah on the one side, and Sheopershad and Gungapershad on the other, from 1238, and shows a balance of Rupees 53,228, for which Gooroopershad admitted his liability; and this bond further goes to prove that the family was joint, for by it Gooroopershad takes upon himself the debts due by both Sheopershad and Gungapershad, which he would not have done had Sheopershad in his lifetime separated himself from the family. Then it is urged that the use of Beepeen's name and Chooharo's name in the bond and in the suit against the late Raja are no sufficient proof of separate interest. Gooroopershad was in possession, and he made use of the names of his relatives, as is frequently done in bonds and transfers of property by the head of the family, and, of course, the suits had to be brought in the names of the parties, in whose favor the bonds had been drawn up. The sole object of Gooroopershad, it is urged, was to defraud his creditors by creating complicated and collusive transfers of property, so as to render it next to impossible for a creditor to seize any part of it, and in furtherance of his object he gave out that Beepeen was in separate possession of her husband's share of the property, and for the same purpose the collusive gift by Beepeen to Botcha, the wife of Huropershad, was made, a gift which of itself disproves the statement of Huropershad that he inherited the property of Sheopershad by virtue of his adoption, for it was made after the adoption took place when Beepeen could have had no authority to make such a gift, she being then only in the position of a Hindoo widow, and the property of her husband having vested in her adopted son, whose possession she admitted in a petition, bearing date 24th June 1862, filed by her as guardian of Huropershad in a suit for rent brought by the zemindar against Chooharo. With respect to the gift to Botcha, it appears that Huropershad was adopted in,* and the deed of gift is dated 19th Bhadro 1269, and it transfers to the donee a 4-annas share in certain villages which had been pledged by Gooroopershad to Meer Abdoollah under his bond of 13th January 1851 (25th Pous 1258 F. S.). The deed of gift sets forth that Beepeen thereby

* Year not ascertainable.

transfers to Botcha a 2-anna share of Mouzah Beckraba Gossainpoor and other villages inherited from her husband, and 2-annas share of the same which she had purchased from Gooroopershad in Bhadro 1260 F. S. Under the circumstances disclosed, the Court of Wards found it difficult to know how to act.

I very much regret that this case, now so ably and clearly put before us by the learned Counsel Mr. Doyne, should have been so mismanaged by the pleader for the respondent, when it first came up for trial. He neither took up the law-point as to the effect of a kritima adoption, nor did he read the evidence of the defendant's witnesses, but passed it by with a remark to this effect. The defendant avoids reading the evidence of his witnesses, one of whom at least proves that the family was joint. The defendant had brought witnesses to prove separation. Their evidence proves nothing of the kind: one man says there was separation; the others speak to Sheopershad and Gungapershad being joint in business, though separated in food. In fact, these witnesses do not prove; nor is there any other sufficient oral evidence of there ever having been a separation between Sheopershad and Gungapershad, or between Sheopershad and Gooroopershad, after the death of Gungapershad. In the absence of any reliable testimony to this fact, I think the documentary evidence produced to prove it is not sufficient, for the head of the family, as Gooroopershad now appears to be, might have had reasons for making use of the names of his female relatives, instead of his own in the loan-transactions into which he entered with the Raja. In the absence of any sufficient proof of separation, I must concur with the Principal Sudder Ameen that the property of Sheopershad and Gungapershad vested in Gooroopershad, and through him went to his son Huropershad, and that Huropershad does not inherit any separate property belonging to Sheopershad by virtue of his adoption by Beepeen Koer, as was pressed upon us by the pleader for the appellant when the case was formerly before us; nor, as now urged, is he in possession of the separate property of Sheopershad as next legal heir after the death of Beepeen, the widow of Sheopershad. It is clear, and I may say not disputed by the opposite side, that Huropershad, as adopted under the kritima form, could not succeed to the property of Sheopershad. It is also clear that he has failed to prove the fact of a separation, and therefore he must hold the property of Sheopershad, not as legal heir after the widow, but as part of the ancestral property which devolved on him from his father Gooroopershad. Further, it is evident that, as his adoption by Beepeen under the kritima form did not take Huropershad out of his own family, the allegation that his mother Chooharo succeeded to the property left by his father Gooroopershad is untrue, for, in the presence of a son, the mother is entitled only to maintenance. Under the view of the case now taken by me, I think our former judgment must be set aside, and the appeal of Huropershad be dismissed with costs.

Macpherson, J.—I am of the same opinion.

The 29th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law (Mitakshara)—Ancestral property—Rights of Son—Alienation by father—Fraud—Limitation—Minority (of proprietors of Revenue-paying estates).

Case No. 364 of 1866.

Regular Appeal from a decision passed by Mr. H. R. Madocks, Judge of Bhauguipore, dated the 13th August 1866.

Baboo Beer Kishore Suhye Singh and others (Plaintiffs), *Appellants,*

versus

Baboo Hur Bullub Narain Singh and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *J. DaCosta*, and *Baboo Umurnath Bose* for Appellants.

Messrs. W. A. Montriou and *R. E. Twidale*, and *Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry*, and *Anund Gopal Paulit* for Respondents.

Suit laid at Rupees 24,997-11-2½.

According to the Mitakshara Law, a son has an equal right with his father in ancestral property. He can compel the father to divide the property during his lifetime; and any alienation by the father made after the birth of the son without the consent of the son, unless for a purpose justified by the Hindoo Law as a legal necessity, will not bind the son. If the father, during the minority of the son, alienated any property in fraud of his creditors, such fraud would not bind the son who was neither a party nor a privy to such fraud.

In a suit by the son to set aside an alienation by the father, limitation runs from the date of alienation or of possession under it, unless the son was under legal disability owing to minority at the time of alienation, in which case (according to Section 11, Act XIV. of 1859) the suit must be brought within 3 years from the time when the disability ceased.

According to Section 2, Regulation XVI., 1793, the minority of a proprietor of an estate paying revenue direct to Government extends to the end of the eighteenth year.

Kemp, J.—THIS is an appeal from the decision of Mr. H. R. Madocks, Judge of Bhaugulpore, dated the 13th August 1866.

It appears that the plaintiff, to enable himself to raise funds for the prosecution of this suit, has sold a moiety of his claim to other parties who have been made co-plaintiffs.

The suit is for possession and registry of name in the Collector's rent-roll by adjudication of right and title in certain estates which the plaintiff alleges were ancestral properties, and which have devolved to him in right of inheritance. The suit is valued at Rupees 24,997, of which Rupees 23,225 are claimed as mesne-profits. The cause of action is said to have accrued from the death of the father of the plaintiff which took place on the 11th Magh 1271 F. S.

It is alleged in the plaint that the villages, the subject of this suit, formed the ancestral estate of Zalim Singh, the father of the plaintiff Beer Kishore; that in such property, according to the Hindoo Law as laid down in the Mitakshara, the father and the son have an equal title; that, without the consent of the son, and in the absence of any legal necessity, alienation by the father of any portion of such ancestral estate is invalid; that Zalim Singh, contrary to the Hindoo Law and without legal necessity, alienated the estates claimed to one Lalljee Mull, who afterwards re-sold them to Mussamut Shambuttee Koonwar, the wife of the said Zalim Singh; that, subsequently, some of the properties passed in satisfaction of a decree against Mussamut Shambuttee to the first defendant, Baboo Hur Bullub Narain Singh, the sale in execution having taken place on the 16th April 1857; that the defendants, Nos. 2, 3, 4, and 5, are in illegal possession of a six-anna share in certain estates in virtue of a sale by the said Shambuttee who had no power to alienate the remaining 10-annas share being in the possession of the defendant No. 1, in virtue of a purchase in execution of a decree against Shambuttee.

The defendant No. 6, it is alleged, is in illegal possession of certain villages claiming under a deed of gift alleged to have been made by Zalim Singh to his eldest son Brijo Bhookun Singh, the said gift being invalid under the Hindoo Law.

The defendants, Nos. 7 and 8, are purchasers from No. 6.

The defendant No. 1, who is the principal defendant, in his written statement, contended that the suit of the plaintiff was barred both under the general and special Law of Limitation, *viz.*, under Clause 3, Section 1, Act XIV. of 1859, and Section 11 of the same Act.

That the alienation by Zalim Singh, the father of the plaintiff, to Lall Jhee took place before the plaintiff was born, and that, consequently, under the Hindoo Law, the suit of the plaintiff to set aside such alienation would not lie.

That the alienations to Lall Jhee took place on the 24th November 1841; that in an execution-case in which Motee Singh was the decree-holder, and Zalim Singh the judgment-debtor, Lall Jhee intervened, and obtained a release of the property in dispute which had been attached and lotted for sale as the property of the judgment-debtor, Zalim Singh.

That, after the lapse of a few years, Lall Jhee re-conveyed to Mussamut Shambuttee the properties purchased from Zalim Singh by a deed, dated 29th May 1844; that, in a suit brought by Khedoo Singh *versus* Shambuttee and Zalim Singh, the Principal Sudder Ameen in his decision, dated the 18th August 1847, and the late Sudder Dewanny in appeal, confirmed the sale to Shambuttee.

That subsequently the properties were purchased by the father of the defendant No. 1, in execution of a decree against Shambuttee, and are in the possession of the said defendant.

That the defendant No. 1 was not a party to the suit in which Shambuttee was plaintiff, and Mahtab Singh and others were defendants, and that, therefore, the decision passed in that suit is not binding upon the defendant.

That the plaintiff is not entitled to any benefit from the fraud of his father.

That the father of the defendant No. 1 purchased the properties in good faith and for a valuable consideration without notice of any trust in the person of Shambuttee for the benefit of Zalim Singh; that the amount claimed as mesne-profits has been much exaggerated.

The answer of the defendants, Nos. 2, 3, 4, and 5, is substantially the same as that of defendant No. 1, with this difference, that these defendants' claim is based on a right of pre-emption. They allege that Shambuttee sold a six-anna share in certain properties in the first instance to Bugwunt Narain, that the father of the defendants, or Baboo Mahtab Singh, who was the brother of Zalim Singh, sued the vendor Mussamut Shambuttee as also her vendee and Zalim Singh, claiming the right of pre-emption, and obtained a decree dated the 13th August 1854, under which they are in possession.

The defendant No. 6, Baboo Bissessur Narain Singh, does not appear to have put in any written statement.

The defendants Nos. 7 and 8 also plead limitation, and further urge that, as the gift by Zalim Singh to his son Brij Bhookun Singh was made in the year 1837, before the plaintiff was born, the plaintiff is not competent to sue to set aside the said deed of gift. The defendants are the purchasers of the rights and interests of the donee Brij Bhookun Singh in satisfaction of a decree against the son of Brij Bhookun, *viz.*, the defendant No. 6, the sale having taken place on the 8th July 1864.

The Judge removed this suit from the Principal Sudder Ameen's file, and tried it himself.

The issues, as laid down by the Principal Sudder Ameen and apparently adopted by the Judge, were as follows:—

In Bar.

1st.—Does limitation of one or three years bar plaintiff's suit or not?

2nd.—Was plaintiff born when his father sold the properties to Lall Jhee or not?

3rd.—Was plaintiff born when his father made a gift to Brij Bhookun or not?

Of Fact.

1st.—Is the plaintiff the sole heir of Zalim Singh or not?

2nd.—Was there any legal necessity or not on the part of Zalim Singh to part with his property to Lall Jhee?

Of Law.

1st.—Has a Hindoo father power of making a gift of ancestral property under the Hindoo Law?

2nd.—Are plaintiffs entitled to recover possession or not?

Note.—These issues have been taken from the Judge's decision.

On the *first* issue in bar, the Judge held that, as the plaintiff's suit was not to set aside the sale in execution but on the allegation that the judgment-debtor, Shambuttee, had no title in the properties sold, the suit was not barred, although not brought within one year from the date of the sale.

With regard to the question whether the suit was barred under Section 11 of Act XIV. of 1859, the Judge observes that the plaintiff's cause of action accrued from the date of the death of his father, inasmuch as the plaintiff could not sue during the lifetime of his father (Sudder Dewanny Reports of 1851, page 352).

On the *second* issue in bar, the Judge held that the alienations were made before the birth of the plaintiff.

On the *third* issue in bar, the Judge found that the gift to Brijo Bhookun was made before the birth of the plaintiff.

On the *first* issue of fact, the Judge was of opinion that the plaintiff was not the sole heir of Zalim Singh, but that, as Bissessur Narain, the defendant No. 6, had waived his rights, the point seemed to the Judge to be immaterial under his view of the claim.

The *second* issue of fact, *viz.*, whether the alienations were for a legal necessity, was not tried, the Judge deeming it unnecessary to do so.

On the *first* issue of law, the Judge observes that, as the plaintiff seems to rely on the deed of gift being set aside, it was unnecessary to come to any decision on this issue.

On the *second* issue of law, the Judge observes that the former decision in respect to the fictitious character of the alienation to Lall Jhee by Zalim Singh, although not binding upon the defendant No. 1, he being no party to the suit in which that decision was pronounced, is entitled to its "due weight," and that nothing had been adduced before him to shake the decisive verdict of the Superior Court as regards the character of the alienation which was found to be collusive and fictitious in fraud of creditors. The Judge then proceeds to say that, holding the conveyances were fictitious, it followed that no alienation took place, and that it was unnecessary to discuss the question of legal

necessity. With regard to the question whether the plaintiff was entitled to possession of the properties claimed, the Judge remarks (we give his own words) "that there 'is a fatal obstacle to the plaintiff's claim, 'which he cannot elude or override, for, in-'asmuch as Zalim Singh could not have 'come into Court to claim possession except 'on the ground of his own fraud, his son, 'the plaintiff No. 1, cannot do so either, for 'no man can allege his own fraud in 'order to invalidate his own deed, and, 'if his father could not, his son, the 'present plaintiff No. 1, cannot either. The 'leading case on this point is Trilochun 'versus Obhoy Churn, 28th December 1859, 'the effect of that decision being that a 'party cannot plead his own fraud, and the 'party who makes the allegation must fail, 'and the *heirs* of the fraudulent parties are 'equally bound with the original parties." The following cases are quoted by the Judge in support of his finding, *viz.*:—

Hay's Reports, 31st December 1862, page 528.

Page 37, Weekly Reporter, Volume IV., 21st June 1865.

Page 92, Weekly Reporter, Volume III.

Page 30, Weekly Reporter, Volume III.

The plaintiff's suit was, therefore, dismissed with costs. The officers of the Court were, however, directed to furnish an account of the sums due to the witnesses on account of diet-money, as it was alleged that the sums were charged on an exorbitant scale.

Both parties appeal, the defendants under Section 348 of the Code of Civil Procedure.

The plaintiff urges that the Judge has found, contrary to the weight of the evidence, that the plaintiff was born after the alleged sale to Lall Jhee in November 1841, whereas the plaintiff was born after that date; that the reasons and arguments of the Judge in dismissing the plaintiff's suit are erroneous, as the plaintiff was not bound by his father's supposed fraud, for the plaintiff claims under a title equal to, and independent of, that of his father.

The defendants, in their petition of cross-appeal, urge—

That the Judge was wrong in finding that the alienations to Lall Jhee and Shambuttee were collusive and fictitious set up to defraud creditors, as no such question was in issue in his suit; that the Judge had ruled that the period of limitation commenced to run from the death of Zalim Singh; he also ruled that the date of the plaintiff's birth, which he found to have been subsequent to the alienations, was not material to the decision; it is, therefore, submitted that, if, as plaintiff contends, he was born prior to the alienations, then he is barred under Section 11 of the Limitation Act, whilst on the Judge's finding, *viz.*, that plaintiff's birth was subsequent to the alienations, plaintiff by Hindoo Law was never interested in the estate, and has no right of suit; that legal necessity for the alienation is patent on the evidence, and appears from the plaintiff's case and proofs.

The case has been argued before us at great length, and with much ability by Mr. Doyne for the plaintiff, and Mr. Montriou for the defendants. The learned Counsels on both sides seemed to agree that the judgment of the Judge could not be sustained on the reasoning adopted by him. This Court has, therefore, been obliged to try the case as an original suit, the evidence on the record on all points being sufficiently full to enable the Court to come to a decision without remanding the suit, and putting the parties to further expense.

The plaintiff, it is obvious, had an equal right with his father in the ancestral property; he could compel his father to divide the property during his lifetime, and any alienation by the father made after the birth of the son, without the consent of the son, unless for a purpose justified by the Hindoo Law as a legal necessity, would not bind the son. If, therefore, the father, during the minority of the son, alienated the properties in fraud of his creditors, such fraud would not bind the son, who was neither a party nor a privy to such fraud.

In the case cited by the Judge published in Hay's Reports for December, pages 528-532, the plaintiff claimed through the heir of the party who had committed the fraud, and it was held that he was not at liberty to plead the fraud of the party through whom he claimed against the defendant in possession, for to allow this would be to violate a well-known principle of law which does not permit a party to set up the fraud of the party through whom he claims. The decisions quoted by the Judge from Volumes III. and IV. of the Weekly Reporter recognize the same principle. In the present case the son does not claim through his father, his title is from his birth a title wholly independent of and equal to that of the father. The acts of the father, even if fraudulent, are clearly not binding upon the son.

The *first* question on the merits of the case, considered by us, was whether the alienation by Zalim Singh, the father of the plaintiff No. 1, to Lall Jhee in November 1841, and the subsequent reconveyance to Shambuttee, the mother of the plaintiff, were, as found by the Judge, wholly fictitious, for, if so, the property remained with Zalim Singh, and the plaintiff's cause of action would accrue, not from the date of the sham conveyance, but from the date when the property was sold in satisfaction of a decree against Shambuttee, and purchased by the defendant.

After considering the argument on both sides and the evidence adduced, we are clearly of opinion that the alienation by Zalim Singh to Lall Jhee in November 1841 was not a sham. We find that, shortly after this alienation, one Motee Singh, in satisfaction of a decree obtained by him against Zalim Singh, attached the disputed properties, and endeavoured to cause a sale of them in satisfaction of his decree. Lall Jhee intervened, and claimed to be proprietor of the properties by a *bonâ-fide* purchase prior to the attachment. There was much contention between Zalim Singh and his vendee Lall Jhee as to the character of the alienation, the former contending that it was a conditional sale, the latter that it was an absolute sale. Evidence was adduced on both sides. The result was that, in September 1843, the Principal Sudder Ameen held that the sale to Lall Jhee was an out-and-out sale, and that Lall Jhee was in possession. The property was, therefore, released from the attachment placed upon it by the judgment-creditor, Motee Singh. Then, again, we find that the wife of the plaintiff, or Mussamut Kulabuttee, sued Shambuttee, the mother of the plaintiff, to recover a portion of this very property, and was unsuccessful. These proceedings are wholly inconsistent with the theory that the alienations were simply a sham.

In the present case some of the witnesses examined by the plaintiff depose to the fact that Lall Jhee was in possession. We may also observe that the plaint does not allege that the alienation to Lall Jhee was a sham, but that it was invalid, because it was made without the consent of the son and in the absence of any legal necessity.

The decision of the Judge, that the alienations were wholly fictitious, appears to us to be founded upon an assumed state of facts which is contrary to the case started in the plaint by the plaintiff. For these reasons we find that the sale by Zalim Singh to Lall Jhee was not a fictitious transaction: that the title and possession became vested in Lall Jhee, who reconveyed to Shambuttee. Whether such alienation was valid under the Hindoo Law or not will be considered, if necessary, after deciding whether the suit of the plaintiff is barred by the Statute of Limitations as contended by the defendants in their cross-appeal.

Before leaving this part of the case, we may observe that the defendant No. 1 was not a party to the suit in which the Court expressed an opinion that the alienations were fictitious. Moreover, that opinion was expressed in the absence of the strong evidence to the contrary adduced by the defendant No. 1, *viz.*, the proceedings in the case of Motee Singh *versus* Zalim Singh and Lall Jhee intervenor, and those in the suit of Kulabuttee *versus* Shambuttee.

In deciding this question, we have to consider, *first*, when was the plaintiff born: *second*, when did the plaintiff's cause of action arise?

On the first point the Judge has held that the plaintiff was born subsequent to the alienation by his father Zalim Singh to Lall Jhee, which took place in November 1841. If this finding be correct, the plaintiff must fail, and this much his learned Counsel admits. After hearing the whole of the evidence read, we are of opinion that the evidence adduced by the plaintiff is more satisfactory than that adduced by the defendant. The plaintiff has been examined, and he gives the date of his birth as prior to the alienation; his witnesses, who, from their connection with the family, were in a better position to remember events of this description than the witnesses for the defendants, depose to the same effect. We are not disposed to attach the same importance to the evidence of the witness Bijnath Jha as the Judge does. This person cannot depose, of his own knowledge, that the teepun or memorandum of date of birth, &c., and from which a horoscope is prepared, which this witness produced in Court, and which purports to fix the date of the plaintiff's birth as subsequent to the alienation was written by Hur Kool, the uncle of the witness, who is alleged to have been the astrologer of the family. Hur Kool is dead. We may also observe that the plaintiff petitioned the Judge to examine Mussamut Shambuttee, the plaintiff's mother,

the best of witnesses in matters of this character, but the Judge for no good reason omitted to do so.

Finding, therefore, that the plaintiff was born before the alienation, we proceed to consider when his cause of action arose. The Judge has held that the cause of action accrued from the death of the father, which took place on the 11th Magh 1271 F. S. If this finding be correct, the suit is well in time, and it will become necessary to enter into the question of the validity or otherwise of the alienation by Zalim Singh to Lall Jhee, a point which has been fully argued before us, as we were anxious, in case of the case being appealed to a higher Court, to leave no part of the case untouched.

We are of opinion that the Judge is clearly wrong in holding that the plaintiff's cause of action accrued from the death of his father Zalim Singh. The date of the alienation, or, at all events, of the possession under it, must be considered as the starting point from which the Statute commenced to run against the plaintiff. The plaintiff, having an equal right with his father, was competent to sue to set aside the alienation of his father during the lifetime of his father; and, unless under legal disability owing to minority at the time the sale was made, he ought to have brought his suit within the prescribed period from the date of alienation. The alienation took place in 1841. The suit is brought in 1866; it is, therefore, clearly beyond time, unless the plaintiff was a minor at the time the alienation was made. Now, as we have found that the plaintiff was born in September 1841, it is clear that he was under legal disability in November 1841 when the alienation was made. The plaintiff being the proprietor of an estate paying revenue direct to the Government, his minority extends to the end of the eighteenth year. *See* Section 2, Regulation XVI. of 1793. It has been held by this Court in the case of Boycuntnath Chowdhry *versus* N. P. Pogose, Weekly Reporter, Volume 5, p. 2, that "minority is a legal personal disability; it may be placed arbitrarily at one age or another. But, having been determined to extend either generally or as to a particular class up to a certain age, it is accompanied by complete disability unless the law has expressly declared otherwise. Now, the words of Section 2, Regulation XVI. of 1793, clearly extend the term of minority to a class of persons, but do not limit it to a class of subjects. We have no doubt, therefore, that they extend the legal disability attending minority to any act of a proprietor of estates under the full age of eighteen years."

The plaintiff was born in 1841; he was, therefore, under the provisions of Section 2, Regulation XVI. of 1793, of full age in 1859. This suit ought, therefore, to have been commenced within three years from the time when the disability ceased (Section 11, Act XIV. of 1859); but it was not instituted until 1866, and it is, therefore, clearly beyond time.

Mr. Doyne, the Counsel for the plaintiff, has raised an ingenious argument which is not to be found in the pleadings, and which to our minds is neither involved in, nor consistent with, the case of the plaintiff as put by him, *viz.*, that the re-transfer to Shambuttee by Lall Jhee was to Zalim Singh, Shambuttee's name only being used, and that, therefore, the properties became again vested in Zalim Singh, clothed with all the attributes of ancestral property, and remained vested in Zalim Singh, until the sale in execution in 1857, as the property of Shambuttee, from which year the plaintiff's cause of action accrued.

Now, in the first place, this is not the plaintiff's case. He says that the sale to Shambuttee by Lall Jhee was invalid, not being for a legal necessity. There is no allegation that the beneficial title was in Zalim Singh, and that the transaction, in as far as Shambuttee is concerned, was benamee. Again there is no evidence that the sale to Shambuttee was a sham, or that she had no means of her own of acquiring the property independent of her husband. In fact, the suit of the wife of the plaintiff against Shambuttee, for the recovery of a portion of the property purchased by Shambuttee from Lall Jhee, is quite inconsistent with the theory that the beneficial title was all along in Zalim Singh.

Being, therefore, of opinion that the suit of the plaintiff is barred under the Statute of Limitation, we reverse the decision of the Judge, dismiss the plaintiff's claim and this appeal, decreeing the cross-appeal of the defendants, Nos. 1, 2, 3, 4, and 5, with costs of both Courts bearing interest.

With reference to the case of the defendants Nos. 7 and 8, we observe that they claim through a deed of gift made by Zalim Singh to his eldest son Brijo Bhookun Singh in 1837. The plaintiff by his own statement was born in 1841. In this case, too, the plaintiff in his examination admits

this deed of gift, and the fact of the separation of the donee Brijo Bhookun from his father Zalim Singh, the donor receiving as his share the estates covered by the deed of gift. It is, therefore, clear that the plaintiff's claim as against these defendants is wholly untenable, and that his plaint and appeal must both be dismissed with costs of both Courts payable with interest by the plaintiff to the defendants Nos. 7 and 8.

The 29th May 1867.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Appeal (from Rangoon Recorder's Court)—Interlocutory orders—Section 83, Act VIII. of 1859.

Case No. 904 of 1866.

Miscellaneous Appeal from an order passed by the Recorder of Rangoon, dated the 12th November 1866.

Ahmed Ali Mahomed (Defendant), *Appellant,*

versus

Messrs. Gladstone, Wyllie, & Co. (Plaintiffs), *Respondents.*

Messrs. R. V. Doyne and *Fergusson* for Appellant.

Mr. A. T. T. Peterson for Respondents.

No appeal lies to the High Court, under Section 27, Act XXI. of 1863, from an interlocutory order of the Recorder of Rangoon passed before judgment in the suit—*e. g.*, one passed under Section 83, Act VIII. of 1859, directing a defendant to furnish security.

Quære.—Whether, under Act VIII. of 1859, there is any appeal from an order to furnish security under Section 83.

Macpherson, J.—THIS is an appeal from an order passed by the Court of the Recorder of Rangoon under Section 83 of Act VIII. of 1859, directing the appellant (who was the defendant in the Court below) to furnish security in the sum of 9,000 rupees. The order was passed in a suit brought to recover 91,522 rupees, nearly the whole of which sum was composed of the price of goods bargained and sold by the plaintiffs to the defendant.

I think that there is no appeal to the High Court against such an order. It seems to me that the Act constituting the Court of the Recorder of Rangoon, Act XXI. of 1863, does not give any right of appeal to this Court from interlocutory orders passed in the course of a suit prior to decree. By Section 20, it is enacted that, save as is in the Act otherwise provided, the proceedings in civil suits in the Recorder's Court shall be regulated by the Code of Civil Procedure. Section 27 is the Section which gives an appeal to this Court. It is as follows: "In all "*suits heard and determined* by a Recorder "under this Act, in which the amount or "value of the suit shall *exceed three thou-* "*sand rupees*, and be *less than ten thou-* "*sand rupees*, an appeal shall lie to the "High Court of Judicature at Fort William "in Bengal, subject to the rules contained "in the said Code of Civil Procedure re- "*garding Regular Appeals.*"

Section 39 defines the cases in which an appeal will lie to the Privy Council.

The present case does not fall within the provisions of Section 27; for, as I read the Section, it merely enacts in effect that, when a suit between 3,000 rupees and 10,000 rupees, in amount or value, *has been heard and determined* by the Court of the Recorder, a regular appeal will lie to this Court. It is from the final decree made in the suit by the Court of the Recorder that an appeal is given by Section 27: and it is quite impossible to construe the words "suits heard and determined" as referring to or including interlocutory orders passed in the cause prior to the suit "being heard and determined." It appears to me to be clear that Act XXI. of 1863 contemplates no appeal to the High Court save a regular appeal from the decree made after the suit has been tried and determined. The Section is moreover, inapplicable to the present suit, inasmuch as it is a suit for more than 10,000 rupees.

It is unnecessary to consider the effect of Section 39, as that Section relates only to appeals to the Privy Council. Nor need I decide whether, under any circumstances, there is any appeal, under Act VIII. of 1859, from an order to furnish security passed under Section 83. If any appeal exists, it is by reason of the provision contained in the concluding Clause of Section 85, which says: "Any order *for the attachment of pro-* *perty* under the preceding Section shall be open to appeal by the defendant." The order which is the subject of the present appeal was not an order for the attachment of property under Section 84, but an order to furnish security under Section 83; and it may be very much doubted whether it falls within the latter Clause of Section 85 at all.

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But, supposing an appeal did lie to the High Court, I am of opinion that, on the merits, the order which the Lower Court made ought to be affirmed. An order for the attachment of the defendant's property (which order is not the subject of this appeal) was in the first instance granted by the Recorder's Court in the most irregular manner, on very insufficient grounds, and with an utter disregard of the provisions of the Code of Civil Procedure. But this order was subsequently set aside, and the order to furnish security (out of which the present appeal arises) was substituted for it. The latter order was made in the presence of all the parties, and after the matter had been fully discussed; and it seems to have been substantially right in itself. Under such circumstances, I do not think that this Court ought, in appeal, to set aside the order on the ground of the irregularity of the original proceedings which led up to it.

Mr. Doyne for the appellant argued strongly that there ought to be *uberrima fides* in all applications for attachment before judgment, and that, as the plaintiffs are stated by the Recorder to have obtained the original order for attachment by concealing the fact that they had in their possession the very goods to recover the price of which was the object of the suit, the Lower Court was bound to have set aside the attachment, and to have rejected the plaintiff's application *in toto*.

It certainly has been repeatedly and most properly decided that in all such cases there must be *uberrima fides* on the part of the plaintiff; and that, where the most perfect good faith is wanting, the application should be rejected. There is no question as to the general rule. But it is, in my opinion, very questionable whether there really was any concealment on the part of the plaintiffs when they made their application. Mr. Steel, one of the plaintiffs, gave his deposition in Court in support of the application: indeed, it was upon his deposition alone that it was granted. But he was subjected to no proper examination by the Court; and, although he certainly does not say that he still holds the goods for which he is suing, he was never asked the question, nor whether he had in his possession any goods of the defendant or any security for the money due by him. Then, the plaint being on the face of it for the recovery of the price of goods bargained and sold—of goods of which the defendant had failed to take delivery—it was almost necessarily suggestive of the fact that the goods remained in the plaintiff's possession. Under such circumstances, it seems to me rather hard to attribute bad faith to Mr. Steel for not having expressly stated to the Court that those goods still remained in his hands undelivered. However that may be, the Recorder, when the parties were before him on the application to set aside the attachment, received certain further statements and explanations, and, on the whole, was so far satisfied with them, and with the case made for the plaintiffs, that, although he set aside the attachment, he made the order to furnish security which is now before us. The Recorder having taken this view of the conduct of the parties, my opinion of the course adopted by the plaintiffs would need to be much more unfavorable than it is, before I should think it right, sitting as an Appellate Court, to set aside the order on the ground of there having been a want of good faith in the original application.

I think that this appeal ought to be dismissed with costs.

Bayley, J.—I concur in this judgment. These words of Section 27, "*all suits heard and determined*," cannot be made to apply to interlocutory orders, such as that in respect to the giving security for 9,000 rupees in this case, *before* the suit is heard or determined. In this view, Section 27 does, in fact, not allow this appeal. I also am of opinion that, if it should be ruled that there be an appeal to this Court, the view taken by Mr. Justice Macpherson on the merits of this appeal is the correct view, and that it is so for the reasons given in his judgment.

The 29th May 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Adjustment (through Court).

Case No. 48 of 1867.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 24th November 1866, reversing an order passed by the Moonsiff of Sonamookhy, dated the 27th January 1866.

Thakoor Lall Missree (Decree-holder), *Appellant,*

versus

Kanye Lal Tewaree (Judgment-debtor), *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboo Rajendurnath Bose for Respondent.

A letter from a decree-holder to his vakeel to put in an acknowledgment into Court is not a settlement out of Court certified to the Court in the manner required by Section 206, Act VIII. of 1859, to warrant further investigation in the matter.

Loch, J.—In his petition of appeal to the Judge, the debtor states that he informed the Moonsiff that the decree-holder had received the amount due to him, and had given him a letter to his vakeel to put in an acknowledgment into Court, and he prayed the Moonsiff to summon the decree-holder who, he was sure, would not, on examination, deny his handwriting. We think the Judge was wrong in ordering further investigation in this matter, for this was clearly a settlement out of Court, and was not certified to the Court in the manner required by Section 206. If enquiries were allowed in cases such as this, decree-holders would be exposed to be continually harassed by fraudulent debtors. We reverse the order of the Judge, and decree the appeal with costs.

The 29th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 240, Act VIII. of 1859—Alienation after attachment.

Case No. 145 of 1867.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 20th December 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 4th April 1864.

Jadubanund Roy (Defendant), *Appellant.*

versus

Beejoy Gobind Chowdhry (Plaintiff), *Respondent.*

Baboos Sreenath Dass and *Bhuggobutty Churn Ghose* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Any alienation of property after attachment is illegal under Section 240, Act VIII. of 1859.

Glover, J.—There appears to be no ground for this appeal. The private sale to the special appellant was made confessedly at a time when the property was already under attachment in satisfaction of another decree; and the words of Section 240, Act VIII. of 1859, leave us no option but to declare the private alienation illegal. There is no exception made. The words used are *any* alienation after attachment.

We agree with the Judge, and dismiss this special appeal with costs.

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The 29th May 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Rent—Enhancement—Payment.

Case No. 251 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 3rd December 1866, affirming a decision passed by the Deputy Collector of that District, dated the 27th August 1866.

Ranee Shurno Moyee (Plaintiff), *Appellant,*

versus

Kashee Kant Bhuttacharjee and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboo Kishen Dyal Roy for Respondents.

Where a tenant pays money to his landlord on account of rent without any specification, whether the payment was for old or enhanced rent, the landlord is at liberty to credit the payment as he thinks fit.

Bayley, J.—The grounds taken in this special appeal are these:—

I. That the Lower Appellate Court has wrongly held that a fresh notice to enhance was necessary.

II. That it had wrongly considered that the 30 rupees paid as rent by defendant were paid at the old rates.

III. That the *onus* of proving that the 30 rupees were not paid on account of the old rates of jumma was wrongly put on plaintiff.

Plaintiff sued for rents at an enhanced rate under a notice, and agreeably to the provisions of Sections 13 and 17 of Act X. of 1859.

Defendant's plea was that, as the plaintiff had received rents (30 rupees) from defendant, plaintiff must be supposed to have received them for the jumma at the old rates, and so to have acquiesced in defendant's plea that he, plaintiff, could have no claim to enhance.

Defendant also pleaded a *mokurruree* lease.

Both the Lower Courts held that, as the receipt given by plaintiff did not contain any specification that the 30 rupees paid were on account of a jumma at enhanced rates, plaintiff must be supposed to have accepted the money in the view that the old were the proper rates.

They, accordingly, dismissed plaintiff's suit.

The plaintiff, special appellant, urges (as above set forth) that this is an incorrect judgment below.

We have no hesitation in saying that we are of that opinion, and that the judgment of the Lower Appellate Court must be reversed.

Had the defendant specified in his invoice of payment that the 30 rupees were on account of the old and smaller jumma of 80 rupees, or had he declined to accept a receipt from plaintiff without its containing an entry to that effect, plaintiff could only have credited that payment to the old and smaller jumma of 80 rupees, or not received the money. Defendant, however, sent the money to plaintiff "*on account of rent*" without any reservation of direction on account of what amount of jumma it should be considered a payment in credit. Under such circumstances, the rule of law is that plaintiff may credit the payment as he thinks fit, and is not bound to credit it to the old jumma, or to prove that it was made on account of the enhanced jumma of 208 rupees.

The Lower Appellate Court's judgment is reversed on this point, and the case is remanded to be re-tried in respect to defendant's plea of a mokurruree pottah, or any other pleas which may legitimately arise in the case.

Remand accordingly.

Markby, J.—I concur.

The 30th May 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, J. P. Norman, F. B. Kemp, L. S. Jackson, A. G. Macpherson, and W. Markby, *Judges*.

Letters Patent—Appeal (from judgment of Senior Judge of Division Bench of High Court in civil appellate jurisdiction).

Petition connected with Special Appeal No. 336 of 1866.

Ranee Shurno Moyee, *Petitioner*,

versus

Luchmeeput Doogur and others, *Opposite Party*.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Petitioner.

Mr. R. T. Allan and *Baboo Dwarkanath Miller* for Opposite Party.

An appeal lies, under Section 15 of the Letters Patent of the High Court, to the Court at large from the judgment (not being a sentence or order passed or made in a criminal trial) of a Division Court in the exercise of appellate jurisdiction, when the Judges of such Court are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges.

In this case a rule was granted on the 23rd January 1867* for the opposite party to show cause why an appeal should not, under Section 15 of the Letters Patent of the High Court, be admitted to the Court at large from the judgment (not being a sentence or order passed or made in a criminal trial) of a Division Court in the exercise of appellate jurisdiction, when the Judges of such Court are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges.

The opposite party accordingly appeared this day, and, being unable to show cause to the contrary, the rule was made absolute, the judgment of the Court being delivered as follows:—

Peacock, C. J.—When this rule was moved for, I expressed my views at length, not as binding upon me in case I should be satisfied upon argument that I was wrong, but merely that Counsel might know the views which I took, in order that they might point out, if they could, in what respects they were erroneous. No arguments have been adduced, and Mr. Allan (who appears for the opposite party) says that he does not think that he can show on behalf of his client that the reasoning in that judgment is unsound. Under these circumstances, I think it unnecessary to go through that judgment again. I could not add anything to it. All that is necessary for me to say is that I adhere to the opinion which I then expressed, that an appeal will lie. All my learned brothers agree in this opinion, except Mr. Justice Louis Jackson; who has some little doubt in the matter.

The rule is made absolute, and the petitioner will be at liberty to file an appeal within a month.

Jackson, J.—I need hardly say that it is with very strong diffidence as to the correctness of my own judgment or of my own sentiments in this matter that I venture to express even the slight degree of hesitation which remains on my mind in respect of the right decision of this point. I confess that some slight residuum of doubt remains on my mind for this reason, that it seems to me that the whole subject of appeals from decisions of this Court, whether in its appellate or its original jurisdiction, is not contained in Section 15 of the Letters Patent, but is contained in the two Sections 15 and 39 taken together. In the conclusion of Section 15 are these words: "But that the right "of appeal from other judgments of the said "High Court, or of such Division Court, "shall be to us, our heirs, or successors, in our "or their Privy Council, as hereinafter pro- "vided."

These words appear to me to make it indispensably necessary that the two Sections should be considered together so as to afford a consistent interpretation. I am still inclined to think with very great deference that Section 39 appears to divide appeals from judgments of this Court delivered on the appellate side and appeals from judgments of this Court in its original jurisdiction, and that Section 15 ought to be construed so as to be in accordance with the meaning of Section 39. But, with the weight of the unanimous judgment of six of my learned brothers, including His Lordship the Chief Justice, against me, I do not think I shall be justified either in taking up the time of the Court or of the public, or in suggesting to the parties the taking possibly of still further proceedings in this case, by doing more than to throw out this expression of the slight hesitation I still feel. I do not wish formally to dissent from the judgment of the Court. I therefore concur in it.

* See *ante*, p. 52.

The 30th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Fraudulent Conveyance by Husband to Wife.

Case No. 351 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 30th December 1866, reversing a decision passed by the Moonsiff of Sittakoond, dated the 23rd January 1866.

Shaikh Mahomed Buseeroollah Chowdhry (one of the Defendants), *Appellant,*

versus

Abemoonissa (Plaintiff) and others (Defendants), *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Mr. R. E. Twidale for Respondents.

If a man largely indebted executes a conveyance of property to his wife as in satisfaction of dower, the conveyance is void as against his creditors if executed for the fraudulent purpose of keeping the property in his own hands out of the reach of the creditors. So also a conveyance by a man in such circumstances to his wife is fraudulent and void if no dower is due, and the conveyance is voluntary, and not made in satisfaction of any debt due to him.

Norman, J.—This is a suit by the plaintiff to establish her title to certain property, alleged to have been obtained by her in gift from her husband, against the defendant who caused the same property to be sold in execution of a decree against the plaintiff's husband.

The plaintiff alleges that the property in dispute was conveyed to her on the 17th Bysack 1216 Mughee (A. D. 1855) in lieu of dower secured to her by a kabinamah of the Mughee year 1191.

The defendant alleges that the conveyance to the plaintiff was fraudulent.

The Principal Sudder Ameen finds that the plaintiff's kobalah was executed four years before the date of the decree, in favor of the plaintiff. He says that "the "defendant has stated that, at the time when "the transfer was made, the plaintiff's hus- "band was liable for the amount of the "original debt covered by the decree; but "that this is simply an irrelevant state- "ment." Again, he makes no enquiry whatever into the genuineness of the alleged kabinamah, or the fact whether the dower alleged to have been due to the plaintiff in 1216 really was so or not.

He thus omits to make any enquiry into the two most important points in the whole case. If the dower, said to be Rupees 2,000, was due as alleged, the plaintiff's husband had, no doubt, a right to execute a conveyance of this property, apparently worth less than Rupees 800, to his wife to satisfy the debt, even if he was indebted to other people. But if, being largely indebted, though there were no decrees against him, he executed a conveyance of this property to his wife to whom he really owed nothing, or if he executed it for the fraudulent purpose of keeping the property in his own hands, and out of the way of his creditors, the conveyance would be fraudulent and void. So, again, if, being largely indebted, he gave the property to his wife voluntarily, and not in payment of a debt, the conveyance would be in itself fraudulent and void.

The Principal Sudder Ameen has also omitted to try an issue whether, at the time of the alleged execution of the conveyance to his wife, the husband was of sound mind. The first Court finds that he was not. There is a decision filed with the papers in which an issue was laid as to the husband's sanity. But it does not appear to decide that he was sane in 1216 Mughee. Nor is it binding as a decision between the plaintiff and the defendants, because the decree in the suit does not proceed on the finding on that issue. The Principal Sudder Ameen, in taking up the case again, will carefully look to the possession as indicating that property passed by the kobala in 1216 or otherwise.

The 30th May 1867.

Present:

The Hon'ble G. Loch and A.G. Macpherson, *Judges.*

Alluvial Land—Government as riparian proprietor.

Cases Nos. 531 and 543 of 1866.

*Applications for review of judgment passed by the Hon'ble Justices Loch and Macpherson, on the 31st July 1866, in Regular Appeals Nos. 95 and 96 of 1865.**

The Government, Plaintiff (Respondent), *Petitioner,*

versus

Mussamut Tabira and another, Defendants (Appellants), *Opposite Party.*

* *See* Vol. VI., p. 123.

Baboo Kishén Kishore Ghose for Petitioner.

Mr. C. Gregory for Opposite Party.

The Government, when it claims land as a riparian proprietor, must prove its title like any other private proprietor. When a riparian proprietor claims land which has formed in front of his estate, from which it is separated by a running stream, he must, under Clause 3, Section 3, Regulation XI., 1825, prove that the channel between his property and the land claimed is fordable at some time of the year.

Loch, J.—THE petitioner has asked for a review of the judgment of the Court, dated 31st July 1866, on the ground that, owing to the Lower Court having omitted to frame the proper issue, the petitioner was unable to bring evidence to prove that the stream between the main land and the alluvial formation was fordable at any time of the year; and it is further stated that the Court is wrong in holding that the plaintiff (Government) must prove that the stream was fordable when the alluvion formed, such an opinion being opposed to two decisions of a Division Bench of this Court reported in II. Weekly Reporter, pages 34-127.

We think these are not sufficient grounds for admitting a review. The plaintiff claims the land, which has formed in front of his estate from which it is separated by a running stream, as an accession to that estate. Plaintiff knew perfectly well that he could have a right to it under the provisions of Clause 3, Section 3, Regulation XI., 1825, only if the channel between his property and the lands claimed is fordable at any time of the year. Plaintiff knew perfectly well that he had to prove this, and, when called upon to produce his evidence, he should have brought witnesses to establish this fact. But it is said that this fact was never denied, and it was never put in issue. Even if it were not denied, it was plaintiff's duty to prove his case, for it was a material part of his case to show that, under the terms of the law, he was entitled to the land claimed. And, on reference to the judgment of the Lower Court, we think this point was sufficiently clearly put in issue on the 6th issue, and therefore the petitioner has no ground for saying that he was taken by surprise, and that he had not an opportunity of proving what the law requires to be proved; and we would observe that, when the case was previously before us, the pleader for the plaintiff, respondent, read the evidence of three witnesses, with the view, as understood by the Court, of proving the point by their evidence, which it altogether failed to do.

It is unnecessary, under this view of the petitioner's case, to enter upon the second objection raised by him, as our opinion on this point, whether correct or otherwise, cannot be questioned in the absence of evidence as to the state of the stream which the petitioner has failed to supply. The application is dismissed with costs.

Macpherson, J.—I also think that this application ought to be dismissed with costs. The Government claims these lands merely as a riparian proprietor, and must prove its title like any other private proprietor. The question as to the channel being fordable was of vital importance, and has throughout been substantially in issue, although the point was not expressly declared by the Lower Court to form a separate formal issue by itself. There was no admission favorable to Government upon this point by the opposing parties, and, in the absence of such an admission, the Government could not prove a title without proving that the channel was fordable.

The review is, in fact, sought for in order that further evidence, which it is said exists, may be given on certain points, as to which the evidence, on which the applicant allowed the case to go to trial, was very defective. But the further evidence referred to was just as available when this suit was tried as it is now. If parties choose to allow their cases to go to trial without putting in all their evidence, they are not entitled to a review afterwards merely in order to remove the results of their own default. In the present case, every opportunity was given to the parties to put in their evidence; and, if they failed to avail themselves of that opportunity, they are not on that ground entitled to a review.

It is argued that our decision is in conflict with those of another Division Court, which are reported at pp. 84 and 127 of II. Weekly Reporter. But the state of facts in those cases differs from that in the present case, and I fail to see any conflict such as affects the merits of our judgment.

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The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Limitation—Sections 20 and 21, Act XIV. of 1859—Execution.

Case No. 445 of 1866.

Miscellaneous Appeal from an order passed by Mr. J. E. S. Lillie, Judge of East Burdwan, dated the 6th January 1866.

Kangaleechurn Ghosal (Judgment-creditor), *Appellant,*

versus

Bonomalee Mullick and others (Judgment-debtors), *Respondents.*

Baboos Obhoy Churn Bose and *Goopeenath Mookerjee* for Appellant.

Baboos Kishen Kishore Ghose, Bamachurn Banerjee, Shoshee Bhoosun Bose, and *Greeja Sunkur Mozoomdar* for Respondents.

Case No. 719 of 1866.

Miscellaneous Appeal from an order passed by Mr. A. Hope, Judge of Sarun, dated the 30th July 1866.

Mohabeer Persad (Judgment-debtor), *Appellant,*

versus

Mussamut Pranputtee Koer (Decree-holder), *Respondent.*

Baboo Kallee Kishen Sein for Appellant.

Baboos Mohesh Chunder Chowdhry and *Bhowanee Churn Dutt* for Respondent.

According to Sections 20 and 21, Act XIV. of 1859, read together, process of execution may be issued upon decrees in force at the time of the passing of that Act within the time mentioned in Section 21, without any prior proceeding having been taken; but, if an application is made to enforce such a decree more than 3 years after the passing of the Act, no execution shall be issued upon it, unless some proceeding shall have been taken to enforce it or to keep it in force within 3 years next preceding the application for execution. If such proceeding has been taken, it is not too late, although the decree may have been in force at the time of the passing of Act XIV., and the application for execution made more than 3 years after the passing of the Act.

Case No. 445 was referred to a Full Bench by Loch and L. S. Jackson, JJ., under the following orders:—

Jackson, J.—This was an application under Section 208, Civil Procedure Code, for the execution of a decree, which decree had passed by assignment to the applicant. The judgment-debtor objected to the execution, on the ground that it was barred by limitation. The circumstances were these. The decree was passed originally in the year 1844, and the person who obtained the decree shortly afterwards died, leaving minor sons. In 1846 some proceedings were taken by persons representing themselves to be entitled, but no effectual execution was had. The next proceeding taken appears to have been in September 1858, by one Mohamoya, who represented herself as being the person really entitled to the decree, the ostensible decree-holder being, according to her statement, a mere *furzee.* Her application was, after some contest, rejected in December 1859, but she immediately afterwards instituted a regular suit in order to establish her right to the benefit of the decree. That suit was dismissed in January 1861, and the judgment of dismissal was confirmed by the Appellate Court in April 1863. In the meantime, the present applicant, who had taken the decree by assignment about December 1859, made application to the Court on the 30th September 1862, to be allowed to execute it. That application was rejected by the Court, on the ground that the applicant had not filed his bill of sale, and, consequently, did not show that he was entitled to execute the decree. His statement is, that he was unable to file this document by reason of its then being annexed to the record of the civil suit that was then going on between himself and Mohamoya in reference to the right to execute this decree. He subsequently renewed that application on the 14th December 1864, and the Court of the Moonsiff appears to have assented to the application. The case was then carried in appeal before the Judge of Burdwan, and the Judge holds that the application was out of time, and therefore he reversed the order of the Principal Sudder Ameen. The question before us is therefore whether, under the circumstances, execution of this decree is barred by the Law of Limitation.

The Section applicable to the case is unquestionably Section 21 of Act XIV. of 1859. This was a decree which was in force at the time of the passing of that Act. That being so, nothing in Section 20 is to apply to the case; but process of execution might have been issued, either within the time then limited by law, that is, within the period of 12 years formerly allowed in such

* The judgment of the Full Bench was orally delivered on the 15th March 1867, when Trevor, J., concurred in it.

cases, or within three years next after the passing of the Act, whichever should first expire. According to the practice which previously prevailed on the subject of execution of decrees, not only was the period of 12 years allowed within which process of execution might be taken out, but also parties were held entitled to the deduction of periods of minority and other disability. Apparently, therefore, a considerable time still remained under the old law at the passing of Act XIV., within which execution of this decree might have been taken. But the period could not be extended beyond the lapse of three years after the passing of the Act. The question, therefore, is whether any process of execution has been issued in this case within three years from the passing of the Act. It appears to me that, whatever might have been said, if this had been a case governed by Section 20, that is, whether or not we might have held that the pendency of the suit between the applicant and Mohamoya as to the right to execute the decree was within the terms of that Section a "proceeding to enforce the decree or to keep it in force," it cannot be said that the defending that suit against Mohamoya was issuing "a process of execution" in this decree. It seems to me that we must take the wording of these words as they stand. I apprehend that, when the words "may be issued" are used, the meaning is that the decree-holder is to be allowed either a period still remaining to him under the old law or the period of three years from the passing of the Act, whichever shall first come to an end—not that he can execute the decree after the expiration of both those periods. But our attention has been drawn to two cases upon this point, one of them in 2 Weekly Reporter, page 3, and the other in 6 Weekly Reporter, pages 14-15. As to the case from the 6 Weekly Reporter, that appears to be not a case in point. The proceedings there were all taken under Act VIII. of 1859. The decree, being executed apparently, was one under that Act, and the suit brought by some party to question the rights of the decree-holder under that Act arose out of proceedings under Act VIII. of 1859. That, therefore, would not be a case to which Section 21, but a case to which Section 20 would apply. But, undoubtedly, the case in page 3 of 2 Weekly Reporter is a case which stands very much on the same ground as the present case. That was also an old decree—a decree passed in 1843; and there the learned Judges appear to have ruled that the pendency of the suit against Soudamonee was something in furtherance of the decree obtained against the original debtor, and, therefore, kept alive the decree which Shib Chunder held. It seems to me possible that the learned Judges, in deciding that case, adverted rather to the terms of Section 20 than to the terms of Section 21. My brother Loch, who was one of the Judges who decided that case, I believe, is inclined to alter the opinion which he then held. At any rate, it is a decision standing in the books upon this particular point, and it is a decision with which we should be now in conflict if we decided otherwise. It appears to me, therefore, that this matter ought to be referred for the final decision of a Full Bench.

Loch, J.—The order passed in the case cited from Vol. 2 of the Weekly Reporter appears to me, on further consideration, not to be quite correct. I was one of the Judges who tried that case; and I think that, when trying it, we looked rather more much to Section 20 than to Section 21 of Act XIV. of 1859, which latter was the Section applicable. The proceedings taken by the decree-holder in that case appeared to me to have been taken, as we said there, for the purpose of keeping the original decree alive. The litigation ceased by his getting a decree against the party intervening on the 26th November 1866. Now, he had from that date plenty of time to have complied with the requisitions of Section 21 of Act XIV. of 1859 to issue process of execution, which he failed to do. The Court, when trying that case, looked, therefore, to Section 20 (so I apprehend), considering that this litigation was a proceeding to keep the decree alive, and that consequently the decree-holder had, from the 26th November 1860, a period of three years, from which to file his application for execution. Looking, however, at the terms of Section 21, which were applicable to that case as much as to the case now before us, it is clear that "process of execution," which are the words used in the law, should have been issued within three years from the passing of the Act. There could not be a longer period than three years, though it might have been less, within which process of execution had to be issued. The decision, therefore, we came to in that case appears to have been incorrect, and I concur with my colleague in submitting this case to the decision of a Full Bench.

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Case No. 719 was referred to a Full Bench by Loch and Macpherson, JJ., under the following orders:—

Loch, J.—This was an application to execute a decree of 19th November 1853, which was in force when Act XIV. of 1859 was passed. Consequently, Section 21 of the Act is applicable to it, and that Section requires a process of execution "to be issued within the time limited by law for issuing process of execution thereon, or within three years next after the passing of the Act, whichever shall first expire."

In this case, certain property had been attached in execution, which, on the objection of Bikoo Lall and Bhoop Narain, was released on 31st December 1859, and the execution-case was struck off the file on 21st April 1861.

It is not shown to us that the attachment was made subsequent to the passing of the Act. The decree-holder Pranputtee Koer then brought a suit to set aside the summary order, and to declare the property liable to sale in execution, and was ultimately successful, having obtained a decree in the High Court on 6th September 1864. By that time, however, the three years allowed by Section 21 from the date of the passing of the Act had expired. As no "process of execution" had been taken out within the period limited by law, the question arises whether further execution is not barred by limitation, notwithstanding the successful termination of her litigation against the parties who had successfully claimed the property. The decree-holder might have proceeded against other property of the judgment-debtors while carrying on her suit against the intervenors, or she might have taken out warrants for the arrest of the debtors, and so conformed to the requirements of the law.

As a reference regarding the meaning of Section 21 in a case somewhat similar to the present has been made to the Full Bench by Loch and L. S. Jackson, JJ., we send up this case also for an authoritative ruling as to the meaning of the words "process of execution" used in it; for, judging from a great number of cases which have been before us, it is evident that the words "process of execution" mentioned in Section 21 and the word "proceeding" in Section 20 are confounded together, parties understanding that any notice to the judgment-debtor, or even a petition for execution presented in good faith, is a "process of execution" intended by the terms of Section 21, Act XIV. of 1859.

Macpherson, J.—I also think that this case ought to be referred to a Full Bench—the question being whether, under the circumstances, and with reference to Section 21 of Act XIV. of 1859, execution of the decree can now issue.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The questions of law which appear to arise in these cases which have been referred for the opinion of a Full Bench are whether such provisions of Section 20, Act XIV. of 1859, are applicable to decrees recovered prior to the passing of that Act; or whether such decrees are regulated by Section 21 only; and, if by Section 21 only, whether actual process of execution must be issued within three years from the date of the Act.

The two Sections above referred to are ambiguously and not very accurately worded. But we are clearly of opinion that the words "process of execution" in Section 21, used, as they are, in conjunction with the introductory words of the Section, and following immediately after the word "but," are used in the same sense as that in which the same words are used in the first part of Section 20.

We think that in both Sections they are used in the sense of warrant of execution under Section 221, Act VIII. of 1859.

In a case which came before a Full Bench, and which is reported at page 98 of the 6 Weekly Reporter, Miscellaneous Rulings, the Court had occasion to remark that, "according to the literal wording of Section 20, no process of execution could "ever issue to enforce a judgment even "within a week from the date of it, unless "some proceeding were taken to enforce it "within three weeks next before the application for execution. The meaning of the "Section was, doubtless, to prevent process "of execution from having issued on a "judgment, decree, or order of a Court not "established by Royal Charter after the "expiration of three years from the date of "it, unless some proceeding to enforce it, or to "keep it in force, should have been taken "within three years next before the application for execution."

We think that that is a proper construction of Section 20. It is important to as-

certain what is the proper construction of that Section in order to arrive at a correct conclusion as to the meaning of Section 21.

Section 20 is as follows:—

"No process of execution shall issue from "any Court not established by Royal Char- "ter to enforce any judgment, decree, or "order of such Court, unless some proceed- "ing shall have been taken to enforce such "judgment, decree, or order, to keep the "same in force within three years next pre- "ceding the application for such execution."

Section 21 says:—

"Nothing in the preceding Section shall "apply to any judgment, decree, or order in "force at the time of the passing of this "Act."

According to the strict and literal interpretation of those words, nothing contained in Section 20 is to apply to decrees obtained prior to the passing of Act XIV. of 1859. But we must read those words coupled with the other words of the Section, and we proceed to the following words: "But process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

If the first words of the Section are read literally, and nothing in Section 20 applies to decrees obtained before the passing of Act XIV. of 1859, and if the latter portion of Section 21 commencing at the word "but" are also read literally, there will be no limitation whatever to decrees obtained prior to the passing of the Act, because the old law of limitation, which was applicable to these decrees, had been repealed, and there are no negative words with regard to the time within which those decrees can be executed. It is merely an affirmative statement that process of execution upon such decrees may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of the Act, whichever shall first expire. But there is no enactment that process of execution shall not be issued after the expiration of that time.

If we read the first part of Section 21 literally, and the words "may be issued" in Section 21 as "must be issued," there will be this difficulty, that, unless the actual warrant of execution is issued within the period allowed by the old law, or within three years from the time of the passing of Act XIV. of 1859, no process of execution can be issued upon a decree obtained before the passing of Act XIV. of 1859, however active and diligent the execution-creditor may have been in endeavouring to enforce execution.

The proper construction of the two Sections taken together appears to the Court to be this, that the words coming after the word "but" in Section 21 were intended as a proviso to Section 20; and, by this construction, all the difficulties are got rid of. The two Sections read together thus will be to this effect, that no process of execution shall issue upon any judgment more than three years old, unless some proceeding shall have been taken to enforce or keep it in force within three years next preceding the application for execution; provided that process of execution, in respect of a decree obtained before the passing of the Act XIV. of 1859, may be issued either within the time limited by law, or within three years next after the passing of the Act, whichever shall first expire, even though no proceeding shall have been taken to enforce it, or to keep it in force, within three years next preceding the application for execution.

If this be the correct reading of the Act, process of execution may be issued upon decrees in force at the time of the passing of Act XIV. of 1859 within the time mentioned in Section 21, without any prior proceeding having been taken; but, if an application is made to enforce such a decree more than three years after the passing of Act XIV. of 1859, no execution shall be issued upon it, unless some proceeding shall have been taken to enforce it or to keep it in force within three years next preceding the application for execution. If such proceeding has been taken, it is not too late, although the decree may be a decree which was in force at the time of the passing of Act XIV. of 1859, and the application for execution may be more than three years after the passing of the Act.

Reading the two Sections together, it appears to us that the above construction is a reasonable one from which no injury can arise to any one, and which will carry out the real intentions of the Legislature.

We think, then, with reference to the first case, No. 445, it should go back to the Division Bench which referred it, in order that it may be determined by them whether any proceeding was taken by the person

no claimed to enforce the judgment within e meaning of Section 20.

This decision will also govern miscellane- s appeal No. 719 of 1866. But we think at, in that case, the regular suit, which as brought by the decree-holder to contest e validity of the decision made by the ourt executing the decree, that the property as not the property of the decree-debtor, nd therefore could not be seized, was a oceeding for the purpose of enforcing the ecree. The decree-holder, having obtained decree in that suit on 6th September 1864, tablishing her right to seize the disputed operty, was not barred from proceeding on e 23rd June 1865 to execute the original ecree.

The appeal in No. 719 must be dismissed ith costs.

The 31st May 1867.

Present:

he Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Powers of superintendence of High Court.

Case No. 495 of 1866.

Miscellaneous Appeal from a decision passed by Baboo Kussick Lall Bose, Principal Sudder Ameen of Rungpore, dated the 30th June 1866.

Janokee Bullub Sein, *Appellant*,

versus

Dukhina Mohun Chowdry, *Respondent*.

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Kishen Doyal Roy* for Appellant.

Baboo Nil Madhub Sein for Respondent.

The High Court refused to interfere, in the exercise its general powers of superintendence, with an order a Lower Court, which, though apparently arbitrary nd indiscreet, that Court was authorized by law to ake.

This case was referred to a Full Bench by och and Seton-Karr, JJ., under the following order :—

Referring Order.—MR. ALLAN has argued he case before us on the ground that the Principal Sudder Ameen had no right to summon his client Janokee Bullub to appear personally, and that, this order being illegal and unnecessary on the face of it, the High Court can, and are bound to, take notice of, and to annul, the same.

The Principal Sudder Ameen ordered Janokee Bullub to appear and show, *first*, that he was entitled to represent the decree-holder; and, *secondly*, to enquire into certain adjustments of the decree said to have taken place out of Court. It certainly appears to us, on the face of the decision of the Principal Sudder Ameen, that the *first* point was wholly unnecessary. Janokee Bullub was already represented by his vakeel, and he had put into Court a decree of the High Court of 1863 recognizing him as the adopted son of his mother. On this decree the Court need not have had the slightest hesitation in acting, and it was the costs of that very decree that he was seeking to obtain in execution. As regards the *second* point, the matter was clearly one in which, by Section 206 of Act VIII. of 1859, the Court had only to say that no adjustment of the kind alleged could be recognized by the Court.

On both points, therefore, the order of the Principal Sudder Ameen, for the appearance of the petitioner Janokee Bullub, appears to us to have been arbitrary and vexatious, and unnecessary for the ends of justice. At the same time, we do not find any Section in Act VIII., which would enable us to interfere with, or annul, the order of the Lower Court for the attendance of the petitioner. Under Section 363, an appeal would appear to be barred at least at this stage of the proceedings. Mr. Allan, however, contends that, under Section 15 of the Charter Act, this Court has the power to interfere, and presses us to refer the question to a Full Bench. As a similar question relative to the jurisdiction of this Court, where no appeal is specifically provided, has already been forwarded to a Full Bench, we submit the point raised by Mr. Allan, on the facts as stated, to a Full Bench also.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—It appears that a suit was brought against Janokee Bullub and his mother to set aside a deed which gave his mother power to adopt, and under which Janokee had been adopted by the mother. The case was dismissed with costs.

* The judgment of the Full Bench was delivered ally on the 16th March 1867, when Trevor, J., con- rred in it.

After Janokee Bullub came of age, he applied for execution of the decree for costs, and it was alleged by the opposite party that a compromise had been entered into by the mother.

The Principal Sudder Ameen, before whom the application for execution was made by Janokee Bullub, ordered Janokee Bullub to attend as a witness for the purpose of being examined. Janokee Bullub refused to do so, and he was sent to the Magistrate.

We think that the Principal Sudder Ameen had power to do what he did. Whether he raised a right issue with reference to the alleged adjustment or not, it is clear that he required the attendance of Janokee as a witness to be examined as to the alleged adjustment, and that Janokee, the witness, refused to attend. The Principal Sudder Ameen, therefore, had a right to deal with him according to law as a witness refusing to attend.

Under these circumstances, we think that this Court, in the exercise of its general power of superintendence over the Lower Courts, ought not to interfere with the order of the Principal Sudder Ameen.

The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Powers of superintendence of High Court—Declining jurisdiction.

Case No. 530 of 1866 under Act X. of 1859.

Miscellaneous Appeal from an order passed by Mr. F. B. Simson, Judge of Mymensingh, dated the 29th November 1866.

Gobind Coomar Chowdhry (Judgment-debtor), *Appellant*,

versus

Kisto Coomar Chowdhry (Decree-holder), *Respondent*.

Baboos Khutter Mohun Mookerjee and *Nuleet Chunder Sein* for Appellant.

No one for Respondent.

A Deputy Collector declined to make an order for restitution of an amount levied in excess of what was due under a decree, directing the applicant to institute a separate civil suit to enforce his claim. There being no appeal, the High Court, in the exercise of its general powers of superintendence, interfered and directed the Deputy Collector to give restitution himself, he having power by law to do so.

This case was referred to a Full Bench under the following order recorded by Macpherson, J., and concurred in by Loch, J.:—

Referring Order.—In this suit (brought under Act X. of 1859) the plaintiff got an *ex-parte* decree for arrears of rent in the Court of the Deputy Collector. Pending an appeal by the defendant, the plaintiff took out execution, and realized the amount decreed to him. Subsequently, the Lower Appellate Court, and on special appeal the High Court, modified this decree, declaring the plaintiff entitled to something less than the amount originally decreed, with costs only in proportion to the reduced amount. The defendant then applied to the Court of first instance, praying that the plaintiff might be ordered to refund what had been received by him in excess of that to which he was entitled under the decree as modified, and praying that execution might issue against the plaintiff to enforce the refund.

The Deputy Collector refused the application, saying that a separate civil suit must be instituted by the defendant if he wished to enforce his claim. The Judge, on an appeal being preferred to him from this order, held that the appeal would not lie, as it was an appeal from an order passed after decree, and relating to the execution thereof (*see* Section 151 of Act X. of 1859).

Before us it is contended that, even if no appeal did lie to the Judge, still the original order of the Deputy Collector was wrong, and this Court, in the exercise of the powers of superintendence vested in it by Section 15 of 24 and 25 Vic., Chapter 104, can direct the Court to entertain the petitioner's application, and deal with it on its merits.

I think that the question, as to whether this Court, under the Section just mentioned, has the power contended for, ought to be referred for decision to a Full Bench. Almost precisely the same point is involved in a case No. 1090 (Miscellaneous) of 1866, which is now awaiting the decision of a Full Bench. And the matter is one, any doubts as to which ought to be set finally at rest with as little delay as possible, with reference more especially to the judgment of a Full Bench in the case of DaCosta *vs.* Hall, V. Weekly Reporter (Miscellaneous) 25.

* The judgment of the Full Bench was delivered orally on the 15th March 1867, when Trevor, J., concurred in it.

and of a Division Court in the subsequent suit of Bhyrub Chunder Chunder *vs.* Shama Soondaree Debia, VI. Weekly Reporter (Act X.) 68.

The following judgment (concurred in by Trevor, Kemp, and Macpherson, JJ.) was delivered by—

Peacock, C. J.—We think that in this case the Deputy Collector had power to enforce restitution of so much of the amount which was levied under the decree as it originally stood as exceeded that to which the plaintiff is entitled under the decree as modified. He was wrong in refusing the application to enforce restitution. He also appears to have committed a mistake with reference to the costs which were awarded by the decree of this Court to the defendant. The Deputy Collector ought to have enforced the decree with regard to those costs, and to have enforced restitution of the amount which had been levied in excess of the amount finally decreed.

Under these circumstances, we think that this Court, under the general powers of superintendence vested in it, has power to order the Deputy Collector to enforce restitution, and also to execute that part of the decree which awards costs to the defendant.

Loch, J.—I think that, under the words "shall have superintendence over all Courts" used in Section 15 of 24 and 25 Vic., Chap. 104, this Court has the power, in cases where no appeal lies to the Judge, of directing a Lower Court to do that which is legal, and to correct that which is illegal in its proceedings.

The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Limitation—Section 20, Act XIV. of 1859—Appeal—Review.

Case No. 583 of 1866.

Miscellaneous Appeal from an order passed by Mr. J. E. S. Lillie, Judge of Burdwan, dated the 28th July 1866.

Bipro Doss Gossain and others (Judgment-debtors), *Appellants,*

versus

Chunder Seekur Bhuttacharjee (Judgment-creditor), *Respondent.*

Baboos Kishen Kishore Ghose and *Kishen Dyal Roy* for Appellants.

Baboo Nil Madhub Sein for Respondent.

The period of limitation prescribed by Section 20, Act XIV. of 1859, is to be calculated from the date of the judgment, decree, or order which the person in whose favor it is given is at liberty to enforce by execution, whether such judgment, decree, or order be that of the Lower Court or given on review or appeal.

If, upon an application by the judgment-debtor for review or a petition of appeal, the opposite party appear to prevent his decree from being set aside either on review or appeal, and afterwards seeks to execute it, his application for execution is in time if made within 3 years from the time of his so appearing.

This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following orders:—

Macpherson, J.—The first and most important question to be decided in this case is whether, where a plaintiff obtains a decree, and the defendant makes an application to this Court to review its judgment, which application is eventually refused, the three years' limitation, under Section 20 of Act XIV. of 1859, is to be calculated from the date of the original decree, or from the date on which the application for review was rejected.

I think the question ought to be referred to the decision of a Full Bench, as there are conflicting decisions of Division Courts.

In the case of Chowdhry Junmeejoy Mullick *versus* Bissumbhur Panjah (V. Weekly Reporter 45, Misc.), it was held that the three years ran from the date of the original decree, and not from the date on which the application for review was rejected. And this view seems to be supported by the judgment delivered in the case of Ramruttun Banerjee *versus* Maharaja Ameeroolmolk (VI. Weekly Reporter 95, Misc.).

On the other hand, in the case of Singh and others *versus* Lalla Kali Churn (III. Weekly Reporter 21, Misc.), the Court appears to have held that the three years were to be counted from the date on which an application for a review was finally disposed of. And there are several cases which in principle support this view—cases, namely, in which there was an appeal, and the time was held to count from the date of the decree on appeal, and not from the date of the original decree. *See* Sheik Fuzel Imam

*The judgment of the Full Bench was originally delivered on the 16th March 1867, when Trevor, J., concurred in it.

versus Doolim Singh (V. Weekly Reporter 6, Misc.); Hurree Bungsee Banerjee *versus* Ramessur Banerjee (VI. Weekly Reporter 38, Misc.); Chedoo Lall *versus* Nund Coomar Lal (VI. Weekly Reporter 60, Misc.).

In the present instance, an application for review of judgment was made in 1862, which was not disposed of till March 9th, 1864. Therefore, if the time is to be calculated from the date of the rejection of the application for review, the appellant is not barred, and the order of the Lower Court ought to be set aside. If the time is to be calculated from the date of the original decree, however, the case must be returned to this Division Court that certain other points which have been taken may be disposed of.

Loch, J.—I concur in thinking that the case should be referred for the decision of a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—We think that the words "any judgment, decree, or order," used in Section 20, Act XIV. of 1859, must mean a judgment, decree, or order which the person in whose favor it is given is at liberty to enforce by execution, and that it would not be less a judgment, decree, or order of this Court, because an application to review it or a petition of appeal against it had been preferred by the opposite party. If, in the case of an appeal, a new judgment of affirmance of the former decree should be given, then a new judgment would have to be executed, and the period for applying for execution would commence from the time of the new judgment of affirmance. But, if the appeal were dismissed for default, there would be no new judgment, and the judgment of the Lower Court would be the judgment to be enforced.

The next question is whether the words, "unless some proceeding shall have been "taken to enforce such judgment, decree, "or order, or to keep the same in force "within three years next preceding the ap- "plication for such execution," would include an opposition by the person in whose favor the judgment had been given to an application for review or to a petition of appeal.

We think that a mere application for a review or a petition of appeal by the person against whom the judgment was given would not be an act done by the person in whose favor the judgment was given for the purpose of keeping the same in force. It would be an act done by the opposite party to destroy it, and not done by the person in whose favor it was given to keep it in force. But if, upon the application for review or the petition of appeal, the person in whose favor the original decree was given appears in person or by valid (whether voluntarily or upon service of notice) to oppose the application, and files a vakalutnamah, or does anything for the purpose of preventing the Appellate Court or the Court of Review from setting the judgment aside, we think that, within the fair interpretation of the words, such act, being an act of the person in whose favor the judgment has been given for the purpose of preventing it from being set aside, is an act done for the purpose of keeping the judgment in force. If the party is successful in preventing the judgment from being set aside, and does, in fact, keep the judgment in force, and afterwards applies to execute it, his application is in time, if made within three years from the time, of the last act which he did to keep the judgment in force, or to prevent it from being set aside.

With this expression of opinion, the case will be remitted to the Court which referred the questions for our consideration, in order that they may finally deal with the case upon its merits. It does not appear whether the party, in whose favor the judgment was originally given, did oppose the review or not. Besides, there are other facts in the case which must be considered by the Court which referred it.

The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Certificate (under Section 7, Act XL. of 1858)—Revocation of.

Cases Nos. 710 and 773 of 1866.

Miscellaneous Appeals from orders passed by Mr. J. E. S. Lillie, Judge of Burdwan, dated the 30th July 1866.

Nannee Bibee, *Appellant,*

versus

Khojah Surwar Hossein and others, *Respondents.*

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* The judgment of the Full Bench was delivered orally on the 19th March 1867, when Trevor, J., concurred in it.

Baboos Mohendro Lall Shome and *Mohesh Chunder Chowdhry* for Appellant.

Mr. C. Gregory and *Baboo Judoonath Mookerjee* for Respondents.

A certificate granted under Section 7, Act XL. of 1858, may, under Section 21, be recalled summarily without the accounts having been previously taken in a regular suit under Section 19—where the application of the recall is based on charges of waste and mismanagement.

These cases were referred to a Full Bench by Loch and Macpherson, JJ., under the following order:—

Referring Order.—These are cross-appeals from an order passed by the Judge of Burdwan upon a summary application made to him, under Section 21 of Act XL. of 1858, to recall a certificate which had been granted under Section 7 to persons who, under a *towlieutnama* or deed of settlement, claimed a right to have charge of the property of the minor. The application was based on charges of breach of trust, waste, misappropriation of funds, neglect to provide for the education of the minor, &c. The petition stated that the accounts filed by the executors were false; but that, if the executors were made *in one day* to file true account and the *lowazima* papers of the talooks in their possession, then the truth of the charges would be established.

The first question which arises is, whether a certificate, which has been granted under Section 7, Act XL. of 1858, can, on the ground of waste and breach of trust, be recalled on a summary application made under Section 21 of that Act.

It appears to us that this is a question which we ought to refer to a Full Bench, as there is a conflict of decision on the subject. In the case of Anundmoyee Dabee *versus* Hurrish Chunder Chowdhry (Sudder Dewanny Adawlut, 1861, Vol. II., page 163), a widow who, by her deceased husband's will, was appointed guardian of the person and manager of the property of her minor son, having obtained a certificate under Section 7 of Act XL. of 1858, a regular suit was instituted to set aside the certificate, and remove her from the guardianship and management. The matter having come before the Sudder Court on appeal, the question was "whether a regular suit will lie simply to remove a party to whom a certificate has been granted under the law for breach of trust, or whether, by virtue of the certificate, the application must not be made summarily under the Act," and the Court held that, "for the removal of a manager to whom a certificate has been granted, a regular action will not lie, but an appeal should be made to the Judge under Section 21 of the Act (XL. of 1858)."

The Court further said: "The remarks which we have made above apply only to guardians and managers appointed by the Court, and the power vested in it by Act XL. of 1858: where a guardian has been appointed by the will of the father, he can only be removed by a regular suit in the Civil Court." The result of the appeal was that the suit for the recall of the certificate and removal of the guardian and manager was dismissed, on the ground that the proper remedy was not by regular suit, but by summary application under Section 21 of Act XL. of 1858.

The case of Mudhoosoodhun Singh *versus* the Collector of Midnapore (Marshall's Reports, page 244) came before the High Court on appeal from an order of the Judge passed under Section 21 of Act XL., whereby he dismissed the appellant, who was the manager, appointed by will, of the estate of a minor, and recalled a certificate which had been granted to him under Section 7. The Court (*Steer* and *Campbell*, *JJ.*) said that, though there might be some doubt as to the summary removal of a manager, who receives a certificate in right of a will, still they would not, after the decision of the Sudder Court in Anundmoyee Dabee's case (quoted above), object then to the proceedings under Section 21, had there been such proof of malversation and misconduct as would afford sufficient ground for removal. After some further observations, the Court proceeds thus: "The accounts have not been examined in detail, no fraud or embezzlement has been proved, and the grounds of removal are merely general and conjectural. It seems to us that, as Section 19 of the Act has provided a special procedure for impugning the accounts, *viz.*, a suit by a relative or friend, it is not regular that the Judge should, on the application of a friend, call for and go into the accounts in a summary way under Section 21. The friend challenging the accounts should first be directed to a regular suit to discover and impugn the accounts; after which he may bring a suit to prove embezzlement, and may on that or other more directly tangible ground (as insanity or convictions of felony) apply under Section 21 for the removal of the manager."

In the case of Nundo Coomar Gungopadhia and others, petitioners (Miscellaneous

Appeal, No. 574 of 1866), we, on the 6th of December last, held that the Judge was wrong in supposing that he could not deal with the case summarily under Section 21, although there was a will, and the persons, against whom the application was made, and who had obtained the certificate under Act XL. of 1858, were the executors named in the will. We said: "The terms of Section 21 are general; and we think the Judge should examine the will, and also take evidence as to the matter of the complaint made by the petitioners against the executors. We remand the case for the purpose." The grounds on which the re-call of the certificate was applied for in that case were waste, change of religion, and other charges. The Judge had held that, as the certificate had been granted to persons who were, by the will, appointed executors, he could not summarily, under Section 21, enquire into their act, or re-call their certificate.

The questions referred for the decisions of the Full Bench are:—

1st.—Whether, under any circumstances, a certificate, granted under Section 7 of Act XL. of 1858, can be re-called summarily under Section 21.

2nd.—Whether such a certificate can be re-called summarily under Section 21, without any account having been previously taken in a regular suit under Section 19, where the application for the re-call is based on charges of waste and mismanagement, which cannot be disposed of without the accounts being enquired into and fully taken.

Whatever may be the decision of the Full Bench, these appeals must be sent back to us for final disposal.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The two questions which have been preferred for the decision of the Full Bench are:—

1st.—Whether, under any circumstances, a certificate granted under Section 7 of Act XL. of 1858 can be re-called summarily under Section 21.

2nd.—Whether such a certificate can be re-called summarily under Section 21 without any account having been previously taken in a regular suit under Section 19, where the application for the re-call is based on charges of waste and mismanagement, which cannot be disposed of without the accounts being enquired into and fully taken.

We are of opinion that both these questions must be answered in the affirmative.

By the grant of a certificate under Act XL. of 1858, the person to whom it is granted acquires powers which he could not exercise without it. For instance, by Section 8, although he may have been appointed by a will to manage the estate, he is not entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained a certificate.

So, by Section 18, every person to whom a certificate is granted has the same powers in the management of the estate as the proprietor might have had if he were not a minor, except that he cannot sell or mortgage any immoveable property or grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained.

By Section 7, it is compulsory upon the Court to grant a certificate to any person who shall have been appointed to the charge of a minor's estate by will or deed, and who is willing to undertake the trust.

Primâ facie, a person who has been appointed the manager of a minor's estate either by will or deed, is the proper person to be the manager, and, *primâ facie*, there is no sufficient cause why he should not be the person to whom the certificate is to be granted. The law has, therefore, made it compulsory on the Court to grant him the certificate; but it by no means follows that, when a certificate has been granted to him, and he has acquired the management, it may not be discovered that he is not a proper person to have the management.

It is true, no doubt, that a person to whom a certificate is granted under Section 7 is not bound to render periodical accounts in the same manner as a public officer to whom such a certificate is granted, and that he can be compelled to do so only by suit. It was so held in the case reported in 6 Weekly Reporter, Miscellaneous Rulings, p. 53.

The Court in that case said: "After "carefully examining the Act, we come to "the conclusion that the law does not "require a party, holding a certificate under "Section 7, to produce accounts, unless sued "for such under Section 19 of the Act by "any relative or friend of the minor. "Public Curators or Administrators appointed under Section 10 are required by the "provisions of Section 16 to put in annual "accounts, to the accuracy of which any "relative or friend of the minor may take

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"objections. But where a party is appointed under Section 7 to administer to the "estate, it appears to us that he is bound, "as was the practice before the passing of "the Act, to account only to the minor on "his attaining majority, and to no one else, "though, of course, he is liable to have the "certificate withdrawn under Section 21, "should any sufficient cause for its withdrawal be proved to the satisfaction of the "Court."

That case is an authority to show that, although a manager appointed by a will or deed to whom a certificate is granted is not bound to render periodical accounts under Section 16, still, if there be any mismanagement or improper conduct on his part, he is liable to be removed under the provisions of Section 21.

Section 21 enacts that "the Civil Court "for any sufficient cause may recall any "certificate granted under this Act, and may "direct the Collector to take charge of the "estate, or may grant a certificate to the "Public Curator or any other person as the "case may be."

It is only for sufficient cause that a certificate can be recalled; but the words of the Section are general, that for sufficient cause any certificate granted may be recalled; and there seems to be no good reason for holding that a certificate granted under Section 7 of the Act either to a manager appointed by will or to a near relative cannot be recalled for sufficient cause, in the same manner as any other certificate, merely because such manager is not bound to render periodical accounts.

By Section 28 all orders of the Civil Court are subject to appeal, subject to the rules in force in Miscellaneous cases, so that, if a manager be dismissed summarily for insufficient cause, he has a remedy by appeal.

The authorities upon the subject have all been very clearly set out in the statement by which the points were submitted for the opinion of the Full Bench, and the only case which appears to throw doubt upon the right of the Judge to recall a certificate by a summary proceeding in the case of a manager appointed under Section 7 is that which was decided by Mr. Justice Steer and Mr. Justice Campbell, and reported in Marshall's Reports, page 241. In that case the Judges observed: "It is clear that a regular suit "for an account can be brought against such "manager under Section 19 of the Act. "As regards his removal, we would not, after "the precedent quoted now, object to these "proceedings under Section 21; but we "think that, in whatever form a suit instituted to cancel the certificate under that Section may be instituted, it must be supported "by such proof of malversation and misconduct as will afford sufficient ground for "removal."

To that extent we entirely concur.

The Judges proceed: "Looking to the "nature of the title on which the certificate "is held, there is a wide difference between "a manager appointed by will or a near relative appointed in right of natural propinquity, and a mere officer of the Court "appointed manager subject to the supervision of the Court. The two former managers hold under Section 7, and render no "accounts till their management is impugned "under the provision of Section 19. The "latter, appointed under Sections 10 and 12, "is subject to a variety of special provisions, "and is bound to render periodical accounts. "As regards the grant of a certificate to a "person claiming under a will, it is clear "that in the terms of Section 7 the Court "has no option whatever. Hence we think "that in such a case the Court cannot exercise any mere discretionary power under "Section 21, the candidate not being absolutely and palpably incompetent."

In this we also concur. There can be no doubt that it is obligatory on the Court to grant a certificate to a manager appointed by will, and the Court has no power to recall it unless a sufficient cause is made out.

But the Judges go on to observe:—

"There will be sufficient cause for re"moving a manager appointed as of right, "only when there is such entire incompetency or actual breach of trust as would "justify a Court of Equity in depriving a "man of the management of his own "property, or a trustee of the management "of a trust."

There appears to be some inaccuracy in this statement, because we are not aware of any incompetency which would justify a Court of Equity in removing a man from the management of his own property. A man may manage his own property as he thinks fit, and, unless declared to be a lunatic, he has a right to manage his property as he pleases. So far as the Court speaks of the removal of a trustee, we think that they may be correct; but it does not follow that, if a manager to whom a certificate has been granted under Section 7 should be compelled to render his accounts by a regular suit, and

it should appear from those accounts that there has been embezzlement or waste or mismanagement such as would justify the removal of a trustee, the certificate cannot be withdrawn without a regular suit.

There may be many cases in which, if a manager so appointed could not be removed summarily, the estate might be wholly lost.

Suppose it were made out upon a summary application to the Civil Court that an estate, under a manager, had realized more than sufficient to pay the expenses of management and the public revenue and the allowance to the minor, and that the Government revenue was not paid and the estate about to be sold, and that the manager refused to render his accounts, and referred the friend of the minor to regular suit, and would give no reason for his not paying the Government revenue. If the Court could not remove him summarily without a regular suit, the estate might be sold for arrears of public revenue, and, before a decree for his removal could be obtained, the estate would be lost. We think it clear that, in such a case, the Court ought to have, and would have, power to remove the manager by a summary proceeding under Section 21, and to put the management of the estate into the hands of the Collector or of the Public Curator, notwithstanding the manager could not be compelled to render his accounts without a regular suit.

So, if the accounts rendered by such a manager, whether voluntarily or under a decree for an account in a regular suit, should be incorrect, and the manager should fraudulently omit to give credit for moneys received, it appears to us that the manager might be removed upon proof of the facts on a summary proceeding, and it would not be necessary to falsify the accounts in a regular suit.

We make this remark because the Judges in the case to which we have already referred think that, merely because the accounts are impugned, the Court could not remove the manager until those accounts had been impugned by regular suit.

We think that, without compelling the minor or his friend to resort to a regular suit, the Civil Court has power, if a sufficient case is made, by summary proceeding, to recall a certificate granted under Section 7 to a manager appointed by will or deed or to a near relative, and to put the estate into the hands of the Collector, and to exercise the other powers conferred upon the Court by Section 21.

For these reasons, it appears to us that both the questions ought to be answered in the affirmative.

The case will be referred back to a Division Bench with this expression of our opinion, in order that the Division Bench may determine the appeal.

The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Evidence—Presumption—Dakhilas.

Case No. 2779 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 9th July 1866, reversing a decision of the Deputy Collector of that District, dated the 23rd April 1866.

Kriteebash Mytee (Plaintiff), *Appellant*,

versus

Ramdhun Kharah (Defendant), *Respondent*.

Baboos Romesh Chunder Mitter and *Annud Chunder Ghosal* for Appellant.

Baboo Poorno Chunder Shome for Respondent.

A ryot, who puts in dakhilas as evidence to support his case, is bound to prove them. Their admission as genuine is not to be legally presumed, merely because they are not formally disputed by the landlord.

This case was referred to a Full Bench by Peacock, C. J., and L. S. Jackson, J., under the following orders:—

Peacock, C. J.—I am unable to distinguish the present case from the two* rulings which have been cited, and especially from the last in date of those two rulings. But I confess I cannot discover in what stage of the case the dakhilas produced by the defendant in evidence could have been denied upon the record by the plaintiff.

Suppose the defendant had produced these documents in Court under suspicious circumstances, and the plaintiff had not been

* Rajeesurree Dabea *vs.* Shibnath Chatterjee, 4 Weekly Reporter, Act X., p. 42.
Kazee Khoda Newaz *vs.* Nobokishore Raj, 5 Weekly Reporter, Act X., p. 53.

* The judgment of the Full Bench was orally delivered on the 19th March 1867, when Trevor, J., concurred in it.

present, and his mooktear, not knowing whether the documents were genuine or not, could not deny them, would the Judge have been bound to believe them? According to the rulings referred to, the Judge would have been bound to believe them, there being no denial of them upon the record.

My present impression is that these rulings cannot be upheld; but, as I cannot distinguish the present case from the rulings referred to, this case must be referred to a Full Bench for decision.

Jackson, J.—I entirely concur. I also am at a loss to know at what stage of the proceedings or in what manner a denial is to be entered by the plaintiff of documents filed by the defendant, more especially when those documents are so filed by the defendants after the first hearing of the case, when the examination of the plaintiff in person has already taken place. It seems to me that the party who puts in dakhilas as well as other documents as evidence to support his case is bound to satisfy the Court that those documents are genuine, and what they purport to be, in other words, to prove them, and that it cannot possibly be assumed, from the absence of a specific denial by the opposite party, that such documents are genuine.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The Judge in this case says that the dakhilas produced by the defendant are not anywhere denied by the plaintiff, and, consequently, under the ruling at page 53, Volume V. of the Weekly Reporter, they must be accepted as true. He does not state whether there was or was not any evidence to prove that they were genuine; but he accepted them as true merely because the plaintiff had not denied them.

The question came before the First Division Bench, who then thought that the ruling on which the Judge had relied in support of his decision could not be upheld; but, as there are conflicting decisions upon the point, the case was referred to a Full Bench. I retain the opinion which I expressed on referring the case.

In the second of the two cases cited in the referring order, and reported at page 53, Vol. V., Weekly Reporter, Act X. Rulings, Mr. Justice Bayley and Mr. Justice Shumbhoonath Pundit say:—

"Further it has been decided here that, "when the payment of rent is not a matter "directly in dispute, and dakhilas are pro- "duced by the ryot to show that he is "entitled to the presumption of Section 4, "and these receipts are not denied by the "landlord, the tenant is not required to "prove them, but by the non-denial admis- "sion is legally presumed."

We think that the decision cannot be upheld to the extent that admission is legally to be presumed from non-denial. If a fact or a document in support of a fact is to be proved, it must be proved by legal evidence whether the fact is directly in dispute or not. If a fact is admitted, it need not be proved; but, if it has to be proved at all, it must be proved by proper evidence, whatever may be the purpose for which it is to be proved.

The decision refers to a former case decided by Mr. Justice Bayley and Mr. Justice E. Jackson, reported at page 41, Vol. IV. of the Weekly Reporter, Act X. Rulings, in which the Judges say:—

"There is no doubt that dakhilas should, "as a general rule, be attested or proved by "some oral evidence, in the same manner "as all other documentary evidence. But "there is a special difficulty for a tenant to "prove dakhilas which are drawn up by his "zemindar's agents, and signed by them, "more particularly of long past days. The "tenant cannot be expected in every case "to summon all the gomastahs of his ze- "mindar for the past 20 or 30 years to "attest his dakhilas. He should be re- "quired in his examination to attest the "dakhilas himself as far as he can. All "dakhilas which have been given to him "personally he can prove as well as any "other witness. The tenant having so far "deposed to their genuineness, it will re- "main for the zemindar or his agent who "may depose on his behalf to deny their "genuineness. He also should be examined "regarding them. A mere general state- "ment that they are false should not be "listened to. If he states that they are "false documents, he should be required to "detail his reasons for so stating; and, if "they appear to have any foundation, an "issue should be laid down, and both parties "required to produce further evidence on "the point."

To the extent of saying that an issue should be laid down as to whether the documents are genuine or not when they are produced in the course of a trial as evidence to prove an issue which has already been laid down or any important fact in the

cause, I think that the Judges were not right; but I think they were right to this extent that, if a tenant produces dakhilas, and swears that they were genuine documents which were delivered to him by the landowner or his gomastah, or gives other *primâ-facie* evidence to show that they are genuine, whether for the purpose of proving that rent has been paid in a suit for arrears, or to prove that rent has been paid at a fixed rate for a certain number of years for the purpose of barring a landlord's claim to enhance, such dakhilas are strong evidence if the landlord or his agent do not come forward to deny them. The Judges are right in saying that it cannot be expected that a ryot should, in every case, summon all the agents of his landlord who gave him the receipts. But the ruling in the last case that, if the landlord does not deny them, they must be taken to be true, without any evidence on the part of the ryot, cannot be upheld.

In many cases, the landlord is not present at the trial, and does not even know what documents are intended to be produced. How, and in what stage of the case, is he to deny them? If a ryot produces dakhilas, and swears that he received them from the landowner or his agent, or gives other *primâ-facie* evidence of their genuineness, and the landlord or his agent does not come forward, and deny them or give evidence to show that they are not genuine, they may be taken as *primâ-facie* evidence against him if the evidence of the ryot is believed.

In this case, as the Judge has not entered into the question whether there was any evidence in support of the dakhilas, the case must be remanded to him to enquire whether the dakhilas are genuine or not, and to decide the case after that question has been determined upon proper evidence.

The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Right of occupancy—Transferable tenures.

Case No. 2609 of 1866.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 12th July 1866, modifying a decision passed by the Deputy Collector of the District, dated the 30th April 1866.

Ajoodhya Pershad (Defendant), *Appellant,*

versus

Mussamut Imam Bandi Begum (Plaintiff), *Respondent.*

Baboo Khetter Mohun Mookerjee for Appellant.

Mr. R. E. Twidale for Respondent.

The gaining of a right of occupancy in a non-transferable tenure under Section 6, Act X. of 1859, does not make the tenure transferable.

Quære per Peacock, C. J.—Whether a right of occupancy gained under the same Section is necessarily heritable.

This case was referred to a Full Bench by Loch and Bayley, J.J., under the following order:—

Referring Order.—The special appellant in this case, Ajoodhya Pershad, is a tenant having a right of occupancy. Some time back he, without the consent of his landlord, transferred his tenure to another party, viz. Jugdeonarain Singh. The zemindar brought a suit for arrears of rent against Ajoodhya Pershad, who pleaded that he had sold his tenure, and Jugdeonarain intervened claiming the tenure. As, however, the intervenor's name was not registered, the decree was given against Ajoodhya Pershad, and the intervenor, in order to save the property from sale in execution, deposited the amount of the decree in the name of the judgment-debtor, and the sum so deposited was paid over to the zemindar on his application.

The zemindar has again brought a suit for arrears of enhanced rent after service of notice against Ajoodhya Pershad, who pleads (as before) that he had no interest in the tenure. The intervenor also comes forward with his claim; but the Lower Appellate Court holds that the defendant Ajoodhya is liable for the rent, as his tenancy has never been cancelled, and the landlord is not bound to look beyond him as long as the tenant chooses to let the tenure run on.

An appeal from this order has now been preferred by Ajoodhya Pershad, who urges that, as he has transferred the tenure to Jugdeonarain, a substantial party, and that the zemindar is aware of such transfer, he (the special appellant) cannot be further considered liable for the rent. It may be noted that, after the previous suit was disposed of, Jugdeonarain applied to the Collector to compel the zemindars to register his name, but the Collector rejected his ap-

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* The judgment of the Full Bench was delivered orally on the 19th March 1867, when Trevor, J., concurred in it.

cation, as he was a cultivating ryot, and t an intermediate holder of a transferable ıure to whom the provisions of Section 27, :t X. of 1859, were applicable.

Before us it is not contended that the ten- e was originally transferable, but it is ged that it has become so, because the ndor tenant, Ajoodhya Pershad, has a *right occupancy*, and it has been ruled by a vision Bench of this Court (Weekly Re- rter, page 87, Taramonee Dassee) that a ht of occupancy is a transferable tenure like e jotes of Rungpore and the howlas and em-howlas of Backergunge. We have some ubts as to the correctness of this ruling generally applicable throughout the coun-. We do not understand how a tenure, t transferable in its nature, can become so a right of occupancy ; and we think it ight be both inconvenient and injurious landlords, were tenants having a right occupancy allowed, without the consent the landlord, to transfer their tenures to ıomsoever they pleased. There would be) safety for the due realization of the rent. 'e know that in some parts of the country e tenant's jotes are transferable, but that from *local custom, and not* from a right occupancy. As the question is of con- lerable importance, we submit the follow- g point for the decision of a Full Bench :— Whether a tenure, not originally transfer- ble without the consent of the landlord, :comes so because the tenant has obtained prescriptive *right of occupancy*.

The judgment of the Full Bench was deli- red as follows by—

Peacock, C. J.—As I understand the pro- ısition for which the vakeel for the special ppellant has contended, it is this, that, if a te, which, so long as no right of occupancy isted in it, was not transferable, be held for years, and a right of occupancy be ac- uired in it under Section 6, Act X. of 1859, at which was a non-transferable ten- e becomes a transferable one—in other ords, that every tenure in which a right of :cupancy is acquired under Act X. is a ansferable tenure.

It appears to me that there is nothing in ection 6, Act X. of 1859, which shows that it as the intention of the Legislature to alter ıe nature of a jote, and to convert a non- ansferable jote into a transferable one, ıerely because a ryot who held it for 12 ears had thereby gained a right of occu- ancy under Act X. of 1859.

None of the cases which have been cited go to that extent. The only case which can bear an interpretation such as that now contended for is the case referred to by the Judges who have referred this question to us, and reported in 1 Weekly Reporter, page 86. There the Judges say :—

"The question, then, arises, is a right of "occupancy a transferable tenure? We think "that it is so transferable. A right of oc- "cupancy is, after all, a perpetual lease, the "holder of which cannot be ejected so long "as he pays a fair and equitable rent. There "are many similar rights common in differ- "ent parts of Bengal, such as the jotes of "Rungpore and the howlas and neem- "howlas of Backergunge which are in "effect in no respect higher than that "of a right of occupancy, inasmuch as they "are mere personal rights which are, and "have always been, held to be transferable "as well as heritable."

But, even supposing that the Judges in that case thought that a jote which was not transferable became transferable merely by reason of the tenant's having held it for 12 years, and gained a right of occupancy in it under Section 6, Act X. of 1859, it appears to us that their construction of that Section was not correct.

The case will go back to the Division Bench which referred it, in order that they may decide it.

Speaking for myself, I am not at all sure that a right of occupancy gained under Section 6, Act X. of 1859, is necessarily heritable.

The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.

Time for Appeal—Application for Review.

Petition of Brojender Coomar Roy Chowdry.

Baboos Sreenath Doss and *Onoocool Chunder Mookerjee* for Petitioner.

If a party presents an application for review of judgment within the ordinary period limited for appealing,

* The judgment of the Full Bench was orally delivered on the 23rd March 1867, when Trevor, J., concurred in it.

the time occupied by the Court in disposing of such application will not be reckoned among the number of days limited for appealing, but will be added thereto; and a memorandum of appeal presented within such extended period will be received as put in within time.

The petition was as follows:—

"That one Radha Gobindo Sha having instituted a suit against your petitioner for breaking down the buildings erected by him, the Sudder Moonsiff decreed the plaintiff's claim on the 7th of February 1866. That your petitioner preferred an appeal to the Principal Sudder Ameen against the said decision, and it was confirmed on the 31st August 1866. That your petitioner, being dissatisfied with the decision of the Principal Sudder Ameen, filed a petition of review on the 2nd of October 1866: on this, the Principal Sudder Ameen, having caused notice to be served on the opposite party, tried and rejected it on the 12th of January last. That your petitioner, feeling himself aggrieved by the decisions passed by the Lower Courts, prefers this special appeal; and, though three months have elapsed from the date when the Principal Sudder Ameen first confirmed the order of the Court of first instance, yet, as the petition of review was not disposed of till the 12th of January last, your petitioner prays that your Lordships will be pleased to grant him the indulgence in filing this special appeal on the principle laid down in the Miscellaneous Order of 15* Judges made on the 9th of March 1865."

The case was referred to a Full Bench by L. S. Jackson, J., under the following order:—

Referring Order.—I have consulted my learned colleagues; the result is, I think it right to refer the question for the consideration of the Full Bench now sitting.

It will be observed that there is a very clear distinction between the case which has been brought to my notice under which this application and so many other applications have been made, and the case before the Judges cited in Sutherland's Weekly Reporter II., page 36, Miscellaneous Rulings. That was a case of an appeal on the original side of the Court where only 20 days are allowed. Probably in no case would there be very much time to spare if the appeal has to be preferred on the original side of the Court within those 20 days; but here, where one period of appeal has been allowed from all districts, whether in the immediate vicinity of the Appellate Court or at many days or even weeks' journey distant, it is manifest that it would not be in all cases either reasonable or necessary to allow the full period of appeal in addition to the time absolutely taken up whilst the application for review was pending. I am very doubtful whether the Court intended to go so far in ruling as they did in that case as to say that in all cases of appeal on this side of the Court that further period was invariably to be allowed.

In the present case it seems that the decision from which the petitioner now seeks to appeal was passed on the 31st August, five days having been consumed in obtaining copy of the judgment for the application of review which was put in on the 2nd October immediately before the Doorga Poojah Vacation began. It may turn out, though of course I am not disposed to prejudge the question—it may turn out that that application was expressly put in with a view to delay. An application of that character made just before the Court is closed for the long vacation has very much the appearance of an application for delay. However that may be, this application having been more than three months pending was disposed of on the 12th of January, when it was rejected. From the 12th January to this day the party has had 63 days to prefer his special appeal. It is true that the application is said to have been presented to the Deputy Registrar on the 12th of this month, but then the pleader who presented it must have been perfectly well aware that he was presenting it to the Deputy Registrar under circumstances which forbade the Deputy Registrar receiving it without the leave of the Court. I therefore, look upon the application for special appeal as presented this day, and not earlier. That leaves, as I have said, 63 days. Now, this is a case from the district of Dacca. Dacca is distant from this Court about two days' post, and not much longer for the traveller. It appears to me that it cannot have been intended that, under such circumstances, the entire period of 90 days was invariably to be allowed excluding the time during which the application for review was pending; but that the Court should consider in each case whether, after deducting the period during which the application for review was pending, the special appellant had exercised a proper diligence in prosecuting his appeal.

I, therefore, wish the question to be referred to a Full Bench, in order that the Full Bench may decide for my guidance what

* 14 Judges—*See* 2 Weekly Reporter (Miscellaneous) 36.

her, in future, the full period is invariably to be allowed, or such further period as may appear to have been reasonably necessary.

The judgment of the Full Bench was delivered as follows by—

Peacock, C.J.—We think that we must uphold the ruling of the fourteen Judges. Although it was a mere dictum of the Judges that the decision of the Madras Sudder Court was right, still we think that we ought not to interfere with it. It was merely following a practice which has been adopted in Madras from 1860 down to the present time. Probably parties have been acting upon the dictum or ruling of the fourteen Judges. It is too late now to reverse it. Great inconvenience would probably be caused by our doing so.

The 31st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.*

Appeal to Privy Council (Restoration of).

Petition of Radha Binode Misser in connection with Privy Council Appeal No. 41 of 1864.

Radha Binode Misser, *Appellant to England,*

versus

Kripa Moyee Debea, *Respondent to England.*

Baboo Kallee Prosunno Dutt for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

The High Court has the power, and ought to exercise its discretion in each particular case, with regard to restoring appeals to the Privy Council dismissed for default, or removed for any reason from the file of the High Court.

This case was referred to a Full Bench by L. S. Jackson, J., under the following order:—

Referring Order.—I think it proper to refer for the decision of a Full Bench a point on which I entertain doubt, and upon which my present opinion and practice appear to be at variance with the views entertained by some of the other Judges.

The question is whether, after an appeal to Her Majesty in Council has been dismissed for default, or for any reason removed from the file of this Court, under the law or under the rules of the Court, I have any power to restore such appeal when the period of six months, allowed for making appeals to England, has expired.

My present opinion is that I have not the power. These are cases in which, as it seems to me, this Court acts altogether ministerially, and cannot go beyond the functions expressly committed to it.

At the same time cases occasionally arise, as when an applicant seeks to justify a default in which it would certainly be convenient and beneficial that the Court should exercise the power in question.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—We think that the Court has the power, and should exercise its discretion in each particular case.

The case will go back to the Court which referred it, in order that it may decide whether there is sufficient grounds.

The 31st May 1867.

Present:

The Hon'ble H. V. Bayley and C. P. Hobhouse, *Judges.*

Limitation—Suit to recover possession with mesne-profits—Allegation of mal tenure—Lakheraj.

Case No. 263 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 24th November 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 14th June 1866.

Mr. James Furlong, manager on behalf of the Raja of Durbangah (Plaintiff), *Appellant,*

versus

Khusroo Mundur and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Appellant.

Baboo Bhuggobutty Churn Ghose for Respondents.

A suit, not to resume or assess, but to recover possession with mesne-profits, as part of the plaintiff's mál tenure, of land which the defendant is alleged to be holding on an invalid lakheraj tenure, must, under Clause

* The judgment of the Full Bench was orally delivered on the 23rd March 1867, when Trevor, J., concurred in it.

12, Section 1, Act XIV. of 1859, be brought within 12 years from the time the cause of action arose—*i. e.*, from the date on which the defendant began to hold the land in dispute rent-free.

Hobhouse, J.—This was a suit for possession with mesne-profits on the allegation that the lands in suit were a part of the plaintiff's (special appellant's) "mâl" estate, and that the defendant (special respondent) held them on an invalid lakheraj tenure.

Limitation (Clause 12, Section 1, Act XIV. of 1859) was pleaded, and the Courts below, finding that special respondent had been in possession for a period of more than 12 years, dismissed the suit as barred by limitation under the Statute quoted.

In special appeal, it is urged that the Courts below were in error in the above finding—

First, because special respondent's possession was not an adverse possession.

Secondly, because special respondent was retained in possession without any enquiry into the validity of the lakheraj title he set up.

Looking to the fact that this was not a suit to resume or assess, but simply to recover possession, and looking also to the words of the Statute, I think the finding of the Courts below is correct in law.

The Statute declares that, to escape the penalty of limitation, "suits for the recovery of immoveable property" must be brought within "the period of 12 years from the time the cause of action arose."

Now, when did the cause of action arise in this suit? Clearly, in my judgment, it arose on that date on which special respondent began to hold the lands in dispute rent-free, *i. e.*, on a title adverse to special appellant's allegation of a "mâl" tenure.

And, as a matter of fact, with which we cannot in this Court interfere, the Courts below have found that the date on which special respondent began to hold thus adversely to special appellant was some four generations back, or for more than 12 years before the institution of this suit.

This being so, the suit was clearly barred by the application of the Statute of Limitations quoted, and the Courts below were right in so finding, and it follows that they were also right in declining to go into special respondent's title.

In this view of the case, I would dismiss this special appeal with costs and interest thereon.

Bayley, J.—I am of the same opinion.

The 31st May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Objection by way of cross-appeal (against absent co-respondent).

Case No. 338 of 1867.

Special Appeal from a decision passed by the Judge of Gya, dated the 11th December 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 28th December 1865.

Lall Chand and others (Defendants), *Appellants,*

versus

Mussamut Kudmoo Koonwar and others (Plaintiffs), *Respondents.*

Messrs. R. T. Allan and *C. Gregory* for Appellants.

Mr. R. V. Doyne and *Baboo Onookool Chunder Mookerjee* for Respondents.

An objection by way of cross-appeal cannot be taken against a co-respondent who is not present in Court, and so not able to answer the objection of the cross-appellant.

Norman, J.—This is a suit by three ladies, Mussamuts Kudma Koonwar, Latoo Koonwar, and Munbasoo Koonwar, to set aside three several ikrarnamahs, dated respectively the 23rd Bhadro 1267, the 15th Pous 1268, and the 14th Pous 1268.

The Lower Appellate Court, confirming the decision of the first Court, found the ikrarnamahs forgeries, and from that decision this special appeal is presented to this Court.

Mr. Allan for the appellants put forward arguments which might have had some weight if this had been a *regular* appeal, being arguments intended to show that the Judge was wrong on the facts.

Mr. Gregory also for the appellants, in a somewhat unusual manner taking up a point which had been passed over by his learned leader, contended that two of the above three ladies had not verified the plaint at the time when it was filed or purported to have been verified. The Judge caused an enquiry to be made in this matter, as to whether or not the plaint *was* verified by them, and that the suit was *theirs*. They said the suit was brought with their knowledge and on

their account, and the Judge was perfectly justified upon this with proceeding with the case.

The first Court, finding that Mussamut Munbasoo had married, ordered that Mussamuts Kudma Koonwar and Latoo Koonwar should be put in possession of the whole property in dispute.

On appeal, the Judge modified that decision, and gave a decree in favor of the three plaintiffs, awarding to them individually their several shares as specified in the plaint, leaving Mussamuts Kudma Koonwar and Latoo Koonwar to seek their remedy by another suit against Mussamut Munbasoo Koonwar.

Mussamut Munbasoo Koonwar appears to have married a second time, and, therefore, under Section 2 of Act XV. of 1856, she would appear to have forfeited all rights and interests in her deceased husband's property by way of inheritance.

Mr. Doyne, who appeared for the respondents, objects that the decision of the Judge is erroneous, and that the decision of the first Court ought to be restored so far as regards the share of Munbasoo. This objection is taken by way of cross-appeal. Now, if the objection had been taken by way of regular appeal or special appeal, and if Mussamut Munbasoo had been before us as a respondent, we should probably have held that the interest of Mussamut Munbasoo became forfeited under the Act in question. It is not clear what was the exact date of her marriage. If the marriage took place before the institution of the suit, the decree might have been in favor of the two plaintiffs, Mussamuts Kudma Koonwar and Latoo Koonwar, whose titles have been established by the finding of the first Court. If Mussamut Munbasoo Koonwar had married after the commencement of the suit, the cause of action would, on her marriage, apparently have survived, and gone over to the two co-plaintiffs Kudma Koonwar and Latoo Koonwar. In either case we might have been able to give the two plaintiffs, who are represented by Mr. Doyne, a decree for the whole of the property sued for.

But, as a cross-appeal cannot be taken against a co-respondent who is not present in Court, and so is not able to answer the objection of the cross-appellant, the decree of the Judge must stand. Probably, the plaintiffs in the Execution Department may be able to work out the decree, and prevent Mussamut Munbasoo Koonwar, upon her own admission made in this suit, from interfering in any way; if not, they must be left to a suit against Mussamut Munbasoo.

The appeal will be dismissed with costs and interest.

The 31st May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Evidence—Jumma-wasil-Bakee papers—Canoongoe papers.

Case No. 291 of 1867 under Act X. of 1869.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 24th December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 7th July 1866.

Kheero Monee Dossia and others (Defendants), *Appellants,*

versus

Beejoy Gobind Bural and others (Plaintiffs), *Respondents.*

Baboo Gopal Lal Mitter for Appellants.

Baboos Bhuggobutty Churn Ghose, Sreenath Doss, and *Ashootosh Dhur* for Respondents.

In a suit for enhancement of rent a collection-account or a jumma-wasil-bakee filed many years previously by the plaintiff's predecessor in a suit to which the defendants are not parties is not *per se* evidence for the plaintiff that the defendant's predecessor held at the rates of rent mentioned therein.

Semble that, if proved to have been regularly kept in the way of business, the paper might have been put in as corroborative evidence under Section 43 of Act II. of 1855, or might have been used by the writer thereof to refresh his memory under Section 45.

Semble that, if it were shown that the writer was dead or could not be found, the original might have been put in evidence under Section 39.

Semble that series of collection-accounts or jumma-wasil-bakee papers appearing to be regularly kept may be evidence and entitled to credit on the same principle as other contemporaneous records made and kept by the party producing them in the ordinary course of his business.

How far and when canoongoe papers are admissible as evidence for the zemindar as to the rate of rent paid by the ryot.

Norman, J.—The plaintiffs brought this suit for enhancement of rent. The defendant proved uniform payment for 20 years, and claimed the benefit of the presumption that his rent had remained unchanged from the time of the Permanent Settlement.

The plaintiff, in answer to this case for the purpose of proving that the rent had varied, puts in evidence—

First.—A copy of the jumma-wasil-bakee of the year 1235, which was filed some 14 years ago in a civil suit to which the present defendant was not a party, before the plaintiffs came into possession of the estate.

Secondly.—A copy of the canoongoe's papers for 1227.

The Judge relies mainly on these documents as proving that the rent has been changed.

The defendant, on special appeal, objected that this copy of the jumma-wasil-bakee is not evidence.

First.—As regards the copy of the jumma-wasil-bakee. If admissible in evidence, it will, no doubt, be great weight, because the original in Court may be produced from a place of safe custody where it could not have been tampered with, and the entries made in it must have been written at a time when it was no one's interest to misrepresent the rate of rent to which the now defendant was liable, certainly not the interest of the plaintiff's predecessor in estate to represent his ryot as holding at a less rate of rent than he really paid.

As the case stands in the judgment of the Judge, it does not appear to be admissible as evidence. *First*, it is apparently a copy, and the original is not accounted for. *Secondly*, if the original were produced, it might, under Section 43 of Act II. of 1855, perhaps be admissible as a *book* regularly kept in the way of business, but, as such, it would be corroborative, but *not independent proof* of the facts stated therein, *viz.*, that, *in the year 1235, the defendant's rent was so and so.* We do not understand that there is any independent evidence as to this particular fact. Very possibly the paper may be made evidence. The writer of it may be produced. Refreshing his memory from the paper (*see* Section 45), he might be able to state what rent the defendant paid in the year in question, and then, to corroborate his testimony, the paper *may be put in* under Section 43.

If it is proved that the writer is dead or cannot be found, the document may be put in as an entry made in the ordinary course of business under Section 39 of Act II. of 1855.

As to the value of jumma-wasil-bakee as evidence in rent-suits for the zemindar, the Deputy Collector quotes a passage from the 5th Volume of the Weekly Reporter, page 243, and treats it as if the language applied to all jumma-wasil-bakees. But there is a wide distinction between the case with which the learned Judges were then dealing, and to which they apply their remarks, and the present. Here we have a series of jumma-wasil-bakees apparently regularly kept for 10 years with one gap from 1149 to 1258. There is a single paper unattested the writer of which was not called, and his absence not accounted for.

Of course, all books of account and entries made by or on behalf of a party, when produced as evidence in his own favor must be received with caution; but there seems to be no reason why a series of collection-accounts, or jumma-wasil-bakee papers, appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business.

Secondly.—As to the canoongoe's papers. It is not stated before us that the estate was held khas or under attachment in the year 1227; and, if not, it is probable that the entries in the canoongoe's papers is not any evidence at all against the defendant. If it simply gives the rate of rent, it will probably have been made from mere hearsay in the first instance. *See* Regulations V. of 1816, XII. of 1817, and I. of 1819, and Section 7, Clauses 1, 3, 4, and 5 of Regulation IV. of 1808 as introduced into Regulation V. of 1816, Section 7. If the canoongoe papers recorded a pottah granted by the landholder under Clause 3, a lease under Clause 4, or a measurement under Clause 6, it might be different.

A third point was taken that the rates had not been properly enquired into by the Judge who decided this case upon the evidence taken in a local enquiry made in another case some months previously to which the defendant was not a party. The objection is well founded. The now defendant had not opportunity of cross-examining the witnesses or adducing evidence to rebut their statements.

There must be a new enquiry on this point.

With these observations, the case is remitted for trial to the Lower Appellate Court.

The 31st May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Onus Probandi—Title.

Case No. 294 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 24th December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 7th July 1866.

Ram Coomar Roy (Defendant), *Appellant,*

versus

Beejoy Gobind Bural and others (Plaintiffs), *Respondents.*

Baboo Gopal Lal Mitter for Appellant.

Baboos Sreenath Doss, Bhuggobutty Churn Ghose, and *Ashootosh Dhur* for Respondent.

Where a royt holds lands of considerable extent under a zemindar, and alleges that one or two plots occupied by him are held under a different title, the *onus* is on him to prove his allegation.

Norman, J.—THE defendant objected that certain daghs were not held under the plaintiff, and that it was the duty of the plaintiff to show of what his tenure consisted. But, when a ryot is holding lands of considerable extent under a zemindar, it is a matter peculiarly within his own knowledge of what that holding consists; and, if he alleges that one or two plots occupied by him are held under a different title, it is for him to shew it. It would be hard indeed on zemindars, and still more so on purchasers of zemindaries, if ryots were to be able to throw on their zemindars the sole *onus* of proving the extent and the boundaries of the lands occupied by such ryots as part of their holding.

There seems no reason to doubt the correctness of the Judge's decision on this point.

The 31st May 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 207, Act VIII. of 1859—Cross-decrees—Set-off—Execution (by one of several decree-holders).

Case No. 95 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Nuddea, dated the 13th February 1867.

Judoonath Roy and others (Judgment-debtors), *Appellants,*

versus

Ram Buksh Chuttangee and others (Purchasers of decree), *Respondents.*

Baboo Doorga Dass Dutt for Appellants.

Mr. R. T. Allan and *Baboo Romanath Bose* for Respondents.

Section 207, Act VIII. of 1859 (relating to cross-decrees between parties before the Court), relates only to decrees which are in course of execution at the same time.

One out of several decree-holders cannot execute a decree in respect of his own separate interest or otherwise than the decree as a whole. In this case, however, the decree-holder was allowed to amend his application to execute the decree for his own share, and to convert it into an application to execute the whole decree.

Jackson, J.—THIS is one of the many cases arising out of the long-continued litigation between the members of the Nakasheeparah family.

Mr. Allan's client, whose name is Ram Buksh Chuttangee, is the purchaser of the rights and interest of Damoodur and Essen Chunder seeking to execute against Judoo Nath, who is one of the judgment-debtors, under a decree of the Principal Sudder Ameen of Nuddea, which was affirmed by a decision of the late Sudder Court, dated 31st January 1860, and reported at page 59 of the Sudder Dewanny Decisions for that year. Execution having been ordered by the Court below, Judoonath preferred two appeals. The objections which he has brought before us are four in number.

In the *first* place, he contends that the execution is barred by limitation. In the *next* place, he alleges that execution cannot be taken out against him alone for the whole amount which passed under the decree, but that he is only liable to the extent of his own separate share. *Thirdly*, he pleaded that he was entitled to a set-off under a separate decree on account of an excess payment for putnee rent, which decree was confirmed by the late Sudder Court in 1858. And, *lastly*, he contended that the application to execute was irregular as being made by the petitioner, who represented two of the original decree-holders, not in respect of the whole decree, but in respect of that part of the decree in which he was interested.

It seems to me clearly made out that limitation does not bar the execution of the decree, inasmuch as proceedings had taken place within three years next preceding 13th May 1866 (on which day the application to execute was made) which sufficiently kept the decree alive.

The *next* point is as to the liability of the judgment-debtor. I observe that the decree of the Principal Sudder Ameen against these parties was one declaring them jointly and severally liable; that it was made a ground of appeal to the late Sudder Court that this judgment-debtor should not be so declared liable for more than the extent of his own share. But I observe that the decree of the Sudder Court dismissing the appeal, and therefore affirming the decision of the Court below, is entirely silent upon that point. There is, indeed, in the concluding part of the judgment, an expression to this effect: "They think also" (that is, the Judges who decided the case) "that the share payable by each party "to the plaintiff may be adjusted at the time "of execution." Whether that was an expression of opinion or a suggestion, I do not clearly understand. At all events, it does not appear to be a part of the Court's decision in determining the appeal. That being so, it appears to me that the decision of the Court of first instance, which made all parties severally and jointly liable, continues to be in force, and that therefore the decree may be enforced against this party.

The *third* question is as to the set-off. I think it has been held in this Court that Section 207 of the Code of Civil Procedure relating to cross-decrees between parties before the Court relates only to decrees which are in course of execution at the same time. Now, the decision of 1860 declaring that branches of the family whose interests Mr. Allan's client represents to be liable to pay the amount of the putnee rent which had been occupied by the opposite party, that decree expressly declares that it should not be executed until the wassilat, for which those decree-holders were liable, should have been ascertained. It appears that the amount of wassilat has not been, to the present moment, ascertained; consequently the decree for rent is not in a position to be executed; and, as it cannot be executed, cannot be now set off against the other decree.

Finally, there remains the point as to the petitioner's competence to execute the decree for his own share. It undoubtedly has been held in several cases by the learned Judges who lately have been sitting on the Miscellaneous Bench that one out of several decree-holders may not execute a decree in respect of his own separate interest, or otherwise than the decree as a whole. I think we must be bound by the authority of those decisions. At the same time, it appears to me that that is an objection which ought not to have the effect of entirely rejecting the application to execute. I think the requirements of the law will be fully met if we direct the Court below to permit the decree-holder to amend his application to execute, and to convert it into an application to execute the whole decree. Upon his so amending his application, the Court will, of course, take care to provide for the protection of the interests of the other decree-holders. That, it appears to me, is all that it is necessary to do in the present case. The proceedings should be sent to the Court below in order to that step being taken.

I further think that, as between the parties, the order now made should be without prejudice to what has been done in execution of the decree.

Considering that there was ground which justified the appellants in coming up to this Court, each party will pay his own costs.

It is admitted that this order will govern Miscellaneous Appeal No. 81 of 1867.

Hobhouse, J.—I concur entirely with my learned colleague, and I have nothing to add to the judgment.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 3rd January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Power of High Court (to interfere with sentence)—Cumulative sentence—Limit of imprisonment—Section 46, Code of Criminal Procedure.

Referred Jurisdiction.

Queen *versus* Puban.

After a sentence has once been passed by a competent authority, the High Court has no more power to interfere with it than a private individual, except upon appeal, or on a reference, or by way of revision as provided by the Code of Criminal Procedure.

Sentences of imprisonment may be accumulated beyond the period of 14 years, notwithstanding Section 46 of that Code, which limit has reference only to sentences passed simultaneously, or passed upon charges tried simultaneously.

Markby, J.—In this case the prisoner, having already been frequently convicted, was convicted of cattle-stealing by an Assistant Magistrate in December 1865, and was then sentenced to four years' rigorous imprisonment.

On the 15th February 1866, that is, whilst the prisoner was then under sentence of imprisonment, he was tried for a second offence of cattle-stealing, was convicted, and sentenced to transportation for life.

On the same day, but not at the same time, he was tried and convicted on a third charge of cattle-stealing, but having been already sentenced to transportation for life, no further sentence was passed.

The prisoner then appealed to this Court, and this Court, being of opinion that the Sessions Judge had no power to pass a sentence of transportation for life, quashed that sentence, and, in lieu thereof, passed upon the prisoner a sentence of 7 years' rigorous imprisonment. The term of imprisonment inflicted by this sentence must, by the provisions of Section 480 of the Code of Criminal Procedure, commence at the expiration of the term of imprisonment to which the prisoner had previously been sentenced, that is to say, in December 1869. This Court also directed that the Sessions Judge should pass such sentence as he deemed proper in respect of the third conviction. Upon this, the Sessions Judge passed a sentence of 7 years' rigorous imprisonment in respect of this conviction, which must also commence after the previous terms of imprisonment have expired, namely, in December 1876.

At the time the prisoner was tried in February, he stood committed on a fourth charge of cattle-stealing, but the witnesses were not in attendance; and, as the Sessions Judge had already sentenced the prisoner to transportation for life, he thought it necessary to postpone the case, and acquitted the prisoner on that charge.

Upon this proceeding being brought to the knowledge of this Court, the Sessions Judge was informed that it was erroneous, and that he ought to have tried the prisoner on the charge without reference to the previous convictions. This was accordingly done, and the prisoner, in August last, was convicted on the fourth charge of cattle-stealing. No sentence has been passed in this last case; and the Sessions Judge has applied to us for leave to cancel the sentence passed in December 1865, with a view, as we understand his application, of strengthening his own powers of punishment.

We are at a loss to conceive under what power it is supposed that this Court can grant the permission asked for. After a sentence has once been passed by a competent authority, this Court has no more power to interfere with it than a private individual, except upon appeal, or on a reference, or by way of revision as provided by the Code.

As, however, the Sessions Judge has applied to us with reference to the punishment of this prisoner, we think it desirable to point out how the question presents itself.

The prisoner stands already under sentence of imprisonment (or transportation if it has been commuted) up to December 1883, and any punishment which the Sessions Judge may now inflict must of necessity commence from the expiration of the previous sentences, that is, from December 1883. The Sessions Judge has power to inflict a sentence of imprisonment which may extend to seven years from that time.

It is for the Sessions Judge in his discretion to say whether the prisoner ought to suffer the whole or what part of this additional punishment.

We do not consider that there is any ground for the supposition that sentences of imprisonment cannot be accumulated beyond the period of 14 years. By Section 46, when a person is convicted "at one time," which must mean at one trial, of two or more offences, then the Court may pass successive sentences of imprisonment on the prisoner, and that Section contains a proviso "that in no case shall the person be sentenced to imprisonment for a longer period than 14 years." But in Section 48, which provides for the punishment of persons who are already under sentence to imprisonment and transportation, there is no such restriction. It is obvious, therefore, that the limit of 14 years is fixed with reference to sentences passed simultaneously, or passed upon charges tried simultaneously.

The case is remitted to the Sessions Judge that he may pass sentence upon the prisoner, with reference to these observations.

The 3rd January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Misdirection—Hearsay evidence.

Queen *versus* Kali Churn Gangooly.

Committed by the Deputy Commissioner of Kamroop, and tried by the Judicial Commissioner of Assam, on a charge of culpable homicide not amounting to murder.

The verdict of the Jury was reversed on the ground of misdirection by the Judicial Commissioner in not having left the cause of death and the prisoner's connection with certain attempts at bribery as questions for the consideration of the Jury.

The admission of hearsay evidence prohibited.

Markby, J.—In this case the prisoner Kali Churn has been convicted by a Jury of culpable homicide not amounting to murder, and has appealed to this Court against that conviction.

The ground of law upon which the prisoner's Counsel has impeached the conviction is misdirection by the Judicial Commissioner in his charge to the Jury. And the complaints which he makes of the summing up are four:—

First.—That the Judicial Commissioner was wrong in telling the Jury that the doctor was of opinion that the lungs of the deceased must have sustained some severe injury during life, whereas the evidence of the doctor is that the deceased may have died from rapid inflammation produced by natural causes.

Secondly.—That the Judicial Commissioner was wrong in leaving to the Jury, as evidence against the prisoner, the statements made by the witnesses as to certain attempts made to bribe police officers and others in this case, inasmuch as there was nothing to shew that those attempts were, in any way, made at the suggestion or with the cognizance of the prisoner.

Thirdly.—That the Judicial Commissioner ought to have left to the Jury, as a separate question, whether or not the body produced to the surgeon was the right one.

Fourthly.—That the attention of the Jury was not sufficiently drawn to the question of the extent to which the deceased was beaten by the prisoner.

With regard to the *first* and *second* of these objections, we are of opinion that they are well founded. As to the *first*, we think that the Judicial Commissioner ought to have left the cause of death as a distinct question to the Jury, pointing out the two theories suggested by the doctor from the *post mortem* examination, and how each of these theories was supported, or otherwise, by the other evidence in the case.

With regard to the *second*, we are not quite sure what impression the Judicial Commissioner intended to convey to the Jury; but we think that, whether he intended it or not, the impression they were likely to receive was that this evidence bore against the prisoner. We cannot, however, discover anything to shew that the prisoner was concerned in these attempts at bribery; but, even if there were, the fact ought not to have been assumed, but left to the Jury for their consideration.

With regard to the two other objections, we have some doubt whether there was any such misdirection as would entitle us to reverse the verdict of the Jury having regard to the provisions of Sections 426 and 439 of the Code of Criminal Procedure and to all the circumstances of the case; but, as we think that, upon the two first objections, the verdict ought to be reversed, it is not necessary to express any opinion upon them. We, therefore, under Section 419, order the verdict to be reversed, the result of which is that the proceedings on this trial will be annulled. This will not prevent the prisoner being again put upon his trial, and we think that this is a case in which a fresh trial ought to take place immediately.

Throughout the decision of this case, we adopt the view expressed by the majority of the Full Bench in the case of Elahee Buksh, reported in the 5th Volume of Sutherland's Weekly Reporter, Criminal Rulings, p. 80, as to the duty of this Court, sitting as a Court of Appeal, in criminal cases.

We also think it right to remark that a good deal of hearsay evidence was received in this case. Witnesses ought not to be allowed to make such statements, as it is impossible to remove their effect from the mind of the Jury.

The 3rd January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Torture—Abetment.

Queen *versus* Tarinee Churn Chuttopadhya and others.

Committed by the Magistrate, and tried by the Sessions Judge, of Dinagepore, on a charge of voluntarily causing hurt, &c.

Where several prisoners were all concerned in a case of torture, and were prosecuting a common object, each was held guilty as a principal, and not as an abettor of others.

Markby, J.—In this case eight prisoners, who are police officers, are charged, and are found guilty of having abetted each other, in voluntarily causing hurt for the purpose of torture, and obtaining restoration of property under Sections 330 and 109 of the Penal Code. Each of the prisoners has been sentenced to rigorous imprisonment for 7 years.

Of the eight prisoners, four, namely Muramut Hossein, Luchmun Sing, Bhurut Hazaree, and Shumshere Khan, have been already convicted of manslaughter, and sentenced to transportation for life, and that conviction and sentence has been affirmed by this Court on appeal. The conviction in this case is, as regards those prisoners, therefore, merely formal, but we may say that we are fully satisfied by the evidence that they are guilty.

Three of the other prisoners, Bhurintun Pantee, Shubaktollah, and Joomun Seikh, have not been previously convicted; the remaining prisoner Tarinee Churn, an Inspector of Police, has been already convicted of abetting a similar offence to that now charged, and sentenced to 7 years' transportation, which conviction and sentence has been affirmed by us on appeal.

As regards the merits of this case, we find that the two Assessors concur with the Sessions Judge in finding that all the prisoners are guilty. We have examined the record of the evidence and the judgment of the Sessions Judge, and we find that the witnesses have been carefully examined, and their evidence fairly weighed and tested, and we therefore see no reason whatever for disturbing this conviction, which there was ample evidence to support. Indeed, the learned Counsel, who argued the case in favor of Tarinee Churn, was unable to point out any defect in the trial before the Sessions Judge, and his only complaint against the evidence was that it was too vague and general.

With regard to this objection, it is true that the witnesses do speak in somewhat general terms, but they were cross-examined by practised advocates who failed to shake their testimony, and to whom they gave the details of the matter when they were asked. The Sessions Judge and the Assessors were satisfied of their veracity, and we can see no reason to discredit them.

The conviction and sentences will therefore be affirmed as against all the prisoners. We consider that the term of imprisonment of 14 years to which the Inspector Tarinee Churn is subject for these two offences barely meets the requirements of justice, considering the terrible consequences of such conduct in a person of his position.

With regard to the form of the conviction, we think that is wrong. If, as the Sessions Judge appears to consider, the prisoners were all concerned in the torture, and were prosecuting a common object, then each is guilty as a principal, and not as an abettor of others, and they ought to have been so convicted. As, however, the prisoners have been in no way prejudiced by this error, which is of a purely technical nature, we cannot reverse the conviction on this ground.

The 4th January 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Torture—Arrest and wrongful confinement by Police Officers.

Queen *versus* Behary Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge, of Rungpore.

Exposition of a police officer's powers of arrest and detention of accused persons and witnesses, with a view to the suppression of the practice of torture.

Markby, J.—THE short history of this most extraordinary case is as follows: In the month of Chyet last, a chowkeedar went to the house of a young woman named Cheepoo, residing at the village of Mooahdhopa, in the Zillah of Rungpore, and told her that a body had been found floating in an adjacent river, and at the same time asked her if she knew what had become of her father. The only reason for this proceeding on the part of the chowkeedar seems to have been a quarrel which had taken place between Cheepoo and her father, immediately after which her father had disappeared from the village. This occurred on the Wednesday, and, on the following day, information that the body was found was given at the nearest thannah. On the evening of Friday, a jemadar named Bany Madhub Roy, one of the prisoners, came to the village and took up his quarters at the house of one Elai Bux. From thence, on the following morning (Saturday), he sent for the woman Cheepoo, for a man named Rocha, and another man named Chand. The jemadar then went taking all these persons with him to the river side, to where the body was lying, and he then asked Cheepoo whose the body was. She said she could not distinguish whose body it was; that her father had left her in a rage. The jemadar then asked the neighbours whose body it was, and they said they did not know, but that Uttum (that was the name of Cheepoo's father) was absent, having gone away angry.

The jemadar then abused the people for not telling whose body it was, and took Cheepoo, Chand, Rocha, and also a man named Shabuk back to the house of Elai Bux; and Cheepoo states (and the Sessions Judge and Assessors believe her evidence to be mainly true) that the jemadar then said to her that she should escape if she said it was the body of her father. She replied that it was not the body of her father. The jemadar then struck her across the knees with a light cane. She repeated, however, that it was not the body of her father, and that she could not say that if the jemadar beat her. She says that she then passed the night with the jemadar, and that, on the following day (Sunday), about 12 o'clock, she consented to say that it was the body of her father. The jemadar then took her to the body which was just being carried off to the station. The body was set down, and Cheepoo, in the presence of the people, acknowledged that it was the body of her father. The jemadar then beat with a cane Shabuk, Chand, Rocha, and a fourth man named Hunoo, saying: "The daughter of the dead man recognizes him, why do not you recognize him?" They said that, as Uttum was missing, perhaps it was his body. The jemadar told them to speak direct, and then they said it was his. The body was then sent into the station, and Cheepoo, Shabuk, Chand, Rocha, and Hunoo, were taken by the jemadar back to the house of Elai Bux. The jemadar then told Cheepoo to say that these men had murdered her father, and she consented, and also at his suggestion accused the fifth person named Gourmoney. At 3 o'clock of the same day, an Inspector, the prisoner Jugut Chunder Sein, came to the house of Elai Bux, and began to abuse Cheepoo and said: "You must confess to the murder." The jemadar, however, interfered, and said "She has confessed, and she is not to be abused." The Inspector then asked Chand why he did not confess, and he replied that he had not killed Uttum. Cheepoo says that the Inspector upon this beat Chand, but in this she is not corroborated by Chand himself who does not say he was beaten at this time. The Inspector then went away. Cheepoo passed this night also with the jemadar in Elai Bux's house, the five accused persons being in the same house under the charge of some constables; and these five persons all state that during the night they were tortured in various ways by the three constables who are now prisoners in this case to make them confess to having murdered Uttum, and which the next morning they all accordingly did.

The next day (Monday), the whole party proceeded to the station whither the Inspector had already gone, and from that time the Inspector seems to have taken charge of Cheepoo, and she says that on that night she slept with him. The Inspector took down the confessions of the accused persons, and on the following day (Tuesday) they were sent in to the Magistrate, having been in custody since Sunday. On the next day (the day after Wednesday or Thursday), the case was enquired into by the Magistrate when just as Cheepoo was narrating with the utmost particularity how her father had been murdered by the accused persons, he himself made his appearance in the cutchery. Cheepoo at first, prompted by the Inspector, denied it was her father; but, as several persons recognized him, this was useless, and the whole story came out.

The three constables, Beharee Sing, Khatiboolah, and Tumizoodeen, have been convicted of causing hurt for the purpose of extorting a

confession under Section 330 of the Penal Code. Jugut Chunder Sein, the Inspector, and Banee Madhub, the jemadar, have been convicted of abetting the above-named prisoners in committing this offence under Section 114.

All the prisoners have appealed; but, with the exception of Jugut Chunder Sein, the Inspector, upon whose case we have already signified our opinion, we think that all the prisoners have been rightly convicted. The case of the three constables was not argued by Counsel; but we have considered the whole evidence, and see no reason whatever to discredit the story told by the persons who allege that they were severely beaten by these three men on the Sunday night in order to induce them to confess. The case of the jemadar Banee Madhub was argued at some length. He has been convicted of abetting only, the Sessions Judge not being convinced by the evidence that he actually struck the prisoners. The Sessions Judge, speaking from his own experience of native character, and especially of the native Police, considered it impossible that the torture could have been inflicted by the inferior constables without the consent and approbation of their superiors; and, taking this view, he convicted both the jemadar and the Inspector. We were, however, of opinion that such an inference from past experience, unsupported by any acts, was not sufficient to support a criminal conviction; and, as in the case of the Inspector there was an absence of any such acts, we acquitted him. But the case of the jemadar is very different. He was there from the first. He was the first to suggest, and the most active in carrying out the whole of this diabolical contrivance to obtain false evidence: though he may have struck no blows with his own hand, his conduct was undoubtedly violent in the extreme: and, lastly, during the whole of the period during which the torture was inflicted, the prisoners were in his custody: he was in the same house with them; and not only was it his imperative duty to have known, but we think he must have known the treatment to which they were subjected. We, therefore, confirm the conviction as against the jemadar Banee Madhub also.

From the number and nature of these cases which come before us, we fear that such acts of violence and oppression on the part of the police are far from rare; and we think it right prominently to notice them, in order that the subject may receive attention in the proper quarter. In the meantime, we consider it our duty to point out that, if the existing provisions of the Code of Criminal Procedure were rigidly enforced (and we consider it the duty of every judicial officer, as well as of every Police authority, to see that this is done), such atrocities as these would be almost impossible.

It seems to be generally supposed, and the supposition seems to be generally acted on, that Police-officers, in making enquiries into criminal cases, are limited only by their own discretion as to what persons they may arrest and detain in custody. But, so far from this being the case, the powers of a Police-officer to arrest without warrant are strictly defined by the Code of Criminal Procedure. The widest power is that conferred by para. 2 of Section 100, which provides that a Police-officer may arrest without orders from a Magistrate, and without warrant any person against whom a *reasonable* complaint has been made, or a *reasonable* suspicion exists of his having been concerned in any offence specified in the Schedule to the Act as offences for which Police-officers may arrest without a warrant. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information. Still less have the Police any power to arrest persons as they appear sometimes to do, merely on the chance of something being hereafter proved against them. Any wilful excess by a Policer-officer of his legal powers of arrest is, by Section 220 of the Penal Code, an offence punishable by imprisonment for seven years.

With regard to persons whose evidence is required by a Police-officer making an enquiry, no power exists to arrest or detain them for a single moment. An officer in charge of a Police-station may, under Section 144, by an order in writing, require the attendance before him of persons whose evidence is necessary, and the person summoned is bound to obey the order; but in no case can the Police-officer compel a witness by force to attend before him.

Moreover, if, as is frequently the case, a Police-officer, without arresting a person himself, directs some of the neighbours to take charge of him, the Police-officer is responsible in the same way as if he had himself made the arrest, the person arrested by his order being in law in his custody.

Moreover, even if a person be rightly arrested, it does not rest with the discretion of the Police-officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate more than 24 hours. At the expiration of 24 hours, unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful; and though the Code is not so express upon the place as the time of confinement, still we think it is perfectly clear that it was intended that, where a Police-officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select, but that he should, if possible, be sent immediately to the Police-station, and be placed in the custody of the officer in charge of the station, who is the person entrusted by the Act with the conduct of the enquiry.

If these provisions of the Legislature were strictly enforced, and supplemented by a few rules in the same spirit by the Police authorities, it is clear that such crimes as that which has suggested these remarks could not be committed except under circumstances which would justify a superior officer being held responsible for them. That even superior officers of Police are not incapable of ill-treating the prisoners under their charge has unfortunately been shewn by cases which have come recently before us, but this comparatively small number of officers, it may not, by careful administration, be altogether hopeless to improve.

The 4th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Conviction—Verdict of Jury—Opinion of Judge.

Queen *versus* Chand Bagdee and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity.

A conviction upon no evidence is wrong in point of law.

A Sessions Judge ought to record distinctly whether or not he agrees in the verdict of the Jury.

Markby, J.—In this case eleven prisoners have been convicted by a Jury on a charge of dacoity.

The Sessions Judge very clearly pointed out to the Jury that, against seven of the prisoners, there was no evidence at all; he also commented on the extreme weakness of the evidence against three of the other prisoners, and the grounds for suspecting the genuineness of the confession of the remaining one.

In spite of these remarks, the Jury thought proper to bring in a verdict of guilty against all the prisoners, and we have to consider whether such a conviction is legal.

As against the seven prisoners against whom the Sessions Judge told the Jury that there was no evidence, we think it is clearly illegal.

A conviction upon no evidence is wrong in point of law.

The convictions of these seven prisoners will, therefore, be all quashed.

As regards the three prisoners, Redoy Bowree, Godai Dome, and Gopee Nath Haree, the Sessions Judge appears to have thought there was some slight evidence, though he intimates a pretty clear opinion that it was insufficient to support a conviction.

Had we agreed with the Sessions Judge in thinking that there was some evidence against these three prisoners, however dissatisfied we might be with the verdict of the Jury, we should have no power to interfere; but we think there was no evidence against these three prisoners also.

The statement of Redoy Bowree might rather be called an assertion of innocence than a confession of guilt. The statement of Godai Dome that he was out that night committing a theft, is no evidence whatever that he was engaged in this dacoity. And the so-called evidence against Gopee Nath Haree is that he stated before the Assistant Magistrate that a dacoit struck him, and a witness named Pooran states that he struck "a dacoit;" therefore (it is argued for the prosecution), Gopee Nath must be the person struck by Pooran, and, therefore, he must be a dacoit. A more flagrant instance of *non sequitur* can hardly be imagined.

In the cases of these three prisoners also, therefore, we think there was no evidence against them, and that the Sessions Judge ought so to have directed the Jury. It follows that the convictions are illegal, and they are therefore quashed.

In the case of the remaining prisoner, Nimai Dome, we share the doubts expressed by the Sessions Judge as to the genuineness

the confession made by this prisoner and nce retracted. The case against this pri-ner was one which required very close nd attentive consideration. But the la-ıentable incompetence which this Jury has isplayed in the performance of their duties, ith respect to the other ten prisoners, does ot induce us to place much reliance on ıeir verdict in this case.

We are, however, unable to say that there as no evidence against the prisoner upon hich the Jury would be justified in convict-ıg the prisoner; and the law has made the erdict of a Jury once passed upon the evi-ence final. With this verdict, therefore, we e unable to interfere.

If the Sessions Judge is of opinion that the risoner has been improperly convicted, he ıay and ought to bring his case to the notice f the proper authorities, as one to which the lemency of the Crown ought to be extended.

The Sessions Judge ought to have recorded istinctly for the information of this Court, hether or no he agreed in the verdict of the ury.

The 4th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Evidence—Previous convictions.

Queen *versus* Thakoordas Chootur and others.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity being armed with deadly weapon.

Previous convictions are not admissible in evidence.

Markby, J.—In this case we have no doubt s to the propriety of the convictions and entences as against all the prisoners except hakoordass.

Our doubt in the case of Thakoordass rises from an observation by the Sessions udge in his judgment that this prisoner as charged with dacoity on a former ccasion.

The evidence was that the prisoner was harged, but not convicted. Even if he had een convicted, it would have been improper receive this conviction as evidence in upport of the present charge. Still more nproper was it to receive as such when the rmer charge was not supported.

We have hesitated whether or no this onviction could be supported; but for the reasons already stated in the case of Beharee Dosadh which has just come before us, we think we ought not to quash the conviction, unless there has been a failure of justice, or the prisoner has been prejudiced.

We think the case so clear against the prisoner Thakoordass, that, independently of this evidence, he ought to have been, and would have been, convicted.

We, therefore, affirm the convictions and sentences as against all the prisoners.

The 4th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Evidence (of bad character)—Misreception of evidence—Irregularity.

Queen *versus* Beharee Dosadh and others.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of being a member of a party of more than 5 persons who conjointly committed robbery.

Evidence of bad character is not admissible.

Misreception of evidence is a defect or irregularity within the meaning of Sections 426 and 439, Code of Criminal Procedure.

Markby, J.—With regard to all the prisoners except Beharee Dosadh, we think the convictions and sentences ought to be affirmed.

With respect to Beharee Dosadh, we should have had no doubt, but for the remark of the Sessions Judge in his judgment, which shews that he relies, to some extent, on the evidence of the Sub-Inspector that this prisoner was of a well-known bad character.

Such evidence is not admissible and ought not to have been received—still less relied on; and we have hesitated whether we ought not to quash the conviction of this prisoner, by reason of this evidence having been improperly received.

There is, however, such ample evidence against the prisoner Beharee Dosadh, independently of the evidence of character, that we do not think it necessary on this ground to quash the conviction recorded against him. We think the misreception of evidence is a "defect" or "irregularity" in the proceedings within the meaning of Sections 426 and 439 of the Code of Criminal Procedure; and that, in consequence of such error and irregularity in this case, the prisoner has not been prejudiced, and that there has been no failure of justice.

All the appeals, therefore, are dismissed, and the convictions and sentences affirmed.

The 5th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Charge (Heads of)—Amendment (by Sessions Judge).

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated 15th July 1863.

Kalaram Sing and others.

Where several offences are charged under the same Section, the Committing Magistrate should frame the charge so as to contain a separate head for each offence. The omission of the Magistrate to do this may be remedied by the Sessions Judge exercising the powers of amendment contained in Section 244 of the Code of Criminal Procedure.

Markby, J.—UNDER Sections 238 and 241 of the Code of Criminal Procedure, the Committing Magistrate ought to have drawn a charge containing, under different heads, the several offences chargeable under the same Section. But this deficiency may be remedied by the Sessions Judge exercising the powers of amendment contained in Section 244, under which he may add the heads of charge omitted by the Magistrate.

It will, however, be as well for the Sessions Judge to consider how far it will be desirable to have all five offences tried together; and if he should consider that this will not be desirable, then his best course will be to try the prisoners under the present charge for one of the offences, and to direct the Magistrate to send in fresh charges in each of the other cases, which he can do without taking fresh depositions.

The 7th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Confession—Evidence (previous statements of witnesses).

Queen *versus* Kisto Mundul and others.

Referred case from Deputy Commissioner of Sonthal Pergunnahs.

An admission by *A* and *B* that the crime charged against them was committed by *C* and *D*, and that whatever share they had in it was under compulsion, is not a confession on which any person ought to be convicted.

Previous statements of witnesses on oath are not available as evidence in a subsequent trial.

Markby, J.—IN this case five persons were charged, three named Kisto Mundul, Chubbee Sircar, and Banessur Mundul with murder, Raybuttee Dossee with abetting murder, and Surrusuttee Dossee with concealing a design to commit murder. All have been convicted; the three first have been sentenced to death, the fourth Raybuttee to transportation for life, and the other woman to five years rigorous imprisonment.

The general evidence in the case establishes that the body of one Panchoo, an inhabitant of the same village with the prisoners, was found, on the morning of the 31st of last, lying dead in a *dhan khet*, the head and body were immersed in water, but the feet not so. There were no marks of violence on the body, except a slight *abrasion* over the left eye, and it was the opinion of native Civil Surgeon, who examined the body after death, that the cause of death was strangulation.

There is no doubt that Panchoo was of dissolute character, and carried on intrigues with several women, amongst others with the prisoner Raybuttee Dossee. There is evidence also that Kisto Mundul carried on an intrigue with the same woman, and that some angry words had passed between him and Panchoo in consequence.

The direct evidence against the prisoners lies in a very narrow compass. It is that of three persons who live close to the prisoner Raybuttee. One, an old man, who sees imperfectly, says that on the night in question he was roused by his wife and went out, and he saw Raybuttee and her mother, the prisoner Surrussuttee, talking together; that on seeing him, Raybuttee said, "Two persons (naming them) have killed Panchoo. Don't tell any one, or you will be murdered. I don't care." He neither saw nor heard anything else.

Nophooree Bewah, who lives in the same house with, and is a distant relation of, the last witness, says that she was aroused by her grandson, who wanted to go out to make water; that she went out with him, and saw the three prisoners, Kisto, Chubbee and Banessur, carrying away the dead body of Panchoo from the house of Raybuttee. She says it was a very bright night, and that they passed within a few feet of her. She spoke to Raybuttee, who was standing there, and who described how the murder had taken place in her house. That, shortly afterwards, Raybuttee left her house with a bundle, in

returned after a short absence and began to smear her house; she says also that Surrusuttee was standing at the compound gate, when the dead body was carried out, as if on the watch. She did not tell the old man what she had seen.

The grandson, whose age is 8 or 9 years, was also called, and he says that he saw the three prisoners carry out the body.

The body was found (apparently for there is no accurate statement of distances) at a considerable distance from Raybuttee's house; but nearer to Raybuttee's house than the place where the body was found in the *dhan khet*, a bundle was picked up containing a *gamcha* half a quilt, a torn gunny bag, a cloth, and some string made of jute. The *gamcha* and quilt are said to have been stained with blood. Panchoo's son identified the *gamcha* as belonging to his father. The witness, who found the bundle, states that the gunny cloth was like some he had purchased for Raybuttee 3 years before, and that the string corresponded with that on Raybuttee's *charpoy*. This bundle was found in a track through the *dhan khet*, along which it is suggested that the body was carried.

Against Kisto and Chubbee this is the whole evidence, and they have always asserted their innocence.

It is clear, therefore, that the case against these prisoners depend entirely on the evidence of the woman Nophooree and the child.

We are surprised to find that it does not seem to have occurred to the Deputy Commissioner who tried this case that the story of these two persons is in itself highly improbable. Why the three supposed murderers should have exposed themselves to the observation of these witnesses, it is impossible to conceive. But the doubt which thus arises is increased to absolute distrust, when we compare the evidence given at the trial, with the previous statements of these witnesses. Though such statements, whether made on oath or not, cannot be used by the prosecution against the prisoner, they may be used by the prisoner in his own favor to show that the witness has at other times told a story differing from his evidence at the trial. Nophoree was examined before the Assistant Commissioner on the 12th of October, and her statement then was, in the main, similar to that at the trial, except that, whereas she said at the trial that Raybuttee left her house with "a bundle, but what the bundle contained she could not see," she said before the Assistant Commissioner "that Raybuttee left the house with a piece of gunny and quilt."

But it appears that this woman was examined on the spot on the 1st of August, and on that occasion gave an acccunt, differing in many most important particulars from both her subsequent statements. For example, on the 12th of October, and again at the trial, she describes herself as aroused by her grandson, and says that she did not hear any noise up to that time. Whereas on the 1st of August she says, "I was awakened by hearing a noise in Raybuttee's house." She then says she ascertained that a murder was being committed in Raybuttee's house, and that she aroused the old man Alum, told him what had happened, and proposed to call the Mundul. But, subsequently, on both occasions, she distinctly says that she did not tell Alum, and Alum says the same. She also says in her statement on the 1st of August that she saw Panchoo come to Raybuttee's house on the night of the murder; whereas, in that on the 12th of October, she says that she did not see him do so.

It is useless to go further and point out other inconsistencies in this woman's statements which are numerous and glaring. We have no hesitation in saying that she is altogether unworthy of credit.

The little boy's statements are equally inconsistent. He actually on the first occasion declared he saw Panchoo being beaten by the prisoners in Raybuttee's house. And we may here remark that the grandfather's statements will as little bear examination as that of the other two.

We, therefore, acquit the prisoners Kisto and Chubbee. We express our opinion, not only that they ought not to have been convicted, but that there is no evidence against them whatever worthy of credit.

With regard to the three other prisoners, the case stands thus. Rejecting as we feel bound to do the evidence of the three witnesses abovementioned, nothing whatever remains against these persons except their own confessions. Now the confession, which each of them made during the preliminary investigation of the case (but which was retracted at the trial) amounts to this, that the crime was committed by other persons, and that any share they had in it was under compulsion. It is scarcely necessary to point out that, though such a confession contains an important admission, it is not an admission of guilt; and that, upon such a

confession alone, no person ought to be convicted.

We, therefore, think that the conviction of these three persons ought also to be quashed.

We feel bound to remark that, even had the case against the prisoners been much stronger than it is, we should have been bound to reverse it on account of frequent errors in the reception of evidence. The Deputy Commissioner, who tried this case, constantly uses the statements of the prisoners as evidence, not only against themselves, but as against all persons whom they implicate; and he was evidently under the impression, and acted upon it, that previous statements of the witnesses on oath were available as evidence against the prisoners on this trial. It would be impossible to support any conviction in the face of errors of this description.

The 19th January 1867.

Present.

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp and W. Markby, *Judges*.

Appeal—Maintenance of illegitimate child—Section 316, Code of Criminal Procedure.

Referred Jurisdiction.

Queen *versus* Golam Hossein Chowdhry.

Where the Magistrate, under Section 316, Code of Criminal Procedure, ordered a person to make a monthly allowance for the support of an illegitimate child—HELD by the majority of the Court (Markby, J., dissenting) that there was no conviction of an offence, and that consequently no appeal lay.

Markby, J.—IN this case I have the misfortune to differ with the other two Judges of the Court, and the fact that these two learned Judges have come to a different conclusion, makes me very doubtful as to the propriety of my own.

It appears to me that there is an appeal in this case from the order of the Magistrate. The order of the Magistrate is made under Section 316 of the Code of Criminal Procedure, which provides that, if any person, having sufficient means, neglects or refuses to maintain his illegitimate child, it shall be lawful for the Magistrate of the District, or other officer exercising the powers of a Magistrate, upon due proof thereof, to order such person to make a monthly allowance for the maintenance of such child, at such monthly rate, not exceeding 50 rupees in the whole, as to the Magistrate or other officer as aforesaid shall seem reasonable: and that, if such sum is not paid, then the Magistrate may, for every breach of the order, by warrant, direct the amount due to be levied in the manner provided for levying fines, or may order such person to be imprisoned for any term not exceeding one month.

I take it upon that Section that, if a person, after the order of a Magistrate for the maintenance of his illegitimate child, neglects to pay the amount ordered, the subsequent proceedings are simply by way of execution of the original order. It cannot be said that there is a fresh offence; for if there were a fresh offence, a fresh proceeding and a fresh trial would be necessary: consequently, all the subsequent proceedings must be taken to be by way of enforcing the original order. Therefore, it appears to me that, under Section 316, if a person neglects or refuses to maintain his illegitimate child, the Magistrate has the power to order the person to pay a sum of money, which order is to be enforced in a way similar to that in which other criminal orders are enforced.

The question then arises, whether such person has been *tried* and *convicted* within the meaning of Section 109. That there has been a trial, is quite certain. The only doubt upon my mind is as to the word "convicted."

That there was a duty, and a breach of that duty, is also quite clear; otherwise, the defendant could not have been brought into Court at all; and it appears to me that wherever a duty is enforced, and any breach of that duty subjects a person to criminal consequences, in that case such person may be said to be *convicted*. The word "convicted" is, I think, used, not with reference to the nature of the duty to be performed, but with reference to the nature of the proceeding by which the performance of it is enforced. I, therefore, think that, in this case, the appellant has been convicted, although he may not have committed an offence in the ordinary sense of the term, and that an appeal does lie.

Peacock, C. J.—I regret to differ from my learned brother in the judgment which he has now given.

It appears to me that the question whether an appeal lies in this case from the order of the Magistrate, depends upon the construction of Sections 409 and 414 of the Code of Criminal Procedure.

Section 409 says that "any person convicted on a trial held by the Magistrate

"of the District, or other officer exercising "the powers of a Magistrate, or required "by such Magistrate or other officer, under "Section 295 or Section 296 of this Act, "to give security for good behaviour, may "appeal to the Court of Session to which "such Magistrate or other officer is subor-"dinate."

Section 411 says that, "in all cases in "which a Court of Session or the Magis-"trate of a District, or other officer exer-"cising the powers of a Magistrate, shall "pass a sentence of imprisonment not "exceeding one month, or of a fine not ex-"ceeding 50 rupees, no appeal shall be "allowed."

Section 414 says that, "unless otherwise "provided by this Act, or by any other law "for the time being in force, no appeal shall "lie from any order or sentence of a Cri-"minal Court."

It appears to me that the words "con-victed on a trial held by the Magistrate" n Section 409 must mean convicted of an offence; and the question would depend on Section 316 whether the appellant, when he was brought before the Magistrate on he allegation that he had refused or neglected to maintain his illegitimate child, was guilty of an offence. It appears to me hat he was not guilty of any offence at that ime; but that all that the Magistrate could lo was to order the appellant to make such nonthly allowance as he might think rea-onable not exceeding 50 rupees. If the ppellant had wilfully neglected to com-ly with the order of the Magistrate, the mount might have been levied in the man-er provided for levying fines, or the ap-ellant might have been imprisoned for a erm not exceeding one month.

It is unnecessary to decide whether a ilful neglect to comply with an order of naintenance would be an offence. This is an ppeal from the order itself, and not from n order made in respect of a breach of it. t appears to me that, when the Magistrate rdered the appellant to make a monthly llowance for the support of the child, he id not thereby convict the appellant of an ffence. I am of opinion, therefore, that here was no conviction, and, consequently, hat no appeal lies. As Mr. Justice Kemp oncurs with me, the appeal must be dis-nissed.

Kemp, J.—I entirely concur in the judg-ment of the learned Chief Justice.

The 14th January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Robbery.

Referred under Sections 434 and 435 of the Code of Criminal Procedure.

Madhub Ghose *versus* Bullye Metea and others.

A charge of robbery under Section 392 of the Penal Code is, under Act VIII. of 1866, triable only by the Court of Session, or by the Magistrate of the District, but not by a Deputy Magistrate.

Glover, J.—We agree with the Sessions Judge that the order of the Deputy Magistrate was illegal, and should be quashed.

But we also draw the Sessions Judge's attention to the fact that the charge of robbery under Section 392 of the Penal Code was, under Act VIII. of 1866, triable only by the Court of Session or by the Magistrate of the District, and that the Deputy Magistrate had from the first no jurisdiction whatever even on the lesser charge investigated by him.

We direct, therefore, that his proceedings be quashed, and that the Magistrate, or some other officer, having the power of making commitments, take up the charge of dacoity against the prisoners, and commit them to the Sessions on that charge, should he find the evidence sufficient to authorize such a course.

We direct, further, that the Deputy Magistrate be informed that the Court looks upon his proceedings in this case with great dissatisfaction.

The 14th January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Amends—Wrongful Confinement.

Referred under Section 434 of Act XXV. of 1861 and Circular Order No. 18, dated the 15th July 1863.

Jharu *versus* Bahar Ali and others.

Amends cannot be awarded in a case of wrongful confinement.

Glover, J.—We agree with the Officiating Magistrate that the Deputy Magistrate's orders in this case are illegal, and must be quashed.

The charge made was "wrongful confinement" under Section 342, Penal Code; and as this was an offence punishable with imprisonment for more than 6 months, it came under Chapter XIV. of the Procedure Code, even though a summons might be ordinarily issued instead of a warrant.

It has been often ruled by this Court that amends can only be awarded in cases coming under Chapter XV. of the Code of Criminal Procedure, and we therefore annul the Deputy Magistrate's orders, and direct that the fine, if levied, be refunded.

The 14th January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Land Disputes.

Gunga Narain Poddar *versus* Deboo Mundul.

Appeal from an order of the Sessions Judge of West Burdwan, reversing that of the Deputy Magistrate.

On a charge of forcible ejectment, a Magistrate has nothing to do with the rights of the parties to the land.

Glover, J.—We agree with the Sessions Judge that the Deputy Magistrate's order must be quashed.

The charge of forcible ejectment, threatening, &c., ought to have been enquired into on the evidence, and the Deputy Magistrate, in ignoring it, and proceeding on what he considered the rights of the parties to the land, was not justified by law.

His orders are annulled, and he will be directed to take up the case *de novo* passing such orders on the evidence as may appear necessary.

The 14th January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Amends—House-breaking by night—Theft.

Reference from the Sessions Judge of Dinagepore.

Dhurai Noshyo *versus* Hubee Noshyo.

Amends cannot be awarded in a case of house-breaking by night or theft.

Glover, J.—We think that the Deputy Magistrate's order in this case was illegal, and should be quashed.

The case, as preferred at the thannah, was one of house-breaking by night under Section 457 of the Penal Code, and the accused pleaded to a charge of theft before the Deputy Magistrate. The case was, therefore, one coming under Chapter XIV. of the Code of Criminal Procedure, for which, as has been frequently ruled by the Court, "amends" in the shape of fine from the plaintiff cannot be awarded.

We observe that the Magistrate is in error in supposing that the accused was not called upon to answer. The record of the Deputy Magistrate's proceedings shews that he was distinctly accused of theft, and pleaded to the charge, denying his guilt *in toto.*

We quash the Deputy Magistrate's order and direct that the fine, if levied, be returned by the plaintiff.

The 14th January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution of process of Civil Court—Use of force by Bailiff.

Referred under Section 434 of the Code of Criminal Procedure.

John Anderson *versus* J. McQueen.

A Civil Court's bailiff, in executing a process against the moveable property of a judgment-debtor, has no authority to use force, and break open a door or gate.

Kemp, J.—Read a letter from the Sessions Judge of the 24-Pergunnahs, dated the 11th January, submitting the record of a case tried by the Joint Magistrate, in which the bailiff of the Judge's Court has been fined two rupees under the provisions of Section 426 and Section 105, Chapter 155 of the 53rd Geo. III. In the present case the bailiff was clearly acting beyond the scope of his authority. It is manifest from the evidence of the nazir of the Civil Court of the 24-Pergunnahs that no instructions were given to the bailiff to break open the gate of the judgment-debtor, Mr. McQueen. We know of no law by which a bailiff is authorized, in executing a process against the moveable property of a judgment-debtor, to use force, and to break open a door or gate.

The Joint Magistrate having found on the evidence that force was used, and that the bailiff was acting wholly on his own authority and beyond the scope of his instructions, this Court sees no reason to question the legality of the Joint Magistrate's proceedings.

The papers are returned to the Sessions Judge.

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The 14th January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Illegal Confinement.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated the 15th July 1863.

Queen *versus* Komul Manjee and others.

The offence of illegal confinement for more than 10 days is triable only by the Court of Session or by the Magistrate of the District, but not by a Deputy Magistrate.

Glover, J.—In this case we are of opinion that the Deputy Magistrate had no jurisdiction to try the case, and that all the proceedings in connection with it are in consequence null and void.

The charge was "illegal confinement for more than 10 days" under Section 344 of the Penal Code, an offence triable only by the Court of Session or by the Magistrate of the District.

Act VIII. of 1866 does not include Section 344 of the Penal Code, and the Deputy Magistrate had therefore no jurisdiction.

The 14th January 1867.

Present:

The Hon'ble J. P. Norman, *Judge.*

False Evidence.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of intentionally giving false evidence.

Queen *versus* Bhakoas Tutum.

In a case of false evidence, it is necessary to prove the deposition alleged to contain the false statement.

The prisoners have been convicted on a trial before the Sessions Judge of Gya and assessors of intentionally giving false evidence in a judicial proceeding, *viz.*, before the Court of Session.

In appeal they allege that the statement charged to be false is really true. It is not necessary to go into that matter at present.

Neither the Sessions Judge nor the Magistrate seems to have understood that it was necessary to put in and prove the deposition alleged to contain the false statement; in other words, the prosecutor must prove that the statement was made before he shews that it is false.

The case must be remanded to the Sessions Court, in order that evidence may be given to shew what it was that the prisoners stated in the Sessions Court, and that such statements were made on solemn affirmation under Act V. of 1840 or otherwise. He will certify the additional evidence to this Court under Section 422.

The 14th January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Alternative finding.

Miscellaneous Reference.

Queen *versus* Tarinee Mytee.

An alternative finding is perfectly legal.

Glover, J.—In reply to this reference, the Sessions Judge should be informed that, in our opinion, an alternative finding is perfectly legal, and is expressly provided for in Section 72 of the Penal Code, and Section 382 of the Code of Criminal Procedure.

In the present case the Deputy Magistrate would have done well to convict under Section 411 of the Penal Code, but there is nothing in the law which prevents his making an alternative finding, if he was doubtful as to which head of the charge was proved.

The 16th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Culpable homicide not amounting to murder—Unlawful assembly.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of culpable homicide not amounting to murder, &c.

Queen *versus* Rubbeeoolah.

The prisoner was convicted and sentenced separately for culpable homicide not amounting to murder, and for being a member of an unlawful assembly. The two offences, however, being held to be one (the latter being only part of the evidence of the former), the conviction and sentence for the second offence were quashed.

Norman, J.—The prisoner has been convicted by the Sessions Judge of Backergunge of culpable homicide not amounting to murder, and of being a member of an unlawful assembly armed with deadly weapons. He has been sentenced to 7 years' rigorous imprisonment on the first charge, and to a

further period of two years' imprisonment on the second charge. He appeals.

The facts appear to be that, on the 28th of June 1862, Azmutoolah, on the one side, and Kaloo, on the other, having collected their partisans, the two parties met and fought in a field near Azmutoolah's house. The men were armed with spears, pitch-forks, and *lattees*. Kaloo was pierced by a spear-wound given him by Kyamoodeen, and struck with a *lattee* by Dowlut. Meheeoolah received a wound inflicted with a spear by Buksoolah. Both Kaloo and Meheeoolah died of their wounds.

The prisoner Rubbeeoolah was present as one of Azmutoolah's party; but there was no evidence that he was armed, nor did any of the witnesses see him strike any blow.

He has, however, been convicted on the ground that, under Section 149, he must be deemed to be guilty of any offence committed by any member of the unlawful assembly in prosecution of the common object of that assembly, or which the members of that assembly knew to be likely to be committed in prosecution of that object.

The prisoner may think himself very fortunate that he was not put on his trial for, and found guilty of, murder. The two parties, armed as they were, must have attacked each other with the intention of causing such bodily injury as they must have known would be likely to cause death, and every one who joined in the common purpose of either assembly must have known that such bodily injuries would be likely to be inflicted.

It is clear, however, that the offence comes under the general definition of culpable homicide. and, therefore, the conviction, as it stands, is sustainable.

But it appears to me that the prisoner ought not to have been found guilty on a separate charge of being a member of an unlawful assembly. His offence was really single and entire, and the fact that he was present as a member of the unlawful assembly is really only part of the evidence of the major offence. It matters not that this portion of the case, if it stood alone, would constitute a distinct offence (*see* the Circular of the High Court, No. 16 of 1864—Prinsep, page 154). I would, therefore, quash the conviction on the second charge.

Seton-Karr, J.—I concur on the point of law raised by my learned brother, in the reduction of the whole sentence to 7 years as for the first charge only.

The 21st January 1867.

Present:

The Hon'ble J. P. Norman, *Judge.*

Murder.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of murder.

Queen *versus* Poorusoollah Sikhdar.

In a case of murder, where a man was struck on the head in a boat with a heavy paddle and knocked overboard in a large river in the height of the rains, and had never been heard of since, it was held impossible to suppose that the man was still alive.

Norman, J.—THE prisoner has been convicted, by the Judge of Jessore, of the murder of one Bussirooddy, and sentenced to transportation for life. He appeals.

The only point is, that the body of the deceased has not been found. But, as the offence was committed in a boat by striking Bussirooddy on the head with a heavy paddle, knocking him overboard in a large river in the height of the rains; and as he has never been heard of since, I think the Judge was perfectly justified in coming to the conclusion that it is impossible to suppose that the man is still alive.

The case clearly resembles Rex *v.* Hinchmarsh, 2 Leach 569, cited in Russell on Crimes, vol. 1, page 568.

The 21st January 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Penal recognizances to keep the peace.

Queen *versus* Gendoo Khan.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

The order of the Magistrate directing the prisoner, on the expiration of his sentence for the offence of criminal trespass, to execute personal recognizances to keep the peace, was upheld as legal and necessary.

Kemp, J.—THIS is a reference from the Sessions Judge of Mymensing under the provisions of Section 434.

One Gendoo Khan has been convicted by the Joint Magistrate of Mymensing, Mr. Glazier (who, we conclude, exercises the powers of a Magistrate), of criminal trespass under the provisions of Section 447 of the Indian Penal Code. The accused has further been called upon, on the expiration of

his present sentence for the above offence, to execute personal recognizances to keep the peace for the space of one year.

The Sessions Judge is of opinion that the call for penal recognizances is illegal, inasmuch as the offence with which Gendoo Khan was charged did not amount to a breach of the peace, and that, if not illegal, it was unnecessary. On referring to the record, we find that Gendoo Khan himself being armed with sword and shield, and accompanied by twenty or twenty-five other men, some of whom were armed with spears, at midnight entered the premises or homestead of the prosecutor's barn.

He shouted out and roused the villagers. On their approach, Gendoo Khan's party made off, but not before Gendoo Khan was recognized.

The conduct and acts of Gendoo Khan in our opinion clearly point to an intention upon his part to commit a breach of the peace within the meaning of Section 280 of the Code of Criminal Procedure.

The order of the Joint Magistrate was, therefore, strictly legal, and we are certainly not prepared to say that the call for penal recognizances was, under all the circumstances of the case, an unnecessary one. His order will, therefore, stand.

The papers are returned to the Sessions Judge.

The 23rd January 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp and W. Markby, *Judges*.

Section 55, Code of Criminal Procedure—Plea of autrefois acquit.

Appeal against the order of the Sessions Judge of 24-Pergunnahs.

The Queen *versus* Dwarkanath Dutt.

Baboos Dwarkanath Mitter and *Bhowanny Churn Dutt* for Appellant.

Messrs. R. V. Doyne and *F. J. Fergusson* and *Baboo Juggodanund Mookerjee* for the Opposite Party.

To render a former acquittal or conviction a defence on a second trial, the offence must, according to Section 55 of the Code of Criminal Procedure, be the same offence.

The prisoner was charged with having forged pottahs *A* and *B* bearing the same date and adduced in evidence by him in the same suit. No mention of any charge as to pottah *B* was made in the order of commitment; and the prisoner having been acquitted on an indictment for forging pottah *A*, it was held by the majority of the Court (Markby, J., dissenting) that the plea of *autrefois acquit* was inadmissible on a subsequent trial of the prisoner for forging pottah *B*.

Markby, J.—In this case I most unfeignedly regret that I am unable to concur in the judgment of the Chief Justice and Mr. Justice Kemp, and it is scarcely necessary for me to say with how much diffidence I give an opinion contrary to theirs.

The short history of this case is that, in the year 1863, a person of the name of Gray, of the Military Orphan Asylum, brought a suit against the prisoner to recover possession of certain land and godowns standing thereon. In that suit the prisoner filed two documents, both dated the 13th August 1858, and both purporting to have been granted to the prisoner by Gray on behalf of the Asylum, in respect of different portions of the land in dispute. The two pottahs were precisely similar in every respect, except the parcels of land to which they related.

The Sudder Ameen, who tried this suit, refused to receive the documents in evidence, because they were not produced till after the time appointed by him for that purpose. But, at the request of Gray, the documents were retained on the file, and Gray subsequently asked and obtained permission from the Sudder Ameen to take criminal proceedings against the prisoner, for attempting to use in evidence two documents which Gray alleged to be forged.

The proceedings were commenced on the 29th of December when Gray laid a charge before a Magistrate against the prisoner under Section 196, and also under Section 471 of the Indian Penal Code. On this occasion both documents were produced, and marked *A* and *B* respectively. The charge was made, and the evidence given in respect of *both* documents indiscriminately, and eventually the prisoner was committed on a charge containing three counts: *first*, for making a false document, "to wit, the Exhibit 4," under Section 465; *secondly*, with fraudulently and dishonestly using as genuine a document which he knew to be forged, "to wit, Exhibit *A*," under Section 471; *thirdly*, with corruptly intending to use as true and genuine evidence a document which he knew to be false and fabricated, "to wit, Exhibit *A*," under Section 196.

The "Exhibit *A*" mentioned in these three counts is *not* that described in the charge now under consideration, but the document so marked by the Magistrate. The document described in the present

charge is the one which, on the investigation before the Magistrate, was marked *B*.

In February 1864 the prisoner was tried on a charge founded on the one on which he had been committed, and only differing from it in this respect, that the document in the first count mentioned, instead of being described as "Exhibit *A*," was described as "purporting to be a pottah granted by Mr. Charles James Gray, as Secretary to the Military Orphan Society, to Dwarkanath Dutt for one cottah $12\frac{1}{8}$ gundahs of land, with a godown standing thereon, and dated 13th August 1858." And in the two following counts, the document was described by reference to the first count. Notwithstanding the form of the charge, evidence was given throughout indiscriminately with reference to both documents.

In charging the Jury, the Sessions Judge treated the charge as one of forging document *A* only, and, when describing the offence, spoke of that document only; but, when commenting on the evidence, he referred to both documents, and, after remarking on the striking resemblance between the alleged forgery and the admitted genuine signatures of Mr. Gray, the Judge proceeds thus: "The main point on which the prosecutor relies in regard to this resemblance "is that the signature on this document and "on another document which "was also filed by the prisoner* "(the document *B*) are so exactly coincident in size and in every other "particular as to show that one or both must "be mere imitations. It is physically impossible, it is said, or, at least, exceedingly "improbable that any two signatures of the "same person should so exactly correspond "in every particular, and the improbability "is still further increased, when it is remembered that both these documents were said "to have been signed at the same time." What the Counsel for the prosecutor had contended, and which the Judge here alludes to, was that both signatures, being so much alike, must have been traced from a third signature of Gray's which was genuine, and which the prisoner was proved to have had in his possession. The result of this trial was that the prisoner was acquitted.

* *i. e.* in the civil suit.

On the 16th May 1866, a second charge was laid against the prisoner by Gray, and, on the charge being enquired into, the evidence was mainly addressed to the charges of forging and using document *B*, although the other document *A*, with respect to which the prisoner had been tried and acquitted was frequently alluded to.

The prisoner was ultimately again committed on three charges with respect to document *B* precisely similar to the charges on which he had been previously acquitted with respect to document *A*.

The trial on these charges also took place before Mr. Beaufort in July last. The Vakeels, who appeared for the prisoner, objected to the trial proceeding, on the ground that the prisoner had been already tried and acquitted on these charges. They insisted on the fact that, throughout the former proceedings, both documents had been referred to, and also that, as both pottahs were filed at the same time in the Court of the Sudder Ameen, the using of both constituted one act only, and, as he was charged on the former trial with using one of these pottahs knowing it to be forged, he could not be again tried for using the other.

The objection was overruled, and the prisoner was convicted on all three charges. The prisoner has appealed, and has also raised this objection. The point was originally argued before Mr. Justice Kemp and myself, and has been again argued before me sitting with the Chief Justice.

The question is, whether the prisoner has been previously tried for these offences and acquitted for these offences within the meaning of Section 55 of the Code of Criminal Procedure: and, for convenience, I will consider the forgery first.

Whether or no the prisoner has been previously tried for the offence of forgery now under consideration, appears to me to depend on whether he is to be considered upon the whole evidence in both cases as having committed two offences of forgery or one.

I am not aware, nor did I hear in the course of the argument, of any general principle by which it can be at once recognized whether or no, in contemplation of law, a transaction constitutes one offence or several offences. It was, indeed, suggested that the singleness of the offence depended on the singleness of the act done by the offender. But, I think, this test manifestly fails. For on the one hand, it appears to me perfectly possible that a man may by one act commit several offences, as where he discharges a missile into a crowd, and wounds several persons; and, on the other hand, that a man may, by several acts, commit one offence, as where he inflicts several rapidly successive blows on one person, which constitute, I believe it will be admitted, but one assault.

Moreover, it appears to me that there are a large number of cases in which it is entirely at the option of those who conduct the prosecution whether they will treat them as one offence or several. Acts closely connected together, or even one act producing several distinct consequences, may be made the foundation of several entirely distinct charges, or distinct counts in the same charge, but always with this qualification, that the evidence shall be confined to the particular acts charged.

In the case under consideration, I have no hesitation in saying that the forgery of these two pottahs might have been made the foundation of two separate counts in one charge, or even of two perfectly distinct prosecutions, had those who conducted the prosecution chosen to keep them distinct.

But the course taken in this prosecution was this. Before the Magistrate, on the occasion of the charge being laid in the first instance, the whole case as to the forgery of both pottahs was gone into. The prisoner was then committed (whether inadvertently or not is not material) for the forgery of one only. But evidence, notwithstanding, was given at the trial that both pottahs were forged, and, as has already been seen, the theory on which the prosecution principally relied was that both had been copied from a third genuine signature which was produced, and which had been in the prisoner's possession. This would be perfectly legal, if these two forgeries were so connected together as to form but one offence, and entirely in accordance with the practice in larceny, assaults, and other offences, when it frequently occurs that much more is proved than is stated in the indictment. But, if it was intended to treat these two forgeries as distinct, then it was wholly illegal to give this evidence as to the second forgery.

At the second trial, also, evidence was given as to the forgery of both pottahs, and the same theory as to the execution of the forgery was laid before the Jury: a course which was again illegal, if the offences were distinct.

It is said that the question now to be decided is not whether or no evidence was improperly admitted at the first or the second trial, and that any illegal proceeding on the part of the prosecution cannot change the nature of the offence. But this argument appears to me to be fallacious. As I have already said, I consider this to be one of those transactions which may be treated as constituting one offence or two offences at the option of those who conduct the prosecution; and though, whatever takes place subsequently, the history of the transaction remains the same, I think the unity of the offence has, in the contemplation of law, been irrevocably determined by the course taken by the prosecution on the first trial. For these reasons it appears to me that the prisoner in this case has, in contemplation of law, committed but one offence of forgery only; that he has already been tried and acquitted for that offence within the meaning of Section 55 of the Code of Criminal Procedure; and that the present conviction is, therefore, illegal.

For similar reasons, it appears to me that the convictions on the two other counts in the charge are illegal also.

The result which I have come to appears to me to be not only that which is in accordance with the law, but also to be that which is most in accordance with the true interests of justice. For while it leaves to the prosecution a latitude of choice, often very useful, as to the course to be taken in the proceedings against an offender, it prevents that which it appears to me most desirable to prevent, conflicting verdicts of Juries upon the same evidence.

When the case was before Mr. Justice Kemp and myself in the first instance, two other objections were taken on behalf of the prisoner. The first was that he had not been allowed sufficient facilities for summoning his witnesses; and that objection we disposed of at that time, being of opinion that this was no ground of law which the prisoner could raise on appeal against the verdict of a Jury. The other objection was that the Judge was wrong in rejecting as evidence the deposition which a witness for the prisoner had made at a former trial, and which, as was alleged before us, was tendered on the ground that the witness was dead when the second trial took place. This point was argued before Mr. Justice Kemp and myself on the assumption that the evidence had been properly tendered at the trial, and we reserved the question of its admissibility for further consideration, together with the question arising on Section 55 of the Code of Criminal Procedure. Upon the second argument, the Judge's notes were searched, and then it appeared that there was no note of this deposition ever having been tendered at all. None of the Advocates employed at the trial, either for the prosecution or the defence, were present on either argument before us, nor was any affidavit filed as to what took place at the trial.

On the other hand, it is clear from the Judge's own report of his charge to the Jury, that some application for the admission of depositions was made in the course of the trial by the Advocate for the prisoner, but no note of any such application appears to have been taken. The language used in the charge, however, rather appears to refer to an application to admit the depositions of the absent witnesses than of the one who was dead.

It is extremely unsatisfactory to me to have to come to a decision on such materials; but, on the whole, I do not feel justified in saying that this evidence was tendered. The point, therefore, as to its admissibility does not arise.

Peacock, C. J.—I regret that I am obliged to differ from my hon'ble and learned colleague, Mr. Justice Markby. Were it not for the knowledge that he entertains a different opinion, I should have considered the present case a very clear one.

It is clear that, under the indictment for forging Exhibit *A*, the prisoner could not have been either convicted or acquitted of forging both Exhibits. Having been charged with the commission of one offence only, he could not be either convicted or acquitted of two separate and distinct offences.

If, under the charge on the first trial, the prisoner had been acquitted of forging Exhibit *A*, and had been found guilty of forging Exhibit *B*, and sentenced to punishment for the latter offence, it is clear that the conviction could not have been supported, inasmuch as the charge against the prisoner was confined to the forgery of *A*. In like manner, if the prisoner had been found guilty of forging *A*, and also of forging *B*, and had been sentenced to one punishment in respect of *A*, and to another punishment in respect of *B*, the sentence in respect of *B* must have been reversed, inasmuch as the charge did not extend to the forgery of *B*.

So, if, on the first trial, the prisoner had been convicted of forging Exhibit *A*, and sentenced to punishment for that offence, such former conviction would not have been a bar to the charge of forging *B*, and. if not, I cannot see how an acquittal of the forgery of *B*, under the charge of forging *A*, even if the defendant had been expressly acquitted of forging *B*, could have been set up as a bar to the charge of forging *B*, for a conviction and acquittal both fall under the same category in Section 55 of the Code of Criminal Procedure. In the present case, however, there was no express acquittal in respect of the forgery of *B*. It is only to be inferred from the acquittal of the forgery of *A*. in consequence of evidence having been adduced. from which it might have been found that the signatures on *A* and *B* had both been traced from a genuine signature of the same person. There is nothing, however, conclusive in that finding. It is quite consistent with the evidence that *B* was forged, though *A* may have been genuine. How can the Court, which tries the prisoner for forging *B*, ascertain what credence was given by the Jury to the evidence on the first trial? They might have thought that the signatures to *A* and *B* were not so much alike as was supposed by the witnesses. They might have thought that the two genuine signatures did not resemble the signature with which they were compared. In that case it would have been wholly unnecessary for them to consider whether *B* was a forgery or not; and indeed, it would have been the duty of the Judge, if they had delivered a verdict with respect to *B*, as well as with respect to *A*. to tell them that they were not sworn to give a verdict in respect of *B*. In this case the Judge was the same on both trials, but there might have been a different Judge, as well as a different Jury on the second trial.

Exhibit *A* and Exhibit *B* relate to different portions of land. The pottahs were as separate and distinct as two different persons, or as two bonds, one for 100 rupees and the other for 10,000 rupees. It is stated by my hon'ble colleague that a man may by one act commit several offences—as for instance, where, by the discharge of a missile into a crowd, he kills several persons. It is not necessary for the present case to go to that extent, or to express any opinion upon that point. The forging of two different instruments cannot be effected by a single act, though two men may be killed by one shot. It appears to me to be clear that the forgery of each of the documents constituted a distinct offence, and, if so, the two offences could not be reduced to one offence by the course which the prosecutor thought fit to adopt on the trial for one of them. Whether the prisoner committed one offence or two offences, must be determined with reference to the facts as they existed at the time when the offences are alleged to have been committed. To render a formal acquittal or conviction a defence on a second trial, the offence must, according to Section 55, be the same offence. It would be no answer on a trial for one to say that

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the prisoner had been acquitted of another on a trial at which evidence was given respecting both, and which, if believed, would have proved the prisoner guilty of both. The words of Section 55 are, "A person who has been tried for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence." The Jury were not empanelled or sworn to try the prisoner in respect of *B*, and he was never tried for the offence of forging *B*.

The law here is similar to the law in England and America, and, therefore, it may be as well to refer to some decisions in those countries as throwing light upon the subject now under consideration.

In England it is necessary that the crime charged be precisely the same as that of which the prisoner was acquitted, and so strictly does the rule prevail that it was held by all the Judges that an acquittal upon a trial for burglariously breaking and entering a dwelling-house, and stealing goods therein, was no bar to a subsequent indictment for burglariously breaking and entering the dwelling-house with intent to steal the goods, though both charges related to the same breaking and entering. Mr. Justice Buller, in delivering the opinion of the Judges, remarked that, if the crimes were so distinct that evidence of the one would not support the other, it would be as inconsistent with reason, as it would be repugnant to the rules of law, to say that the offences were so far the same that an acquittal of the one would be a bar to a prosecution for the other. The question in these cases is whether the prisoner could have been convicted on the first trial of the offence charged on the second trial, and whether he was ever in jeopardy for that offence. In Vaux's Case, 4 Coke's Reports 44, it was held that, where a former acquittal or conviction is spoken of as a good plea, a lawful acquittal or conviction is intended, and that, if the former indictment was not sufficient, the acquittal or conviction would not be a lawful one. When it is said that the offences must be the same, it is merely meant that they must be in reality the same; and, therefore, a defendant may plead his previous acquittal, though the two charges differ in immaterial circumstances, for it would be absurd to suppose that, by varying the day, place, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial for what in reality was the same offence. Thus, if a prisoner be indicted for murder alleged to have been committed on a certain day and acquitted, and afterwards be charged with killing the same person on a different day, he may plead the former acquittal in bar notwithstanding this difference, for the day stated in the indictment on the former trial was not material. *See* Chitty's Criminal Law, 1st Volume, page 452, and the cases there cited.

The following are instances of cases in which the offences have been held to be different. It is laid down in Hale's Pleas of the Crown that, if *A* commit a burglary, and at the same time steal goods out of a house, and he be indicted for stealing the goods and acquitted, he may be afterwards indicted for the burglary notwithstanding the acquittal, and *é converso*, if indicted for the burglary and acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time, and burglary may be where there is no larceny, and larceny may be where there is no burglary. So, it has happened that a man acquitted for stealing a horse has yet been arraigned and convicted for stealing the saddle, though both were done at the same time. Hale's Pleas of the Crown, Volume 2, page 245.

Wherever the offences charged in the two indictments are capable of being identified as the same offence, it is a question of fact whether the offences are the same, and the identity must be proved; but where a plea of *autrefois acquit* upon its face shews that the offences are legally distinct and incapable of identification, the Court may determine the question as a matter of law. *See* the case of King *vs.* Vandecomb and another above cited. If a prisoner should be charged with murdering *A*, and should plead a former acquittal, and prove that he had been acquitted upon a charge of murdering *B*, evidence would be admissible to prove that the two charges related to the same person and to the same killing, and it might be shewn that the person referred to in the former indictment by the name of *A* was in fact the same person as the one referred to in the second charge by the name of *B*, for the same person might be known by two different names. But if a person were indicted for murdering *A* by shooting him, and also for murdering *B* by poisoning him, and it should be proved that he killed both *A* and *B*, a former acquittal upon a charge of murdering *A* would be no bar to his trial on the subsequent charge so far as it related to the murder of *B*, even though it should be shewn.

that, upon the former trial, evidence had been erroneously admitted to prove that he murdered *B* for the purpose of showing that he was a man of a wicked and evil disposition, and that it was, therefore, probable that he murdered *A*. So, upon a charge of forging a bond for 10,000 rupees, I apprehend it would be no answer to show that he had been formerly tried and acquitted of forging a bond for 10 rupees, if it should appear that the former trial related to a bond for 10 rupees, even though it should be proved that the bond for 10,000 rupees, the subject of the second trial, had been adduced in evidence on the former trial for the purpose of shewing that the signature to the bond for 10 rupees, and the signature to the bond for 10,000 rupees, were so exactly alike, and so nearly resembled a genuine signature of the obligor, that they were both probably forged by tracing the signature to each of them over the same genuine signature. It appears to me that it would be wholly inconsistent with justice to hold that the forging of the two bonds was one and the same offence, and that the acquittal as to the bond for 10 rupees was conclusive in favor of the prisoner, for all purposes connected with the administration of the criminal law, that he had not been guilty of any offence as regards the bond for 10,000 rupees.

Suppose *A* should sue *B* in one suit upon two bonds, one for 100 rupees, and the other for 500 rupees, and should afterwards sue him on a bond of later date for a lac of rupees, and *B* should admit that the bond for 100 rupees was genuine, and set up as a defence to the other bonds that they were forgeries; and suppose that, upon the trial in the suit upon the 500 rupees bond, *B* should cause the bond for a lac to be produced for the purpose of showing that both bonds were forgeries, and that the signature to them were so precisely alike, and so similar to the signature on the admitted bond for 100 rupees, that they must have been traced over that bond. Suppose, further, that the bond for 500 rupees should be held to be genuine and not a forgery, and that a decree should be given against *B* for the amount. Could it be contended for a moment that the decree holding the bond for 500 rupees to be genuine would be conclusive in favor of *A* and against *B* that the bond for a lac in the second suit was also genuine and not a forgery, merely because, upon the evidence applicable alike to the bond for 500 rupees and the bond for a lac, it had been found in a former suit between *A* and *B* that the bond for 500 rupees was genuine and not a forgery? If the decree in the first civil suit, that the bond for 500 rupees was not a forgery, would not be conclusive in the second suit in favor of *A* that the bond for a lac was not a forgery, why should a judgment of acquittal in favor of *A*, upon an indictment for forging the bond for 500 rupees, be conclusive evidence in his favor, upon a subsequent indictment against him for forging the bond for a lac, that he had not forged that bond?

It is contended by my hon'ble colleague, in the present case, that to hold the former acquittal an answer to the charge of forging the second pottah, is not only in accordance with law, but is also in accordance with the true interests of justice, and that it would prevent that which it is most desirable to prevent, *viz.*, conflicting verdicts of Juries upon the same evidence. Would it not be equally desirable, in the case which I have supposed, to hold that the judgment given as to the bond for 500 rupees in the first suit was binding in the second suit upon the bond for a lac, lest upon the same evidence the same Judge should hold the first bond to be genuine, and the second a forgery? Or suppose that, in the case of the two bonds, the bond for 500 rupees should be held to be a forgery, and the suit upon it should be dismissed: would it follow that the suit upon the second bond for a lac ought to be dismissed, lest there should be conflicting judgments by the same Judge upon the same evidence. Suppose, in the present case, pottah *A* had been held genuine in a civil suit, and in a subsequent suit relating to the land in pottah *A* precisely the same evidence should be given as that which had been adduced in the suit relating to pottah *A*, could it be held that the decision in the first suit would be conclusive in the second suit that pottah *B* was genuine, lest conflicting judgments should be given upon the same evidence by the same Judge?

It appears to me that the forgery of *A* and the forgery of *B* constituted two distinct offences; that the acquittal of the prisoner under the charge of forging *A* was not an acquittal of the same offence as that which formed the subject of the second charge, *viz.*, the forgery of *B*, notwithstanding evidence was given upon the first trial tending to show that both pottahs were forgeries. The truth is that, when a former conviction or acquittal is set up as a bar to a subsequent

rial, the Court, before which the second trial s held, has nothing to do with the evidence given on the former trial, except for the purpose of ascertaining whether the offence which formed the subject of the first trial is he same as that which forms the subject of he second charge. If the offence is the same, the former conviction or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given in the first trial or not. If the offence s not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding the evidence given in the two cases is the same; and the Court, whether the same as that which tried the prisoner for the first offence, or a different Court, is bound to apply its own judgment to the evidence before it, and to give a verdict according to its own conviction upon the evidence adduced. It appears to me that two distinct offences cannot be converted into one such offence by reason of any evidence which the prosecutor may think fit to adduce upon the trial for one of them.

For instance, upon an indictment for murdering *A*, it would be no answer that the prisoner had been acquitted upon a trial for murdering *B*, unless it could be shown that the two charges related to the same person under different names. If it were shown that *A* and *B* were two different persons, as for instance, that *A* was a man, and that *B* was a woman, no amount of proof as to what evidence was given on the trial for the murder of *A* could show that the offences were one and the same, so as to render the acquittal as to *A* a bar to the charge of murdering *B*.

As to the second point, there is nothing to show that the deposition of the deceased witness was offered in evidence on behalf of the prisoner on the second trial. Suppose it could be proved that the evidence of the deceased witness was false, and that the prisoner knew it to be false, the prisoner could not, in consequence of anything that appears to have been done on the second trial, be convicted under Section 196 of the Penal Code of attempting to use on the second trial the deposition of the deceased witness as true, knowing it to be false. If he had tendered the deposition on the second trial with the knowledge that it was false, he would have been liable to punishment under the Section to which I have referred. The Judge was not bound of his own accord to refer to the deposition as evidence, merely because it was annexed to the record which was put in evidence for the purpose of proving a former acquittal. It appears to me that there are no grounds for reversing the conviction, or sending the case back for a new trial, and I am of opinion that the conviction and sentence ought to be affirmed.

Kemp, J.—The appellant, through his pleader, contends that his conviction by the Sessions Judge of the 24-Pergunnahs is illegal, and ought to be set aside under the provisions of Section 55 of the Code of Criminal Procedure.

The said Section is to the following effect: "That a person who has once been tried "for an offence, and convicted or acquitted of "such offence, shall not be liable to be tried "again for the *same* offence."

In short, the prisoner's plea is "*autrefois acquit.*" This plea is grounded on the maxim that no man is to be brought into jeopardy more than once for the *same* offence.

The prisoner in 1864 was arraigned on an indictment for forging an instrument purporting to be a pottah conveying to him a tenure in perpetuity in a parcel of land, situated in the Orphangunge at Kidderpore. The metes and boundaries of the land were described in this pottah, and the jumma was specified. The date of the pottah with the forgery of which the prisoner was charged was given in the indictment. The prisoner pleaded to a formal and precise charge. A majority of the Jury acquitted him of the offence of forging the pottah, which was clearly identified by the indictment.

In the present trial, which took place in 1866, he is charged with the offence of forging another and quite a distinct pottah for a piece of land which is not identical with the land which was the subject matter of the former charge. He has been found guilty by the unanimous verdict of the Jury, and I am of opinion that the plea of "*autrefois acquit*" is inadmissible, inasmuch as the prisoner has clearly not been brought into jeopardy more than once for the same offence.

The above was the judgment that I proposed delivering in this case. After hearing the case argued before a third learned Judge, I have only to add that I entirely concur in the judgment delivered by the learned Chief Justice.

The 26th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Disappearance of evidence of a crime.

Queen *versus* Muddun Mohun Bose, Noimuddee Cazee, and Soban Sircar.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of causing evidence to disappear, &c.

A conviction on a charge of causing the disappearance of evidence of an offence which amounted to culpable homicide not amounting to murder may be good, though there be no proof of who committed the culpable homicide.

Kemp, J.—THE prisoners have been heard through their learned Counsel, Mr. Jackson.

The Sessions Judge and assessors, after rejecting much of the evidence, and acquitting some of the other prisoners, have come to the same finding, that the prisoners are guilty under Sections 201 and 143.

The arguments used by the learned Counsel are the same as he used when defending the prisoner in the Court below, and they were duly considered by the Sessions Judge, who appears to have exercised much discrimination in his estimate of the weight of the evidence. We cannot, in this case, after hearing the argument of the Counsel, say that we find such discrepancies or improbabilities in the evidence as to induce us to differ from the view taken by a Judge who had the witnesses before him, and by assessors of local experience.

The Sessions Judge, though he found that the evidence was insufficient to shew who killed the man Dokee, finds that a homicide was committed. The prisoners have caused the disappearance of evidence of an offence which amounted to culpable homicide not amounting to murder. The conviction is, therefore, good, though it may not be proved who actually committed the offence.

The appeals are rejected.

The 26th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Misdirection.

Queen *versus* Shama Khankee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of disposing of a minor under the age of 16, with intent that she should be employed for the purpose of prostitution, &c.

Where a Sessions Judge left the Jury to decide upon the age of a girl who had been kidnapped, merely aiding them with his own opinion, in which they expressed their concurrence—HELD that there was no misdirection to the Jury.

Kemp, J.—THE vakeel for these prisoners contends that the Sessions Judge should have left to the Jury to find whether the girl who was kidnapped was a minor, that is to say, under 16 years of age, and not to have left them to be guided by the Sessions Judge's impression of the girl's age.

There has been no misdirection to the Jury. The Sessions Judge told the Jury that the first point for their consideration was the age of the girl. He left that question to their unfettered judgment, aiding them with his own opinion, in which it appears they had expressed their concurrence. There is nothing illegal in the proceeding and the appeal is rejected.

The 26th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Power of Sessions Judge—Verdict of Jury.

Queen *versus* Joy Kisto Gossamy.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of theft, &c.

Where a Sessions Judge refused to accept the verdict of the Jury acquitting the prisoner on the first count and finding him guilty on the second, and required them to find the prisoner guilty on the first count—HELD that the Judge had no power to control the Jury in this manner, but that he should have recorded the finding on the first count as the verdict in the case, and sentenced the prisoner accordingly.

Markby, J.—IN this case the pleader for the prisoner has objected that the evidence was not fairly summed up to the Jury, but we are perfectly satisfied with the fairness of the direction.

It is also objected that the confession before the Deputy Magistrate was improperly admitted; but this objection is, also, in our opinion, ill founded.

Lastly, the pleader objected that the Sessions Judge acted illegally in refusing to accept the verdict of the Jury acquitting

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ıe prisoner on the first count, and finding im guilty on the second, and requiring them ı find the prisoner guilty on the first count. 'e think this objection is well founded. he Sessions Judge has no power to control ıe Jury in this manner. Having left the :veral charges to the Jury, it must be pre-ımed that he considered that there was evi-ence in support of each of those charges, ad it was for the Jury alone to acquit or onvict the prisoner in the several charges ; they thought proper.

The Sessions Judge ought to have re-orded the first finding of the Jury, which ; the verdict in this case, and sentenced ıe prisoner accordingly. This Court, ıerefore, directs that the finding of the ury, that the prisoner was not guilty on the rst charge, and guilty on the second, be re-orded as the verdict of the Jury, and upon ıat finding we sentence the prisoner to ıree years' rigorous imprisonment.

The 26th January 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Forged Evidence.

Queen *versus* Muddoo Soodun Shaw.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of corruptly attempting to use as genuine fabricated evidence.

Where a prisoner produced as evidence an account book, one page of which had been fraudulently abstracted, and another substituted for it—HELD that he was not guilty of the offence of attempting to use, as genuine, fabricated evidence, unless he knew of the forgery, and intended to use the forged evidence for the purpose of affecting the decision on the point at issue when the book was tendered.

Markby, J.—IN this case the prisoner ındoubtedly produced as evidence an ac-:ount book, one page of which had been ıbstracted, another being substituted in its place. That this was done in furtherance of some fraudulent design can also scarcely be doubted, considerable pains having been taken to conceal the alteration.

But, notwithstanding this, the prisoner is not guilty of the crime with which he is now charged, unless he knew of the forgery, and intended to use the forged evidence for the purpose of affecting the decision on the point at issue when the book was tendered. The point upon which the book was tendered was simply whether or no it contained any entry of a certain money transaction. The alteration would, therefore, be immaterial so far as the purpose for which the book was tendered is concerned, unless the original page contained an entry of the transaction in question. But upon an inspection of the subsequent pages of the book, it appears that transactions of an earlier date than that of the transaction in question are there entered, and, from the internal evidence of the book, therefore, it would seem that the original page could not have contained any entry of this particular transaction.

Had it been clear that the original page contained an entry of the disputed transaction, the Judge would have been justified in inferring that the prisoner was cognizant of the fraud, and intended to use the book as genuine evidence, knowing it to be forged; but as this is not the case, and other persons had access to the book, the prisoner cannot be supposed to have intended to impose upon the Court by using forged evidence, when the only forgery which appears to have taken place had no relation whatever to the purpose for which the false evidence was used.

We, therefore, think that the conviction is wrong, and that the prisoner ought to be acquitted.

The 28th January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Security to keep the peace—Section 290, Code of Criminal Procedure.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Diego De Silva *versus* Jehangeer and others.

Where a matter in respect of which further security to keep the peace is required is the same as that before the Magistrate on the first occasion, the case can only be dealt with under Section 290 of the Code of Criminal Procedure.

Norman, J.—THE Officiating Joint Magistrate appears to have ordered Mr. Diego DeSilva to give a security bond in rupees 5,000 to keep the peace for a year.

The Sessions Judge suggests that the order is illegal, because Mr. Diego DeSilva was already under a recognizance to keep the peace for a year, and under Section 289 of the Code of Criminal Procedure, the Magistrate had no power to bind him over for a longer period than one year.

The mode in which the Magistrate has dealt with the case is very unsatisfactory. We cannot make out that he had before him any credible information that Mr. DeSilva was likely to commit a breach of the peace so as to justify proceedings under Section 382.

A charge is brought against certain Mughs, and the Magistrate, dismissing the case, chooses to say that the parties are merely instruments of others in the quarrel between DeSilva and Hoshan Ali. He, therefore, dismisses the case, and orders that DeSilva should show cause why he should not give a security bond of 5,000 rupees.

Whether any summons was issued under Section 283 is not clear. We suppose it was, because the parties seem to have appeared.

On the day of hearing, he merely says that no sufficient cause has been shown, and that neither party has produced witnesses. But there is nothing whatever that we can make out to show that the Magistrate had any jurisdiction to proceed either under the 284th or 282nd Section.

If there was any fresh cause for ordering security, it may be possible that the Magistrate, on that independent complaint, might have had power to take security from the party to keep the peace for a year, though in respect of some former and different, perhaps very trifling, matter, security had been taken from the same party.

Here, however, if there was any ground or justification for the second order of security or even jurisdiction in the Magistrate to make it, which we doubt very much, the matter in respect of which the further security was required was the same as that before the Magistrate on the first occasion, and, therefore, the case could only be dealt with under Section 290.

We quash the order.

The 28th January 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Calendar—Object of Column 13.

Queen *versus* Ajail Aheer and others.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of dacoity.

Column 13 of the Calendar is not meant for a Magistrate's opinion as to the value of the evidence for the defence, but for an abstract of the nature of the evidence, whether to prove *alibi*, character, or any other plea.

THE evidence against all the prisoners appears to me sufficient. They were residents of an adjacent village, and were personally well known to all the witnesses. The night, moreover, was moonlight, and there would have been no difficulty in identifying them, more especially as the witnesses and the prisoners were several times close together, and crossed *lattees* more than once.

The assessors acquitted all the prisoners on the ground that no witness had been able to depose to the actual theft of the barley. But this is not exactly the case. Witness No. 1, the owner, states that he was awoke by the noise made by the plunderers, saw that his barley-stacks had been disturbed and a portion of their contents gone, and saw the prisoners making off with bundles of the grain on their heads. The other witnesses, who came up on hearing the prosecutor's shouts, saw the barley being carried off, and saw likewise that the stacks of grain had been disturbed as though persons had carried off part of them.

Taking the whole of the evidence together, it is sufficient, if believed, to establish the fact on violent presumption that it was the prosecutor's grain which was being carried off by the prisoners.

The appeal must be rejected. The Deputy Magistrate should be informed that column No. 13 of the Calendar is not meant for his opinion as to the value of the prisoners' defence evidence, but for an abstract of the nature of that evidence, whether to prove *alibi*, "character" or any other plea. The Deputy Magistrate, instead of filling up the column with such an abstract, has, under the heading "nature of evidence," recorded his opinion that it is "unworthy of any reliance."

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The 2nd February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Hearsay Evidence.

The Queen *versus* Pittambur Sirdar and others.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of dacoity, &c.

The moment a witness commences giving evidence which is inadmissible, *e. g.*, hearsay evidence, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the Jury to reject the hearsay evidence, and to decide on the legal evidence alone.

Markby, J.—It is unnecessary to answer the question which the Sessions Judge has put to us in this case. Whether he had the power or not to withdraw the case of any of the prisoners from the consideration of the Jury, he certainly was not bound to do so. As in this case he yielded to the representation of the Jury, and the Jury passed their verdict against all the prisoners, the case now comes before us on appeal in the usual way.

Nor is it necessary to express any opinion upon the point whether or no the conviction of two of the prisoners on the uncorroborated testimony of the wife of another prisoner then under trial is legal, because we are of opinion that there must, in any event, be a fresh trial of all the prisoners.

The Sessions Judge has recorded a mass of evidence which is mere hearsay, and we have no guarantee whatever that this evidence has not been acted upon by the Jury as against all the prisoners.

The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the Jury to reject the hearsay evidence, and to decide on the legal evidence alone.

In this case it is quite clear that the Jury, in spite of the warning given them, acted on the hearsay evidence.

Moreover, we think the charge to the Jury defective, inasmuch as it is not pointed out that the witness No. 1, who is the only witness to the identification (which is admitted to be a weak point in the case), was flatly contradicted in that part of his evidence which relates to the finding of the property by the other witness for the prosecution, whereby the credit due to his testimony was generally shaken.

The Sessions Judge, instead of doing this, told the Jury that the identification had been sufficiently proved—a remark which probably led them to give that part of the case very little consideration.

The case will, therefore, go back for a new trial as against all the prisoners before a fresh Jury. The prisoners will remain in custody.

The 3rd February 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Evidence—Summing up by, and opinion of, Sessions Judge.

Queen *versus* Nawab Khan.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of administering a stupifying drug with intent to cause hurt and commit theft.

It is the duty of a Sessions Judge to give a summing up of the evidence as recorded before him, and to state his own reasons for considering a prisoner guilty.

The only direct evidence against the prisoner is the statement of the witness Tajalee; but, as it is strongly corroborated by the circumstances of the case, I think that the conviction is a proper one and should stand.

The prisoner himself admits that Tajalee fell ill whilst in his company, and also that he carried off the clothes and money belonging to Tajalee, which were afterwards found by the Police in Arman's house, where the prisoner had placed them.

His plea that Tajalee requested him to take charge of his property is altogether unsupported, and bears improbability on the face of it.

I see, therefore, no reason to interfere with the Sessions Judge's finding, nor do I feel justified in modifying the sentence (although it is the heaviest allowed by law, and although the offence does not present any particularly bad features), because crimes of this nature are of very frequent occurrence in the Bhaugulpore District, and the public safety requires a severe example.

The appeal is therefore rejected.

The Sessions Judge's attention should be called to the fact that it is his duty to give a summing up of the evidence as recorded before himself, and to state his own reasons for considering a prisoner guilty.

In this case he has merely extracted the Magistrate's statement of the case (a statement which depended on the evidence taken by that officer, and which might or might not be a correct one with reference to the depositions recorded at the Sessions), and, on it, has contented himself with remarking that "the case is fully proved against the prisoners."

The 4th February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Recognizances to keep the peace.

Kally Churn Sing *versus* Bunker Singh and others.

Reference from the Sessions Judge of Dinagepore.

A Magistrate cannot bind down parties to keep the peace beyond the term of their first recognizance, without proceeding as prescribed by Section 290 of the Code of Criminal Procedure.

Case.—UNDER Section 434, Code of Criminal Procedure, I have the honor to forward the enclosed papers connected with the proceedings of the Magistrate of Maldah, with the view that orders passed by him may be quashed as illegal.

On the 25th June 1866, the Magistrate recorded an order calling upon two persons, by name Lokenath Roy and Brijololl Roy, to show cause why they should not execute a personal recognizance of 5,000 rupees under Section 380, Code of Criminal Procedure.

The number of the Section has, evidently, either through inadvertence or misconception, been misquoted, as it does not appear that the above-named men were convicted of any offence, and the Magistrate seems to have acted on information obtained through a special enquiry made by the Police according to his own directions.

Hence I presume it was Section 282 that formed the grounds of his proceeding.

This, however, is not the error which forms the subject of this reference; but another and subsequent order passed by the Magistrate, dated the 22nd October 1866, in which he calls upon the same parties to furnish a further recognizance of 10,000 rupees, with additional security of 2,000 rupees.

On what grounds or proof this order is dictated, does not appear in the record; but any how it is clear the Magistrate had no power to bind down the parties beyond the term of their first recognizance without reference to this Court under Section 290.

As this has not been done, I request the latter order may be annulled, and that he be directed to proceed in accordance with the aforesaid Section, if he considers it necessary for the preservation of the peace that a further recognizance should be taken from the parties.

The judgment of the High Court was delivered by—

Seton-Karr, J.—WE concur with the Sessions Judge that the Magistrate has not observed the course prescribed by Section 290 of the Criminal Procedure Code, and we quash the second order passed by the Magistrate for additional recognizances with security besides.

The Magistrate, if he thinks it necessary, must proceed under the terms prescribed by the Section quoted.

At the same time, and under may circumstances, we desire that the Magistrate do furnish to this Court, through the Sessions Judge, an explanation of the grounds and proof on which he acted in passing the second order which is hereby annulled.

The 4th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Land Disputes—Possession.

Criminal Jurisdiction.

Miscellaneous Case.

Queen *versus* Mussamut Imam Bandee.

Under Section 318 of the Code of Criminal Procedure, a Magistrate can only try the question of possession without reference to the right of possession.

Kemp, J.—THE orders of the Magistrate in this case, being wholly without jurisdiction, are quashed.

The charge was one of criminal trespass, which the Magistrate dismissed. He then went into the question of title, which was quite beyond his competency to do. Under Section 318, he could only try the question of possession, without reference to the right of possession.

The 4th February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Murder—Culpable homicide not amounting to murder—Grave provocation.

Queen *versus* Nokul Nushyo.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of murder.

Where a man suddenly cut off his wife's throat, it was held that, in order to establish that the act was not one under grave provocation so as to bring the case under Exception 1 of Section 300 of the Penal Code, is not sufficient to state that the deceased ceased abusing the prisoner then, but it is necessary to show what interval elapsed between the time when the deceased ceased to speak, and the instant when the prisoner attacked her.

Norman, J.—THE prisoner has been convicted of the murder of his wife, Nuzunbee, and sentenced to death. The case comes before us for a confirmation of the sentence.

It appears from the evidence that, on Saturday, the 22nd of December last, the prisoner and his wife were quarrelling and abusing each other. The deceased was lying down, and the prisoner sitting near her, when the prisoner cut her throat with a knife which he had in his hand.

The deceased had, for about a month prior to her death, carried on an intrigue with one Ali. The prisoner in his defence states that on the day before he had found her sleeping with Ali. The witnesses state that the prisoner had been aware of the intimacy for a week. On the morning of the 22nd, at about 9 o'clock, the prisoner had abused his wife for laughing and joking that day with Ali.

The eye-witness Anbee states that, from the time the deceased and prisoner went into the house till he cut her throat, which was about two *ghurries* (forty minutes), the deceased used provoking language.

She told the prisoner that he was the son of a slave; that she would dishonor his father (using most disgusting language); that she would not remain in his house, but would go to Ali, who, she boasted, was her paramour.

This evidence substantially corresponds with the prisoner's statement before the Magistrate. The prisoner adds: "*She raised my temper, and I killed her.*"

The Judge says: "That the prisoner "received a great deal of provocation from "the deceased, is doubtless: and, had he on "the spur of the moment done some act to "cause her death, there might be some "ground for presuming he was deprived of "self-control. But, from the evidence of "witness No. 3, it appears to me to have "been accompanied by too much deliberation and design to afford the prisoner the "benefit of this plea. According to the "testimony of witness No. 3, the deceased "had ceased to use the foul and aggravating "language. When the prisoner committed "the deed, his demeanour was apparently "calm, and, before using the knife upon her, "he had it in his hand, being engaged in "slicing a betel-nut, a piece of which he "commenced to eat." He adds: "The sight "of the weapon may perhaps have suggested the deed, but this was too long after "the impulse to afford reasonable ground for "supposing it was uncontrollable."

On looking at the evidence of Anbee as given before the Magistrate, and in her statement-in-chief before the Judge, she says nothing of the interval between the time when the deceased was abusing the prisoner, and the time when he cut her throat. On being questioned by the Judge, she says: "The prisoner appeared to be calm at the "time, and not in a passion. Deceased "was not abusing the prisoner then; she "had ceased a short time previously."

But she does not state what interval elapsed between the time when the deceased ceased to speak, and the instant when the prisoner attacked her. We think it is not safe to act on a statement so general.

Provocation was given by the deceased about the gravest that one human being can offer to another. There is nothing which leads us to suppose that the prisoner acted on anything but this grave provocation. Sudden it was undoubtedly, and such as in the ordinary course of nature might be expected to deprive any man of the power of self-control.

We think that the fatal stroke must be referred to the immediate impulse of such provocation. We find that the act was done while the offender was deprived of the power of self-control by grave and sudden provocation, and, therefore, the case falls within Exception 1 of Section 300 of the Penal Code.

Under Sections 399 and 405 of the Code of Criminal Procedure, we pronounce that the prisoner is guilty of culpable homicide not amounting to murder, and sentence him to rigorous imprisonment for five years.

The 4th February 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Extortion—Criminal charge.

Criminal Jurisdiction.

Miscellaneous Case.

Queen *versus* Mobarruk and others.

The terror of a criminal charge is a fear of injury within the meaning of those words in Section 383 of the Penal Code. Extortion may be equally committed whether the charge threatened is true or false.

Norman, J.—THE prisoners, Police-officers, were convicted by the Magistrate, Mr. W. Le F. Robinson, under Section 384 of the Indian Penal Code of extortion.

On appeal the Sessions Judge of Dinagepore reversed the conviction on this head of charge, and, acting under the powers supposed to be conferred on him by Section 72, found that the prisoners were guilty, either of taking a gratification other than a legal remuneration in respect of an official act under Section 161, or furnishing false information to the Magistrate under Section 405, contending that the conviction by the Sessions Judge is erroneous, and an order for that purpose was made by Mr. Justice L. S. Jackson.

We think that the conviction, as it originally stood, was perfectly correct.

A charge was made that some cattle had been stolen from one Aheer Mollah. The prisoner Andaroo arrested the persons who had taken them on Monday. He kept them all day, and then made them over on Tuesday to the prisoner Mobarruk, who is the head constable. Mobarruk subsequently offered to let those people go for a consideration, and subsequently accepted 30 rupees cash from them to report the case as one of cattle-trespass.

The Sessions Judge appears to think that the terror of a criminal charge is not a fear of injury within the meaning of these words in Section 383. But we think clear that it is so. Sections 388 and 389 ing under the general head of extortion. tain special provisions for extortion and tempted extortion by threats of accusation charges of offences punishable with Extortion may be equally committed the charge is true or false. It is from the evidence that the prisoner, course of the same enquiry as to the cattle, committed other entirely and distinct offences punishable Sections 177 and 161, for which they have been separately punished.

It is not necessary to say whether Sec 72 has any application.

The original conviction was right. the sentence, which has not been disturbed by the Sessions Judge, is a proper and therefore, under Section 426, the tence will stand.

The 4th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Mark *Judges.*

Criminal Trespass.

Miscellaneous Case.

Queen *versus* Ram Dyal Mundle.

A person who forcibly enters upon property in *possession* of another, and erects a building thereon does any other act with intent to annoy the person possession, is guilty of criminal trespass within meaning of Section 441 of the Penal Code, without ence to the question in whom the title to the land ultimately be found.

Markby, J.—IN this case it has been contended that the prosecutor was not possession of the land upon which the minal trespass was alleged to have been committed; but this is found as a fact the Court below, and we have no jurisdiction to enquire into the propriety that finding.

It has also been contended that force and in spite of opposition to enter upon man's land, and erect a building thereon not a criminal trespass within the meaning of Section 441, in a case where the accused claims a legal right to do the act by reason of having a title to the land on which alleged trespass is committed. But think it is clear that the Magistrate in a case should look to the possession only:

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if one person forcibly enters upon property in the possession of another, and there does an act with intent to annoy the person so in possession, he is guilty of the offence specified in Section 441, without reference to the question in whom the title to the land may ultimately be found.

The appeal is, therefore, dismissed, and the prisoners, who are now on bail, will have to undergo the remaining portion of their imprisonment.

The 4th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Power of Magistrate—Fines (under Excise Act, XXI. of 1856).

Queen *versus* Surroop Chunder Dutt.

Committed by the Magistrate, and tried by the Sessions Judge at Patna, on a charge of having possession of contraband opium.

A Magistrate may impose a fine exceeding 1,000 rupees under the Excise Act, XXI. of 1856, Section 22 of the Code of Criminal Procedure notwithstanding.

This appeal was originally heard by L. S. Jackson, J., by whom the following judgment was recorded on the 14th December last :—

I AM doubtful whether, with advertence to the terms of Section 22 of the Code of Criminal Procedure, the Magistrate is authorized, in respect of offences punishable either under the Procedure Code or under any special or local law, to inflict a fine exceeding 1,000 rupees.

I therefore direct that the proceedings be sent for, with a view to this point being determined.

On the receipt of the proceedings, the case was heard by Kemp and Markby, JJ., and the following judgment was then recorded by—

Kemp, J.—The only point referred to this Bench by Mr. Justice Jackson is whether the fine imposed by the Magistrate of a sum upwards of rupees 1,000 is or is not beyond his competency.

The offence of which the appellant has been convicted is not an offence mentioned in the schedule annexed to Act XXV. of 1861; consequently, Section 22 of that Act does not apply. The prisoner has been convicted of an offence under a special Excise Act, XXI. of 1856, and the fine of 16 rupees per seer on the whole quantity of contraband opium found in the prisoner's possession without license, although in the aggregate it exceeds rupees 1,000, is not under the last quoted Act illegal.

The offence, therefore, being one not mentioned in the schedule annexed to Act XXV. of 1861, and being punishable by the authority specially mentioned in Act XXI. of 1856, *viz.*, the Magistrate, who in this instance has not exceeded the limit of his competency, we reject the appeal. The merits of the case are not before us.

The 5th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Omission to give information to prevent offence.

Queen *versus* Lahai Mundul and others.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of dacoity.

The refusal of a person to join in a dacoity does not imply a knowledge on his part of the commission of that offence, or render him liable to punishment, under Section 176 of the Penal Code, for intentional omission to give notice or information for the purpose of preventing the commission of an offence.

Kemp, J.—WE see no reason to question the propriety of the conviction and sentence of the prisoners Lahai, Salul, Ram Lochun, and Jagir. They confessed, and property obtained by the commission of dacoity was found in their possession. The Jury was satisfied that the confessions were voluntary.

The prisoner Jagir Khan, who has been convicted of an offence under Section 176 of the Indian Penal Code, has not appealed; but, as the record is before us, we are competent, as a Court of Revision, to determine any question involving a point of law.

The Sessions Judge's charge to the Jury, with reference to the prisoner Jagir Khan, is to this effect, that prisoner states "that, prior to the dacoity, one evening, when he was out in his field, the prisoner Lahai came and proposed to him to take part in the dacoity, but that he declined to have any-

thing to do with it; so that, although the prisoner and Jagir Khan cannot be convicted of actual participation in the dacoity, he is guilty on his own confession under the third head of the charge."

The third charge is under Section 176, which runs thus: "Whoever, being legally bound to give any notice or to furnish any information on any subject to any public servant as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment which may extend to one month, or with fine which may extend to five hundred rupees, or both; or if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Now, without deciding the question whether the prisoner was legally bound to give information of what was communicated to him by the prisoner Lahai, we are clearly of opinion that, taking the whole of his admission, he cannot be said to have intentionally omitted to give such notice or information for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender. Lahai meets the prisoner casually in the field of the latter; proposes to him to join a dacoity; tempts him with the prospect of a share of the booty. The prisoner prefers a life of honest labor, to use his own words, and refuses to join.

We have not been shown that he, well knowing that a dacoity would take place whether he joined in it or not, intentionally omitted to give information. It may well be that he was under the impression that his refusal to join would deter Sahai from committing the dacoity. The Sessions Judge should have told the Jury to find whether, upon the admissions of the prisoner, a guilty intention to suppress information which was required for the purpose of preventing an offence could be legally inferred. Not having done so, there has been a misdirection to the Jury, and the prisoner has been committed upon what is not legal evidence.

The conviction and sentence passed upon this prisoner must, therefore, be quashed, and he must be immediately released.

The 6th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Recognizances to keep the peace.

Reference under Section 434 of the Code of Criminal Procedure.

Queen *versus* Kristendro Roy.

A statement by a complainant (believed by the Magistrate) that he expected the defendant at any time to make an attempt on his person or property is credible information, within the meaning of Section 282 of the Code of Criminal Procedure, of an intended breach of the peace.

The Magistrate may require the accused to deposit money, in lieu of security, for his good behaviour.

Markby, J.—Two grounds are submitted to us by the Judge for reversing the order of the Magistrate requiring the defendant to enter into a bond to keep the peace, which are as follows:—

1. That the Magistrate had no credible information before him that the defendant was likely to commit a breach of the peace or to do any act that might probably occasion a breach of the peace.

2. That the Magistrate had no legal authority to compel the defendant to deposit money in lieu of security for his good behaviour.

We are of opinion that the Magistrate's order is not illegal on either of these grounds. The complainant stated in effect that he expected the defendant might at any time make an attempt on his person or property, and the Magistrate in his order states that he believes this deposition to be true. This is credible information within the meaning of Section 282 of the Code of Criminal Procedure.

With regard to the order to deposit the money, we also think it was legal. Under Section 288, the Magistrate may take a bond from the defendant, either with or without security. In this case the Magistrate in the first instance required a bond, with two sureties as security, but insisted that the defendant should himself appear and enter into the security. The defendant, in order to avoid this, offered to deposit rupees 2,000 as security, to which the Magistrate assented and modified his order accordingly, and subsequently, on the petition of the defendant, he reduced the amount of the deposit to rupees 1,000.

We are unable to see any illegality in such a proceeding. The Sessions Judge states that the appearance of the defendant in person was an unnecessary formality

But a discretion as to whether or no he shall compel the defendant to appear for this purpose is expressly given to the Magistrate by Section 28 ; and with the exercise of that discretion we have no power to interfere.

We, therefore, direct the order of the Magistrate to be affirmed.

The 11th February 1867.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Evidence—Corroboration.

Queen *versus* Bissen Nath and another.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of dacoity.

It is not competent to a Court of Session to inspect an original report from the office of the Superintendent of Police, and to make it evidence against the prisoners. Statements made otherwise than before the Courts, and Officers specified in Section 31, Act II. of 1855, may be given in corroboration of testimony ; but such statements must be regularly proved by the person who received them, or by some one who heard them given.

HAVING read the judgment of the Court of Session, and the petition of the two prisoners who, out of the three convicted in this case, have appealed, I see no reason to suppose that the conviction and sentence was unjust and improper.

The appeal is therefore rejected.

I note, for the guidance of the Sessions Judge in future cases, though it is not important in this case (as there was other and sufficient evidence), that it was not competent for the Court to inspect the "original report from the office of the Superintendent of Police," and to make it evidence against the prisoners.

The cases, in which certified copies of statements previously made are receivable as *primâ facie* evidence of such statements having been made, are set out in the latter part of Section 31, Act II. of 1855.

Statements made otherwise than before the Courts and Officers therein specified may be given in corroboration of testimony, but such statements must be regularly proved by the person who received them, or by some one who heard them given.

The 16th February 1867.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Imprisonment (in default of fine).

Queen *versus* Srimonto Kotal and another.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity, &c.

Additional imprisonment in default of payment of fine must be rigorous, and not in transportation.

Kemp, J.—THIS case was tried with a Jury. The petition of appeal raises no point of law ; it simply asserts that the prisoners are not guilty, and prays that the record may be sent for, and justice done.

The whole of the evidence was laid before the Jury, and the Sessions Judge's charge appears to me to be a very proper one.

The appeals are rejected. With reference to the sentence passed on Srimonto Kotal, I would observe that the additional punishment of 5 years in lieu of fine is illegal : it must be reduced to 2 years and 6 months. The additional imprisonment, in default of payment of fine, must be rigorous, and not in transportation ; with this amendment the appeal is rejected, and the sentence confirmed.

Seton-Karr, J.—I concur as regards Srimonto.

The 16th February 1867.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Dismissal of Complaint—Obstruction.

Queen *versus* Bholanath Banerjee.

Reference from the Sessions Court at Jessore.

Where an accused, for having repaired a public road without having previously asked for leave to repair it, was, on simple petition, charged with having obstructed the road, and the complainant never appeared—HELD that the Deputy Magistrate ought to have dismissed the complaint.

Case.—UNDER Section 434, Act XXV. of 1861, and Circular Order of the High Court,

dated 15th July 1863, No. 18, I herewith transmit the record of the case to be laid before the High Court, with the following report:—

One Bholanath Banerjee was reported to the Deputy Magistrate of Khoolneah, Baboo Rashbahary Bose, to have obstructed a public road.

The Deputy Magistrate summoned Bholanath, and also visited the road himself.

The Deputy Magistrate found that Bholanath had been cutting the road with a view to make it more passable than it was before, and the Deputy Magistrate admits that, when the work is completed, and which Bholanath has promised to do, the road will be more useful than formerly; but because Bholanath commenced the work without leave, and because the road, in the unfinished state in which the Deputy Magistrate found it, was impassable, the Deputy Magistrate fined him Rs. 30, commutable to 15 days' imprisonment under Section 283 of the Indian Penal Code.

That Section obviously cannot apply to a case of this kind, as it refers to parties who do acts so as to cause danger, obstruction, or injury to any person in any public way.

Now, what the accused did was to repair a road; work of this knid cannot be performed without some temporary obstruction to traffic; and though the accused perhaps could not claim the right to repair the road, still, when he repaired it for the public benefit, his having failed to ask for leave to repair cannot convert his act into an offence.

I observe that the Deputy Magistrate acted simply on a petition which had been presented to him, and that the complainant never appeared. The Deputy Magistrate therefore, should, on the appearance of the accused, have dismissed the complaint under Section 259 of the Criminal Procedure Code.

As his proceedings then from the very commencement appear to have been illegal, I beg to recommend that they be quashed, and that the fine, if paid, be returned to Bholanath Banerjee.

The judgment of the High Court was delivered by—

Kemp, J.—The proceedings of the Deputy Magistrate in this case, which are illegal and certainly ill-advised, are quashed for the reasons given by the Sessions Judge, and the fine, if realized, must be refunded.

The 16th February 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Ferries—Regulation VI. of 1819.

Queen *versus* Deeyanutoollah.

Reference from the Judge of Rajshahye

Clause 2, Section 13, Regulation VI., 1819, only applies where there has been an accident. Where the Magistrate thinks that a ferry is improperly kept and is in a dangerous condition, he should proceed under Section 4.

Case.—Under Section 434 of Act XXV. of 1861, and Circular Order of the High Court No. 18, dated 15th July 1863, I have the honor to transmit the record of this case to be laid before the High Court, with the following report.

2. On the 23rd November last, the Magistrate of Rajshahye directed a Police Inspector of Beauleah to enquire into the condition of the Hudolkatty ferry, which crosses the Ganges above 2 miles above Rampore Beauleah, dividing the high road from the latter place to Berhampore. The Inspector deputed a head constable, Poorno Chunder Soor, to make the enquiry, who reported unfavorably of the farmer's management, and subsequently gave a statement on oath before the Joint Magistrate, Mr. Humphry, in which the former was convicted under Clause 2 of Section 13 of Regulation VI. of 1819, and fined 25 rupees. The Joint Magistrate sums up in the following words: "I find the ijaradar keeps his boats very insufficiently manned: two of the boats in daily use are in a dangerous state and unfit to cross passengers, inasmuch as they leak, and require to be baled out the whole time they are in use. Lastly, there are no sufficient landing-stages; the only really good one is kept half a mile from the water's edge, and is too heavy to be moved." After this follows the sentence passed under the Clause and Section of the Regulation above cited.

3. The law cited by the Joint Magistrate was intended for ferries other than Government ferries, as the preceding Clause of the Section clearly shows, and the penalty is provided only for those cases in which an accident has occurred, and life or property has been endangered, neither of which contingencies happened in the present case. The Joint Magistrate has, therefore, committed an error in law, *first* in applying to the farmer of a Government ferry a law which was passed for private ferries; and, *secondly*, in imposing for a simple omission a penalty which was provided for accidents arising

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out of such omission, and I accordingly recommend that his order be set aside.

4. I have confined myself in this respect to the legal view of the case; but the recorded evidence shows the conviction to be as unsustainable in equity as it is in law, for there is no proof that the boats are insufficiently manned—on the contrary, the only witness for the prosecution who crossed the ferry states that, on each occasion that he crossed, the boat had a crew consisting of a manjee and two grown-up rowers. This witness, moreover, says nothing about the boats being unsafe or leaky, and the other ground mentioned by the Joint Magistrate, *viz.*, neglect to provide a proper landing-stage, is merely a matter of public convenience, but in no way affects the security of the ferry, and is, therefore, not an omission for which a penalty could be imposed under the law cited, supposing that law to be applicable to this case.

The judgment of the High Court was delivered by—

Markby, J.—The Magistrate's order is not legal. Clause 2 of Section 13 of Regulation VI. of 1819 only applies where there has been an *accident*. If the Magistrate thought the ferry improperly kept, and in a dangerous condition, he should have proceeded under Section 4.

The order must be quashed.

The 18th February 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Murder—Capital sentence.

Queen *versus* Sibnarain Palodhee and another.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of culpable homicide amounting to murder, &c.

Judges must not shrink from doing their duty, and they are bound to pass a capital sentence in a case of murder when they believe the evidence.

This appeal is out of time, but I have looked at the Judge's decision and at the confessions of the two prisoners by reason of the gravity of the case.

Why the Judge did not pass a capital sentence, at least on the prisoner Sibnarain, I am wholly at a loss to conceive. If he believed this prisoner's detailed confession, and I can see no possible reason why it should not be fully believed, corroborated as it is by all the other facts disclosed in the evidence, a more cold-blooded, deliberate, and cruel murder of a near relative, perpetrated simply owing to a long-standing quarrel as to the division of the inheritance, has rarely formed the subject of a judicial enquiry. And it is a remarkable fact that the prisoner records that he actually undertook a pilgrimage to Juggernath or Pooree on account of the feelings engendered by this quarrel. I can only say, after carefully perusing the confession of Sibnarain, that, had a sentence of death on a man who confessed to having deliberately hired another man for 6 rupees to murder his nephew come up to me for confirmation, I should unhesitatingly have confirmed and sanctioned the same. The doubts as to who actually perpetrated the crime *might* possibly be some reason for not passing a capital sentence on the other prisoner Boydonath, who merely confesses to having abetted the murder after being tempted with offers of money, but it can be no possible reason for not punishing capitally the criminal who confesses that he and no one else conceived and planned so atrocious a crime. Judges must not shrink from doing their duty, however painful it may be, and must pass capital sentences in cases of such extraordinary depravity if they believe the evidence, as the Judge did in this case.

Of course, the appeals are rejected, and it is difficult to see what the prisoners could have hoped to gain by their appeal.

The 18th February 1867.

Present :

The Hon'ble F. A. Glover and F. B. Kemp, *Judges.*

Riot—Right of private defence.

Queen *versus* Jeolall and others.

Committed by the Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of being members of an unlawful assembly, and voluntarily causing grievous hurt, &c.

There can be no right of private defence, either on one side or the other, in a case of premeditated riot.

Glover, J.—THE prisoners in this case have been convicted under Sections 149 and 325 of the Penal Code, and sentenced each to four years' rigorous imprisonment.

It appears from the record that the prisoners, who are servants in the indigo factory of Pokhera, went to re-sow a certain field belonging to one Jeebun (also convicted in this case) with indigo ; that the owner had on the previous day sown the land with Indian corn ; and that, on the attempt of the factory people to re-sow it with indigo, the villagers of Jaffirputter interfered ; that a general fight was the result, in which one man belonging to the factory party and two of the villagers were severely injured.

The Sessions Judge convicted both parties, sentencing the factory people to four years' and the villagers to two years' rigorous imprisonment.

The factory people now appeal, and Mr. Gregory on their behalf contends that, as against Jeolall and Sookram, there is no sufficient evidence, and that Ram Pertaub was merely exercising his right of private defence of property, and should have been held blameless.

With regard to Jeolall and Sookram, I see no sufficient reason for interfering with the conviction. The first prisoner was identified by three witnesses, the last by two. Jeolall was a person well known to the witnesses ; and the objection urged by his Counsel that, had he been present, all the witnesses would have noticed him, seems to me a reason for giving more credit than usual to the general evidence ; for had the charge as against Jeolall been, as Mr. Gregory hints, altogether false and made with the object of getting rid of an obnoxious factory servant, all the prosecution witnesses would have been careful not name him.

After going over the evidence carefully and hearing all that has been urged, I see no ground for discrediting it.

Then as to Ram Pertaub. He admits that he was on the spot at the time of the riot, and it is clearly proved that he took part in it.

In such a case there can be no right of private defence, either to one side or the other. Both parties were evidently aware of what was likely to happen, for they both turned out in force, and were armed with deadly weapons. Granting that the factory had a perfect right under their contract to re-sow the land of Jeebun with indigo, it is clear that they transgressed the law by doing so or trying to do so forcibly. There was a Police-station within easy distance, to which they could have applied for assistance if they had a claim to it, and in any case the Civil Courts were open to them to recover damages from Jeebun for a breach of his contract. The factory people who seek to justify their acts under the Clauses of Section 105 of the Penal Code must shew that they applied for the protection of the law and did what in them lay to procure its intervention.

So far I dismiss the appeal. But, with regard to the sentences imposed, I do not see why the factory servants should be punished so much more severely than the villagers. Originally both were in fault: and if there be a comparison to be drawn, the villagers who resisted the re-sowing were more to blame than the factory people. And the mere fact that two men chanced to be injured on the part of the village, while only one of the factory side was wounded, does not, in my opinion, form any ground for a difference of punishment ; and, if a sentence of two years' rigorous imprisonment be sufficient in the one case, it is equally so in the other.

I would reduce the sentences passed on Jeolall, Sookram, and Rampertaub to two years' imprisonment each.

Kemp, J.—I concur.

The 19th February 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Dacoity.

Queen *versus* Kissoree Pater and others.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of dacoity, &c.

When a body of men attack and plunder a house, the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced an entrance does not take that offence out of the purview of Section 395 of the Penal Code. It is sufficient for the application of the Section that the robbers cause or attempt to cause the fear of instant hurt or of instant wrongful restraint.

THAT all the prisoners joined together in breaking into and afterwards plundering prosecutor Rusput Naik's house, I hold to be fully proved. The investigation has been very carefully made by the Sessions Judge, and I see no reason to dissent from his finding so far.

But I think he was wrong in not convicting the prisoners of dacoity under Section 395 of the Penal Code.

He considers it proved that a large body of men, nearly 200, forcibly carried off grain, money, clothes, &c., &c., from the prosecutor's house, having previously broken open the door and frightened the family away; but he does not convict of dacoity, because, as the prosecutor and his family had escaped from the house before the robbers entered it, there was no attempt to cause death, hurt, wrongful restraint, or the fear of such injuries, and, therefore, the offence fell under Section 457, house-breaking by night, with the intention (afterwards carried out) of committing theft.

The Assistant Magistrate apparently did not exactly know what was the nature of the offence committed (although in his grounds of commitment he styles it dacoity), and so sent up the prisoners on an alternative charge under Sections 384, 395, and 457.

It appears to me quite clear that, when a body of men attack and plunder a house, the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced an entrance does not take the offence out of the purview of Section 395. It is sufficient for the application of that Section that the robbers cause or attempt to cause the fear of instant hurt or of instant wrongful restraint, and the fact of the residents of the homestead running away just in time to escape actual maltreatment would be of itself proof that fear of hurt or of wrongful restraint had been caused. It cannot be said that, under the circumstances of this case, the prosecutor and his family had not very reasonable and sufficient grounds for such fear; and, therefore, it seems to me that, although the robbers do not appear to have discovered the place (some forty yards off) from which the prosecutor watched their proceedings, they had already by their violent entry caused him that fear of hurt and wrongful restraint provided for by the Section, and afterwards through the same fear prevented him from returning to his house, and from taking any steps to save his property from spoliation.

I have no doubt that the conviction should have been of dacoity under Section 395, Penal Code.

As, however, the prisoners who have been convicted under Section 457 of house-breaking by night, &c., have been sentenced each to 7 years' transportation, a not inadequate punishment for the graver crime of which I consider them to be guilty, no practical mischief has been done by the Judge's finding. The appeals are rejected.

The 19th February 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sections 184 and 185, Code of Criminal Procedure—Claims to attached property of absconding offender.

Queen *versus* Chumroo Roy.

Reference under Section 434, Code of Criminal Procedure.

Held by the majority of the Court (Seton-Karr, J., dissenting) that Sections 184 and 185 of the Code of

* *Erratum in Original Edition.*

Criminal Procedure make no provision for any investigation by a Magistrate of the claims of third persons to property which has been attached. The claimants are not barred by the sale, and may bring a suit in the Civil Court against the purchasers to establish their rights.

Norman, J. (Peacock, C. J., concurring).—SECTIONS 184 and 185 make no provision for any investigation by a Magistrate of the claims of third persons to property which has been attached. We do not think that there was any error in law committed by the Magistrate. The claimants are not barred by the sale, and may bring a suit in the Civil Court against the purchasers to establish their rights. A Magistrate has no power to order the attachment of any property, unless it belongs to the party absconding, and he should be most careful not to interfere with, or disturb, the possession of third persons. We are not prepared to say that, when claimants have held back for six months, a Magistrate may not be perfectly justified in presuming that the property was not theirs, and leaving them to vindicate any right they might have in a civil suit. He may fairly say that he is not bound to try a question which is *more* properly one for the Civil Court.

There is, therefore, no ground for interference.

Seton-Karr, J.—As I understand the case, the Sessions Judge is quite right in saying that the plea of the objectors Gundun Roy and Sheo Buksh Roy deserved some enquiry at the hands of the Magistrate.

Whether they appeared within six months or not, or whether the law distinctly provides for their case or not, they are objectors or *third* parties who say that their property has been wrongly attached, and who produce witnesses to prove their statement.

The Joint Magistrate, for the simple ends of justice and equity, was, I think, bound to consider this evidence, as well as the Police Report, instead of summarily and hastily rejecting their plea, as he did, and without, as the Sessions Judge remarks, going into the merits.

I would content myself with quashing the order, and directing the Joint Magistrate to pronounce on the force of the appellants' pleas, instead of referring them to the delay and tedium of a civil suit.

The 25th February 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Kidnapping.

Queen *versus* Sookee.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of abduction.

Under Section 361 of the Penal Code (kidnapping from lawful guardianship), the consent of a minor is immaterial, nor do force and fraud form elements of the offence.

THE evidence in this case appears to me clearly to disprove the prisoner's statement that the girl Ameerun, who was previously unkown to her, came to her house begging for assistance and protection. On the contrary, it is established by what appears to be very respectable evidence, that the girl was seen in company with the prisoner on the road shortly after she was missed, and that the two had frequent converse together on this and on other days.

Under Section 361, the consent of a minor is immaterial, and neither force nor fraud form elements of the offence: and, if it be shown that the prisoner induced Ameerun to leave her brother-in-law's house it would be no defence that the girl was willing or even anxious to go.

The brother-in-law was, in the absence of Ameerun's husband (a convict in the Rungpore jail), the girl's lawful guardian: and if, in consequence of Sookee's representations, Ameerun left that guardianship, the offence under Section 361 was committed.

Whether there would be sufficient evidence to convict the prisoner under Section 373 of the Penal Code is a point that need not be considered in this appeal: for, although the Sessions Judge is of that opinion, he has only convicted the prisoner under Section 361.

The appeal is rejected.

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* *Erratum in Original Edition.*

The 1st March 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Attendance of witnesses (warrant to enforce) —Section 63, Code of Criminal Procedure— Fines.

Miscellaneous Criminal Appeal from an order passed by the Officiating Judicial Commissioner of Assam, dated the 24th December 1866, affirming an order passed by the Deputy Commissioner of that District, dated the 8th March 1866.

Abdoor Ruhman, *Petitioner.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Petitioner.

A Magistrate is not bound, under Section 191 of the Code of Criminal Procedure, to enforce the attendance of witnesses by warrant, except upon proof of due service of summons.

The description of fine which it was the object of Section 63 of the same Code to prohibit was a fine which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence.

Quære.—Whether Section 63 has any application to fines inflicted by a Magistrate.

It appears to me that there is no ground for calling for the proceedings in this case.

Two points have been raised by the vakeel for the petitioner, one being that the case has been decided without hearing the witnesses for the defence, the fact being that those witnesses had been summoned and did not attend on the summons, and the vakeel urges that, under Section 191 of the Code of Criminal Procedure, which is made applicable to cases tried under Chapter 14 of the Code by Section 254, it was the duty of the Magistrate to enforce the attendance of the witnesses by warrant. That Section only declares that it shall be lawful for the Magistrate, if any person summoned to give evidence shall neglect or refuse to appear at the time and place appointed by the summons, and no just excuse shall be offered for such neglect or refusal, upon proof of the summons having been duly served, to issue a warrant. It does not appear that proof of the summons having been duly served was given in this case. Nor is it at all clear that it was a case in which the Magistrate was bound to make any such order. But, in addition to that, I find in the decision of the Judicial Commissioner that "the appellant, "it is evident from an application which he "filed * * *, had ample opportunity to produce his witnesses had he been inclined to "do so. His object, however, it would appear, "has been to gain time, and his having "named such persons as the Post Master at "Bogwah, and the head constable there, as "his witnesses, is proof of this."

Under such circumstances, it cannot be stated that there has been any legal error in the omission of the Magistrate to issue a warrant.

The *second* point is that the fine imposed on the petitioner is, with reference to Section 63 of the Code of Criminal Procedure, excessive.

It is not shown in any way what the income of the petitioner was, or why the fine is excessive. An application on such a ground should be supported by proof of what the income of the petitioner was, and that the fine was altogether disproportioned to that income and oppressive. It cannot be said generally that a fine of 500 rupees, on a person in the position of a tehsildar of a large zemindaree, is a fine of that character. The description of fine which it was the object of that Section to prohibit was a fine which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence. And to this it may be added that it is doubtful whether the Section cited has any application to fines inflicted by a Magistrate. By its terms it applies only to cases in which the amount of fine is not limited by law. Now, the power of a Magistrate to fine is, in all cases under the Penal and Criminal Procedure Codes, limited to rupees 1,000, and it is only the Court of Session or the High Court that can inflict fines to an unlimited amount.

I see no ground to interfere with the decision of the Court below.

The 6th March 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

False Evidence.

Queen *versus* Gurjoon Aheer.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of intentionally giving false evidence, &c.

A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence which should be lightly passed over. But for a simple mis-statement from which no such

inferences can be drawn, a comparatively light sentence will suffice, particularly where the prisoner pleads guilty and throws himself on the mercy of the Court.

Seton-Karr, J.—In this case the prisoner has pleaded guilty to a charge of intentionally giving false evidence in a stage of a judicial proceeding, and has been sentenced to three years' rigorous imprisonment.

I think this sentence out of all proportion to the offence disclosed by the record, and admitted by the prisoner himself.

The prisoner was prosecuted, it appears, in a case of theft; and he stated before the Magistrate that he had *never* told the police that he found certain articles produced in Court in the house of one Balak Aheer. To the Magistrate his statement was to the effect that he had tracked the thief, by the grains of *janera* stolen, to the door of the prisoner.

When pressed by the Magistrate, the prisoner said that his false statement was not intentional, and that it was the first time he had ever been in a Court.

The Magistrate does not say that the prisoner intended to get the accused let off, and so to frustrate the ends of justice on the one hand, or that he had instituted a wholly false charge on the other.

The gist of his false statement would seem to be that he made out a less clear and precise case to the Magistrate than had been supposed from his statement to the police.

A deliberate mis-statement made in a Court of Justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence which should be lightly passed over.

But when a person, as in the case before us, makes a simple, though a remarkable, mis-statement from which no such inferences can be drawn, and then literally throws himself on the mercy of the Court, I must hold that, if, for the sake of example, it is thought imperative to commit him, and that if, when committed, he is convicted, a much lighter sentence will suffice.

The prisoner has already been more than three months in Jail under his sentence; and I am of opinion that he should be released as soon as the order to that effect can reach the Lower Court.

Loch, J.—I concur in reducing the sentence as proposed by my colleague.

The 6th March 1867.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Right of prisoner—Proceedings of Magistrate (under Section 277, Code of Criminal Procedure).

Queen *versus* Gunesh Sircar.

Referred under Section 434, Criminal Procedure Code.

When the proceedings of an Assistant Magistrate are submitted to the Magistrate under Section 277 of the Code of Criminal Procedure, the prisoner has a right to be present at the proceedings before the Magistrate under that Section, and to be heard in his defence.

Markby, J.—All the proceedings, subsequent to those before the Assistant Magistrate, Mr. Hopkins, are void, and they must be quashed. The proceedings of the Assistant Magistrate were, we understand, submitted to the Magistrate under Section 277 of the Code of Criminal Procedure, and the prisoner had a right to be present at the proceedings before the Magistrate under that Section, and to be heard in his defence, these proceedings being, in fact, a continuation of his trial before the Assistant Magistrate.

The Magistrate will, therefore, take up the case afresh, and adjudicate upon it under Section 277 in the presence of the prisoner.

We also direct that, when the ultimate decision of the Magistrate is given, the record be again submitted to this Court for revision.

The 7th March 1867.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Section 435, Code of Criminal Procedure—Power of Sessions Judge to order commitment.

Miscellaneous Criminal Appeal against the order passed by the Sessions Judge of Dacca dated the 12th January 1867.

Huree Chunder Nundee, *aum mookhtar* behalf of Syud Musmud Ali Chow *alias* Moochee Mean, *Petitioner.*

Messrs. G. C. Paul and *R. E. Twidale*, Petitioner.

A Sessions Judge may, under Section 435 of the Code of Criminal Procedure, after a Magistrate discharged an accused person, order the Magistrate to commit the accused person to the Sessions.

Kemp, J.—This petition must be rejected. The accused person, Moochee Mean, is charged with the offence of affray and ri

* *Erratum in Original Edition.*

n offence not triable by a Magistrate. The eputy Magistrate appears to have discharg- d the offender, Moochee Mean. The Ses- ons Judge, on a review of the evidence ken in the trial of other prisoners who ere implicated in the same offence and were onvicted, has directed the apprehension nd commitment of the offender, Moochee lean.

I am of opinion that, under Section 435 f the Code of Criminal Procedure, the essions Judge is competent to pass such an rder, and I would reject the petition.

Jackson, J.—I am of the same opinion. ection 435 must evidently be construed in onnection with Section 225, which permits Magistrate, when there are not, in his pinion, sufficient grounds to commit the ccused person to take his trial, to discharge im. It is then competent to the Sessions udge, if he thinks fit, to overrule the Magistrate in the exercise of that discretion, nd to order that the Magistrate shall com- nit the accused person to the Sessions.

I wish only to reserve the expression of ny opinion upon what I understand to be he Sessions Judge's ground for ordering the commitment in this particular case. It ap- ears that the Sessions Judge, having tried ome other persons implicated in the same offence, has looked upon the evidence which was recorded before him at the trial as ground for ordering the commitment of this additional accused person. I should have been inclined to suppose that the authority vested in the Sessions Judge under Section 435 would have been more properly exer- cised on a review of the evidence recorded before the Magistrate on the preliminary investigation as against the particular ac- cused person whose commitment he thought proper to order. But, as the law is silent as to the circumstances under which the Ses- sions Judge is competent to order a commit- ment, and as the point is not raised before us, I do not think it necessary to say any- thing more on that subject.

I think the application must be refused.

The 11th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Misdirection—Acquittal (Judge when to charge for).

Queen *versus* Greedhary Manjee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of assembling for the purpose of committing dacoity.

Where there is no evidence against a prisoner, the Judge ought to charge the Jury for an acquittal, and not leave the Jury to say whether the prisoner is guilty or not.

Glover, J.—THE record of this case has been sent up, and from it it appears that, with the exception of Greedhary's state- ment before the Deputy Magistrate, there was no evidence of any kind against him.

This statement does not go the length of a confession. The prisoner admitted, indeed, that he had accompanied the dacoits for a short distance, but declared that he had turned back almost immediately, and had had nothing to do with the dacoity that afterwards took place, and did not know that such an offence was in contemplation.

If this statement be used against the prisoner, it must be taken in its entirety; and it is no evidence, either direct or pre- sumptive, to prove that Greedhary com- mitted the dacoity.

This being the case, the Jury should have been directed to find a verdict of "not guilty" against this prisoner, and the Ses- sions Judge was, I consider, wrong in leaving it to the Jury to say whether Gree- dhary was or was not guilty. There was no evidence against him at all.

I would quash the conviction as being founded on a misdirection to the Jury, and release the prisoner.

Kemp, J.—I quite concur that there has been a misdirection to the Jury in the case of the prisoner Greedhary; his case ought to have been wholly withdrawn from the consideration of the Jury; and the Judge ought to have instructed them in unmistake-

* *Erratum in Original Edition.*

able terms that there was no evidence whatever against this prisoner, and that it was their duty to acquit him.

It is useless to set aside the verdict on the ground of misdirection, and to order that a new trial be had regarding this prisoner, for there is, admittedly, no evidence to go to a Jury. I, therefore, concur in quashing the conviction, and in directing the immediate release of the prisoner.

I observe that the Judge did not concur in the verdict against the prisoner. Had he charged the Jury, pointing out to them that there was no legal evidence against the prisoner, and directed them to acquit, the conviction would not have taken place.

The 11th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Amends—Theft.

Chootoo Dhoon Bharbhonia *versus* Abdool Meah and others.

Reference under Section 434, Code of Criminal Procedure.

Amends cannot be awarded in a case of theft.

Glover, J.—It has been frequently ruled by this Court that amends cannot be awarded in a case of theft, inasmuch as trials for theft do not come under Chapter XV. of the Procedure Code.

The Deputy Magistrate's order is, therefore, quashed, and the fine, if realized, will be given back to the complainant.

The 11th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contempt of Court—Fugitive offender.

Criminal Jurisdiction.

Queen *versus* Madhoosurun.

Referred under Section 434, Act XXV. 1861, and Circular Order No. 18. dated the 15th July 1863.

An order striking off a case on account of the bad prospect of bringing the guilty parties to trial cannot dispose of the question of contempt of Court arising out of the fact of the accused having absconded to evade justice.

Kemp, J.—We are of opinion that the proceedings of the Assistant Magistrate Mr. Merington, are strictly legal. The case was not struck off the file, because the accused person, Madhoosurun, had cleared himself of the crime charged, but simply because there then appeared to be little prospect of bringing the guilty parties to trial. Madhoosurun was absconding to evading the warrant of the Magistrate: his property was therefore attached under the provisions of Section 184 of the Code of Criminal Procedure. He did not appear within the time specified in the proclamation of attachment, and an order, declaring the property to be at the disposal of the Government and for its sale after the expiration of six months, was issued. Madhoosurun then thought proper to surrender himself, and he sets up an *alibi*, stating that he was at Muttra, and that he did not abscond or conceal himself for the purpose of evading justice. This the Assistant Magistrate found to be proved, and ordered the sale of the property under Section 185 of the Code of Criminal Procedure. The Sessions Judge is clearly in error in supposing that the order striking off the case disposed of the question of contempt of Court arising out of the fact of Madhoosurun having absconded to evade justice.

* *Erratum in Original Edition.*

The 11th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sections 307 and 394, Penal Code—Transportation.

Queen *versus* Bhamour Doosadh.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of attempt to murder.

Neither under Section 307 nor under Section 394 of the Penal Code, can a prisoner be sentenced to 14 years' transportation, the punishment awardable under those Sections being transportation for life, or rigorous imprisonment for 10 years with fine.

Glover, J.—It is fully proved that the prisoner attempted to murder the child Meenoo, and would have succeeded in doing so, but for the appearance of the witnesses Nos. 2, 3, and 4. It is also proved that he robbed the child of his ornaments, and we therefore affirm the conviction.

But neither under Section 307, nor Section 394, could the prisoner be sentenced to 14 years' transportation; the punishment that can be awarded under those Sections is transportation for life, or rigorous imprisonment for 10 years with fine. The offence, though comprised under two Sections of the Code, was in reality one and the same, inasmuch as the attempt at murder was committed in furtherance of the robbery.

Had the Sessions Judge sentenced the prisoner to the heavier penalty, we should not have interfered; for the crime was of a particularly brutal character, and only removed from murder by an accident.

It appears, also, that the prisoner is a man of very bad character, and had only shortly before been released from jail after a sentence of 3 years' rigorous imprisonment for robbery.

As a Court of Appeal, this Court must quash the sentence of the Sessions Judge as one not provided by law for the crime of which the prisoner has been found guilty, and, under Section 419 of the Code of Criminal Procedure, pass the legal sentence of 10 years' transportation awarded under Section 59, Penal Code, in lieu of rigorous imprisonment for the same period.

The 11th March 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Confession.

Queen *versus* Jhurree and another.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of retaining stolen property.

A voluntary and genuine confession is legal and sufficient proof of guilt.

THE confession of Bechoo is conclusive evidence against him if it be believed; it speaks to his having accompanied the dacoits in order to commit a dacoity, and to his having been captured, because he could not run away as fast as the others, who were young men.

I do not quite understand why the Sessions Judge told the Jury that the confession was evidence, but was not absolutely conclusive. The question for consideration was, whether the confession was voluntary and genuine; and, if no reasonable doubt arose on these points, the confession was legal and *sufficient* proof of guilt.

As regards the conviction of Jhurree for retaining the iron-pots knowing them to have been stolen, there does not seem to me to be an absolute deficiency of legal evidence. The case resolved itself into evidence of ownership given by the complainant only, and the assertion of Jhurree on the other hand, unsupported by any evidence.

I do not find that any one but the prosecutor has positively sworn to the iron-pots as those of the prosecutor; but the defence is a failure; and one witness for the prosecution does swear that Jhurree has no iron-pot of his own.

I can discover nothing in the convictions wrong in law, and reject the appeals.

The 11th March 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Insanity.

Queen *versus* Pursoram Doss.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Gya, on a charge of culpable homicide amounting to murder.

Case in which the prisoner, notwithstanding that he had been convicted by the Sessions Judge, was acquitted by the High Court on the ground of insanity under Section 393 of the Code of Criminal Procedure, and directed to be kept in safe custody, pending the orders of the Local Government to be applied for by the Judge.

Glover, J.—THERE can be no reasonable doubt, I think, that the prisoner killed the deceased Hajjam. He was seen walking round the body flourishing a *lattee*, and using abusive and threatening language, by two witnesses, who, although they did not go quite close to him in consequence of his violent manner, were near enough to be certain of their identification, and who depose most positively that the prisoner is the man they saw. These witnesses had, moreover, the advantage of seeing the prisoner again almost immediately afterwards, when they assisted in arresting and taking him to the police station after the attack and robbery of the Chooliharas.

The men, who were attacked by the prisoner, and who eventually, with the help of witnesses Nos. 1 and 2, secured him, corroborate the former evidence to a certain extent, and the state of the prisoner's clothes and hands (covered with blood) is a further corroboration.

It is proved, then, that the prisoner was seen flourishing a *lattee* over a dead body covered with wounds and bleeding, and that his hands and a turban which was twisted round his waist were covered with blood. He was arrested a few minutes later (in the midst of a violent attack upon a party of travellers) in the same condition, and was, after a hard struggle, carried off in custody. I think that this evidence is sufficient to prove that the prisoner was the man who killed the Hajjam, and so far I agree with the Sessions Judge.

The important question remains, what was the prisoner's state of mind when he did so?

The Judge's opinion of the prisoner formed from personal observation was "that the "prisoner may not actually be insane, "still he is eccentric to a degree. He is quite "unable to meet a man's eye, has a wild "and uneasy look, talks rationally enough at "times, and then suddenly changes the point "of his talk without rhyme or reason: at "one moment he is placid, at another violent "and abusive."

The Judge also found that there was no sufficient proof that the prisoner was under the influence of any intoxicating drug when he committed the offence.

He convicted him of the murder, and held (rather inconsistently I think) him to be a responsible agent, although, for reasons not given, he considered a sentence of transportation for life a sufficient punishment.

He has gone very laboriously into this case, and has apparently left no means unemployed to arrive at what was the prisoner's state of mind, but I am constrained to differ from his conclusions.

I may remark in passing that the Judge has somewhat mistaken the purport of the enquiry into the prisoner's sanity by referring it more particularly to the present state of the prisoner, rather than to what it was at the time the offence was committed. No doubt, the enquiry was necessary on both points; but the result of it on the former point would only have affected the prisoner's being tried, whilst on the other it would determine judgment after trial. As the whole of the evidence, however, is now before this Court on appeal, the mistake is of no practical importance.

After a careful perusal of that evidence I am of opinion that the prisoner should have been acquitted on the ground that, at the time the offence was committed, he was by reason of unsoundness of mind, incapable of knowing the nature of the act charged.

I will consider the evidence of the prosecution-witnesses in order.

And, first, as to the appearance and manner of the prisoner when first seen by the corpse of the murdered man, Rugonath and Cawput, witnesses Nos. 1 and 2 say that he was walking about the body, which was lying on a frequented road through the jungle, *lattee* in hand, gesticulating and using violently abusive language. Witness No. 4, Dhomun, saw a man (who, from the other evidence, must have been the prisoner) sitting up in a tree beneath which a horse was tied, and shouting at the top of his voice "hush, hush." The Chooliharas, witnesses Nos. 6, 7, and 8, depose that,

after the prisoner had attacked them, he broke open their *pittara*, took out the suttoo, part of which he ate, and part threw away, fixed a pair of earrings which were in the box in his ears, throwing another golden ornament (a dhuntee) into the jungle, and behaved otherwise in an extravagant manner. The other two witnesses, who came up on hearing the noise, depose to the same effect; and all add that the prisoner was outrageously abusive and violent, and fought them with his *lattee* for several minutes before he was overpowered.

The Sub-Inspector of Police, witness No. 12, states that, after his arrest, the prisoner was "violent when interfered with, jabbered a good deal to himself, and again was rational at times." He adds that "the prisoner did "not appear to have partaken of *bhang* or "such like drug; he was sometimes in his "senses, sometimes out of his senses;" and again, "I put handcuffs on him, as I was "afraid he would commit violence;" and again, "he talked on several subjects to the "people about him, sometimes in reason, and "then he would burst out all of a sudden, and "become very violent and uproarious."

This witness also deposed that the prisoner admitted to him his having killed the Hajjam, stating that, as he was sitting up in a tree, the deceased came underneath and grinned at him, on which he descended and killed him with his *lattee*. I allude to this with reference to the man's state of mind only.

This was the evidence as to prisoner's behaviour at the time the crime was committed; and it appears to me inconsistent with any other hypothesis than that the man was, from whatever cause, mad at the time in question. The Civil Surgeon, Dr. Russell, was examined on two several occasions. After he had had considerable opportunity of observing the prisoner, the gist of both depositions is to the effect that he did not consider the prisoner to be of unsound mind at present, but that he might be subject to attacks of mania with lucid intervals. Dr. Russell adds: "I think him eccentric, and he has a haggard and care-worn expression of countenance—in fact, his physiognomy is altogether peculiar."

This evidence shews that, although eccentric, the prisoner is now sane, and was, therefore, properly put on his trial; but it in no way invalidates the evidence detailed above; on the contrary, it rather strengthens it.

Then, with regard to prisoner's state before the occurrence of the murder. Ramjoo Lall deposes that, some days before the prisoner's arrest on the present charge (the precise date is not given, but the time would be under a month), he was running about the village, throwing stones at the boys, and abusing them; that he entered the witness's house, and tried to carry off his little girl, and generally conducted himself strangely.

I may remark here that this witness, as well as the succeeding ones, gave a much more highly-colored account of the petitioner's behaviour to the Assistant Superintendent of Police, who conducted a local enquiry on the subject. They then said plainly that the prisoner was both insane and dangerous. The Judge has noticed the fact, and attributes it to the endeavour of the Police Sub-Inspector to hush the matter up, lest he should be called to account for allowing a dangerous lunatic to go so long at large.

Ram Sohai states that the prisoner at the same time and place entered the village-temple, and flung away all the flowers and offerings, threw stones, and abused people generally.

Jugul Singh deposes to the same effect as regards throwing stones and abuse, and adds that the villagers were much frightened at the prisoner, as he was more violent than on former occasions. This witness further gives his opinion that the prisoner was insane at the time.

Three other witnesses, Ramnath, Choonee, and Beharee, depose much in the same manner. They state that, just before the murder was committed, prisoner behaved in an extraordinary manner, and that they all considered him as "pagul."

Mohaput Singh deposes to the prisoner having came to his house on horse-back (this mention of the horse is corroborative of the evidence of the first three witnesses Nos. 1, 2, and 4, who state that, when they first saw the prisoner in the jungle, he had a horse with him tied to a tree) in February on the day of the murder; that he did not seem mad; but that he behaved oddly, sang a great part of the night, and vociferated considerably at times. This witness adds that he thought the prisoner out of his mind at the time.

The chowkeedar of Korai saw the prisoner the night before the murder. He was singing and talking to himself, but did not do anything particularly out of the way.

Now, it appears to me impossible on this evidence, which, it must be remembered, was not volunteered, as would have been the case had it been desired to get up a case of insanity in favor of the prisoner, but rather extracted from the witnesses after much difficulty, and a lengthened enquiry, to declare that the prisoner, a wandering fukeer from Central India, was, when he committed this murder, in such a state of mind as to know that what he was doing was wrong and contrary to law.

It seems clear that, before it occurred, Pursoram was considered insane by all who knew or saw him; and that, at the time of the murder itself, his acts were those of a man either insane by the act of God, or who had made himself insane by the use of intoxicating drugs. There is no proof of the latter contention. Indeed, the evidence is against the supposition that the prisoner, when arrested, was under the influence of ganja or any similar drug. That he may be sane now, and that he may hereafter remain so, is probable, but that has nothing to do with the question.

I would acquit the prisoner of the charge of murder, as also of the charge of robbery, of which he has been convicted in another case, that of the Chooliharas adverted to in the course of these remarks, and of which the evidence is put up with this record, on the ground of insanity under Section 393, Code of Criminal Procedure, and would direct that, under Section 394 of the Code, he be kept in safe custody until the orders of the Local Government, which the Sessions Judge should apply for, be obtained regarding him.

Kemp, J.—I entirely concur.

The 11th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Witness (accused person discharged by Magistrate for want of evidence).

Queen *versus* Behary Lall Bose.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Jessore, on a charge of abetting the fraudulent use as genuine of a forged document.

There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution.

Norman, J.—THE prisoner has been convicted on a trial held by the Sessions Judge of Jessore of knowingly using a forged copy of a chittah. The Assessors would have acquitted him.

It was proved that the prisoner obtained the copy of a chittah from the Office of the Collector from the writer thereof, one Greedhur Chowdhry. Chunder Coomar has proved that he examined it before it left the office, and that, when he did so, the words interpolated " Da Dinonath" in one place, and "D Dinonath" in another were not in it.

The prisoner delivered the document to his father Ram Lochun, who gave it to his vakeel for the purpose of filing it in the Moonsiff's Court in a suit by Ram Lochun against Dinonath. The vakeel states that when he received the copy of the chittah, had on it the words " Da Dinonath," which were those which made it important as evidence for his client.

The Sessions Judge has acquitted Ram Lochun of the forgery.

The question really is whether there is sufficient evidence that the forgery was committed by Behary Lall, or that the document was used by him knowing it was forged. An inspection of the document shews that, if not actually forged by Greedhur or any of the amlah of the Collector's office, it must at least have been prepared for the purpose of being altered, a space having been left in the copy, which appears not to exist in the original, leaving room for the words " Da Dinonath " to be written in. Behary Lall gives no evidence to shew that, when in his possession, the words " Da Dinonath " were not in it. There appears no reason why he would have applied for a copy of the chittah, unless these words were to be in it; because it does not appear that, without these words, it would have advanced the interest of the plaintiff. The Judge observes that Ram Lochun is a feeble old man, 66 years of age. Behary Lall is his son and heir, and took an active part in managing his suit for him.

The Judge observes, too, that his interest in the suit was as strong or stronger than that of his father.

We think, therefore, that it is pretty clearly shewn that the forgery must have been contrived before the document came into the hands of Ram Lochun. The fact that the prisoner handed the document to his father to give to the vakeel will not avail the prisoner, because he does not attempt to prove

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that he handed it over in the same state in which he received it. He, and not the Collectorate amlah, knew what it was he was required to prove before the Moonsiff. He, and not they, had an interest in it, and would derive a benefit from the alteration of the document. We think that the only reasonable inference from the fact is that the document must have been forged while under his control, or at least at his instigation.

Mr. Jackson attempted to argue that the evidence of Greedhur was not admissible, because he had been at one time charged before the Magistrate as an accomplice, and had neither been acquitted nor pardoned.

We think that there is absolutely nothing in the point. There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution. Greedhur would probably have rejected an offer of pardon, for it would have ruined him. He could not have been acquitted, for he was never committed for trial.

The 18th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Witnesses (Examination of Prosecutor's)—Acquittal of prisoner.

Queen *versus* Sreenath Mookopadhia and others.

Referred under Section 434, Act XXV. of 1861, and Circular Order, dated 15th July 1863, No. 18.

A Magistrate cannot decide the case of a prosecutor without examining his witnesses. If, upon such trial, he finds that the prosecutor has no right to bring a criminal charge, he should acquit the prisoner on that ground.

Pundit, J.—We agree with the Sessions Judge in holding that the Magistrate should not have decided the case of the prosecutor without examining his witnesses. The order of the Magistrate must, therefore, be quashed, and he must re-try the case of the prosecutor.

The Magistrate, after he has tried the prosecutor's case properly, may, if he finds that the prosecutor has no right to bring a criminal charge at all, decide so; but in that case the prisoner must be *acquitted* on that ground.

The 18th March 1867.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Irregularity—Sentence against prisoners not present—Disputes about water-rights.

Reference by Mr. W. Ainslie, Sessions Judge of Patna, dated the 25th February 1867.

Queen *versus* Ramnath and others.

A sentence of imprisonment by the Magistrate was quashed as against those prisoners who were not present, and had not been heard in their defence.

In deciding a dispute as to a right of water, the Magistrate must follow strictly the course pointed out by Chapter XXII. of the Code of Criminal Procedure.

Case.—Under Section 434 of the Criminal Procedure Code and Circular Order No. 18, dated 15th July 1863, I have the honor to submit the records of the Magistrate's proceedings in the case of Ramnath and others, convicted by Deputy Magistrate Syud Azum Ooddeen Hossein Khan, C. S. I., of the offence of being members of an unlawful assembly.

A charge was preferred by Doolar Mahto against Dusruth Mahto and others of rioting, the cause of the riot being a dispute about water-rights. On behalf of the accused, one of whom appeared in person, and two by mooktear, it was pleaded that they had a right to the use of the water, which the prosecutor alleged that they were unlawfully and forcibly appropriating.

Five of the persons summoned did not, as far as the record shows, put in an appearance. The Deputy Magistrate recorded the examination of one of the accused only, namely Dusruth, who was in personal attendance. After completing his enquiry, he came to the conclusion that no actual violence had been committed, but that the accused had no right to the use of the water as claimed by them. He does not state specially of what offence he found the accused guilty; but it is clear from the terms of his decision that it was of being members of an unlawful assembly, he sentenced all the parties *summoned to a fine of rupees 10 each*, and in default of payment to a week's imprisonment. The three persons, who were present personally or by agent, paid the fine. The case has been brought before me under Section 434 of the Criminal Procedure Code on two grounds: *firstly*, that the sentence, as against those not present and not put on their defence, is illegal; and, *secondly*, that a finding as to the right of irrigation has been improperly recorded.

On both grounds, I think, the proceedings are open to objection. I called on the Deputy Magistrate to explain how he had sentenced persons unheard, if, as represented by the petitioners, he had actually done so; and why he had passed a sentence of imprisonment against those who were not personally present. As the fine had been paid up by the mooktears of the two persons represented by agent, this latter part of his order has become immaterial in the particular case. In respect of the sentence on persons wholly unrepresented, the Deputy Magistrate has submitted an explanation, which I hold to be insufficient. I have no doubt that he believed that the parties were before him, but there is no evidence that they were so; and it is clear that great laxity must prevail in his office when there is no means of ascertaining from the office-records or the record of the case whether accused persons have attended in answer to a summons or not. I think it must be held that these persons have not attended, and that the sentence as against them is wholly irregular. These persons are named Ramnath, Dana, Rajaram, Pertab, and Munraj. I propose that the sentence on these men should be quashed; and the Deputy Magistrate directed to re-summon them, and take their defence, and pass such legal order as may seem right in completing the case. In respect of the two represented by agent, Ram Lall and Khooblall, although the nature of the defence is not recorded, I do not propose any interference. Chapter XV. of the Criminal Procedure Code does not absolutely require that the examination of the accused should be recorded; and it is evident that their defence was substantially that they had a right of user; and that, as to them, there has been a fair and complete hearing, and not a legal order within the Magistrate's competency.

4. On the second objection taken, I think that the petitioners are right in so far as that no proceedings were instituted under Chapter XXV. of the Procedure Code; and as the finding is not that the accused acted in defence of a right or supposed right which was being invaded by the opposite party, but that they assembled in a large party to enforce a right, the offence of being members of an unlawful assembly is altogether independent of the existence or non-existence of the right, the finding as to the right to use the water was unnecessary and irregular in form. I propose that this finding should be absolutely quashed, leaving it to the Magistrate to originate a proceeding under Chapter XXII. in due form, if he considers the same necessary.

The Judgment of the High Court was passed as follows by—

Seton-Karr, J.—We concur with the Sessions Judge.

The administration of the business of the Court seems to have been conducted by the Deputy Magistrate with much laxity. We cannot conclude that the five defendants whose cases are referred to us, were really present in Court, and we set aside that part of the Deputy Magistrate's order which refers to them. The Deputy Magistrate will summon these parties again, and will take their defence and evidence if produced. If the parties desire it, they should be afforded an opportunity of cross-examining the witnesses for the prosecution. When the trial has been properly held and completed, the Deputy Magistrate will then pass such orders as may be proper.

We also quash that part of the Court's order which relates to the right of water. If the Court intends to decide this point, it must follow strictly the course pointed out by Chapter XXII. of the Code of Criminal Procedure.

The order relating to three of the defendants, as noticed by the Sessions Judge, will stand good.

The 19th March 1867.

Present :

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Penal Code—Punishment.

Queen *versus* Hossein Ally.

Criminal Jurisdiction.

Case revised under Section 405, Code of Criminal Procedure.

Where a prisoner, convicted of murder against the opinion of the Assessors, was sentenced to transportation for life, the High Court reduced the sentence to 10 years' rigorous imprisonment, remarking on the severity of the Penal Code and on the necessity of administering it so as to make it apply to the various gradations and degrees of crime in this country.

Seton-Karr, J.—THIS case has been called for by the Judge in the English Department, and has been laid before us under Section 405 as a Court of Revision.

The case has been very fully explained by the Sessions Judge, and the whole of the facts are to be gathered from his judgment.

The Judge has convicted the prisoner of culpable homicide amounting to murder against the opinion of the Assessors, and has sentenced him to transportation for life, giving good reasons for not passing a capital sentence.

The main facts do not really admit of any doubts. It is proved that, on a particular day, the prisoner, who for some time had been sitting in the verandah with the deceased, suddenly, and under the influence of an hallucination as to intrigues on the prisoner's part with his female relatives, jumped up, and cut the deceased across the neck and on the arm with a weapon which the deceased was using at his work.

The wound on the neck was certainly very severe. The weapon used was a *dao*, evidently sharp and somewhat heavy. The provocation was nought; and that death ultimately ensued from the wound in the neck, there can be no doubt, although it seems tolerably clear that the case of the deceased was mismanaged, and that with better treatment he might have lived. I do not, however, think that the Judge is right in saying that the second wound on the arm, a slight one, was evidence of an intention to cause the death of the deceased. No doubt, it is possible fairly to argue that the Judge is strictly and legally right in convicting of the highest offence known to our law.

But, had I been presiding at this trial, and charging a Jury or Assessors, I should have much preferred charging for culpable homicide not amounting to murder, or even for grievous hurt. The evidence, to my thinking, would fairly bear out a conviction under the latter part of Section 304, *viz.*, that the "act was done with the knowledge that it is likely to cause death, but without any intention to cause death," &c.

In this view of the case, as a Court of Revision, we may, under Section 405, satisfy ourselves as to the legality or the propriety of the sentence or order passed, and in this case I am not satisfied on either point. I am of opinion that, in the words of the law quoted (405), "the sentence passed is too severe."

The Penal Code is unquestionably one of great severity, and it should be administered by us, so as to make it apply to the various gradations and degrees of crime in this country. I cannot class the crime of which this prisoner has been found guilty, though a grave one, in the category of those which are the highest of crimes, and to which a punishment only short of death, and to many natives equal in severity to death, is meted out.

I would, therefore, convict this prisoner under the latter part of Section 304, and would sentence him to 10 years' rigorous imprisonment.

Pundit, J.—I agree in this order.

The 20th March 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Discharge of accused—Witnesses for the prosecution.

Reference from Hooghly under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Dinonath Gope *versus* Saroda Mookopadhia and others.

A Magistrate ought not to discharge an accused without taking the evidence of the witnesses for the prosecution named in the petition of complaint.

Kemp, J.—THE case is returned with directions that the witnesses for the prosecution be examined, and the case disposed of. The Joint Magistrate was wrong in discharging the accused who were charged under Sections 379 and 447 of the Indian Penal Code, without taking the evidence of the witnesses for the prosecution who were named in the petition of complaint.

The 25th March 1867.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Salt (Confiscation and release of).

Criminal Revisional Jurisdiction.

Revised under Section 404, Code of Criminal Procedure.

Queen *versus* Boidonath and others.

By Section 18, Act VII. of 1864, salt, not being conveyed by the route and to the place prescribed in the rowanna, becomes absolutely confiscated. The power of releasing any such salt is vested in the Board of Revenue under Section 39, and not in the Magistrate.

Seton-Karr, J.—THIS case only comes before us for an expression of our opinion as to the correctness of the law laid down by the Deputy Magistrate and the Sessions Judge in regard to the release of the salt. Our opinion is sought for as a guide for the future, and not with any reference to the release of the salt in this particular instance, which has become final.

We think the views of the Sessions Judge erroneous in law. By Section 18 of Act VII. of 1864, salt, not being conveyed by the route and to the place prescribed in the rowanna, becomes absolutely confiscated.

The other Sections relied on by the Sessions Judge, especially Section 29, we think, refer to salt actually contraband, *i. e.*, unlicensed, and, as we read the Section, it does not apply to this particular kind of salt which was merely confiscated by reason of its wrong destination.

In this view of the case, the power of release is vested in the Board of Revenue by Section 39, and not in the Magistrate.

In future, then, salt seized under similar circumstances must be held, by the fact of seizure, to be confiscated, and the release of any such salt would be a question for the Board of Revenue under Section 39.

A copy of our ruling should go to the Sessions Judge of Chittagong, for communication to his subordinate.

The 25th March 1867.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Dacoity—Section 511 of Penal Code.

Criminal Revisional Jurisdiction.

Queen *versus* Koonee.

Section 511 of the Penal Code does not apply in a case of dacoity.

Where a prisoner was found guilty of an attempt at dacoity under that Section, and of causing grievous hurt in such attempt under Section 397, and a sentence of 3 years' rigorous imprisonment was passed on him, the finding was amended by striking out "Sections 397 and 511," and substituting "Section 395."

Jackson, J.—THIS case has been called for by the Judge in the English Department on account of the discrepancy between the finding of the Court of Session and the sentence passed.

The Judge finds the prisoner guilty of an attempt at dacoity under Section 511 of the Indian Penal Code, and of causing grievous hurt in such attempt under Section 397, and passes a sentence of 3 years' rigorous imprisonment.

It is clear that, if the prisoner had been found guilty of committing dacoity and of causing grievous hurt at the time of committing it, or of attempting to commit dacoity being armed with a deadly weapon, it would have been imperative, under Section 397 or Section 398, as the case might be, to pass a sentence of not less than 7 years' imprisonment. The latter finding would apparently have been borne out by the evidence; but the Judge has not arrived at either of those two findings, and consequently the case does not fall within either of the two Sections; but, under the terms of Section 391, Indian Penal Code, the case was one of dacoity, and Section 511 does not apply.

We, therefore, not disturbing the sentence of rigorous imprisonment for three years, direct that the finding be amended by striking out the words "Sections 397 and 511," and substituting the words "Section 395."

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The 28th March 1867.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Examination of accused—Abetment—Section 114 of Penal Code.

Queen *versus* Mussamut Niruni and Monirooddeen.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder.

Before criminating a man upon his own statement under examination, it is necessary to see that such statement has been deliberately made and recorded; that, after being recorded, it has been shown or read to the accused; and that the examination has been attested by the *signature* of the Magistrate following a certificate to be given under his own hand.

In order to bring a prisoner within Section 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that, "if absent," he would have been "liable to be punished as an abettor," and then to show that he was also present when the offence was committed.

Jackson, J.—This is a reference from the Court of Session at Backergunge for confirmation of the sentence of death passed upon Mussamut Niruni and Monirooddeen for murder and abetment, the abettor being present when the murder was committed.

The murdered man was the husband of the female prisoner, who, it appears, had a criminal intrigue with Monirooddeen, and likewise with one Johirooddeen, who also was tried for abetment of the murder, but was acquitted.

The fact of the intrigue between the wife and each of these two men is clearly proved.

It is also proved that, on the evening of the murder after dusk, Niruni was heard to call out, "come quickly;" and some of the neighbours going to the house found her standing by the body of her husband, who was lying dead with a wound in his neck, almost severing the head from the body, and manifestly inflicted with a *bais* (an axe or adze) which was found close at hand bloody; a broken part of one of Niruni's lac bracelets was also found on the spot, and after a first denial she admitted to the neighbours that she had killed her husband, and she afterwards stated that the bracelet had been broken in the act of striking the blow.

Monirooddeen, it appears, is married to the sister of deceased, and used to live in the same dwelling.

One of the witnesses (Budhim) states that, as he went on hearing Niruni's out-cry towards the house of deceased, which is about 100 yards from his own, he saw Monirooddeen running away; that, although it was dark, he knew him by his gait, and asked him where he was going, to which enquiry Monirooddeen answered "home."

The examination of Niruni and that of Monirooddeen before the Magistrate have been accepted as evidence by the Court of Session.

The former states that her husband having come in after a walk, Monirooddeen and Johirooddeen proposed to her to go with them for the purpose of criminal intercourse; that she declined; and that Monirooddeen put the axe in her hand, and on his persuasion, she struck her husband one blow, and he fell to the ground.

Of the latter, the Judge says, "Monirood-
"deen also confessed before the Magistrate to
"having been present when the blow was
"struck, but he denied giving Niruni the
"axe, saying that Johirooddeen had done
"so."

Now, the fact is that we find among the papers sent up by the Magistrate something which purports to be the examination of Monirooddeen. The question put to him is, "Do you wish to say anything?" Answer—
"I have an intrigue with the wife of Bulai.
"On Johirooddeen putting the axe into
"the woman's hand, she struck Bulai a
"blow with the axe. I was behind the
"house. I did not tell Johirooddeen to kill
"(Bulai)."

Then follows a signature in Bengalee purporting to be that of Monirooddeen, and an irregularly-shaped mark or figure in a different ink, which may be the rudiment of a signature by some English Magistrate, and the Joint Magistrate's seal. There is a note in English of the same examination, not signed, but apparently taken by the Joint Magistrate, which varies in some degree from the foregoing.

By Section 366 of the Code of Criminal Procedure, it is enacted that—

"The examination of the accused person
"before the Magistrate shall be given in
"evidence at the trial. The attestation of the
"Magistrate shall be sufficient *primâ facie*
"proof of such examination, and such attesta-
"tion shall be admitted without proof of
"the signature to it, unless the Court shall
"see reason to doubt its genuineness."

What "the examination of the accused person" and "the attestation of the Magistrate" are, may be seen by reference to Section 205, which is very explicit on the subject. It provides that the "examina-
"tion of the accused, including every ques-

"tion put to him, and every answer given "by him, should be recorded in full, "and shall be shewn or read to him, and "he shall be at liberty to explain or add to "his answers; and when the whole is made "conformable to what he declares is the "truth, the examination should be attested by "the *signature* of the Magistrate, who shall "certify under his own hand that it was "taken in his presence and in his hearing, "and contains accurately the whole of the "statement made by the accused person," and special directions in the case of a confessing prisoner are given in the 203rd Section.

We do not think it proper to admit as evidence against the accused an examination which appears to have been recorded with such utter disregard of the forms prescribed by law as that of Monirooddeen in the present case.

This is very far from being a technical objection. It is obviously necessary that, before you can criminate a man upon his own statement under examination, you should be satisfied that such statement has been deliberately made and recorded; that, after being recorded, it has been shown or read to the accused, so that he might be assured that his words have been correctly taken down; and it is proper that these important circumstances should be attested by the signature of the Magistrate following the certificate mentioned in the Section above quoted, which is to be given under his own hand.

The 366th Section indeed provides that the examination of the accused *shall* be given in evidence at the trial, but this refers to an examination as directed by law, and not to any irregular paper which a Magistrate may substitute for the "examination" in proper form.

This piece of evidence being rejected, we have nothing against Monirooddeen, but

I. The fact of his being one of two persons who had an illicit connexion with the wife of deceased (who was his own wife's brother).

II. The statement of one witness Budai who says that he saw Monirooddeen running away from the spot.

It must be observed that it appears from the evidence of the next witness Dudhin that he and Budai went to the spot at the same time, and that he, Dudhin, went to the house of deceased on hearing the outcry of Niruni which she made about 1 *dund* or 20 minutes after the witness had heard Bulai (the deceased) exclaim "O ma." This, no doubt, would be on his receiving the blow (only one was struck).

Therefore, if it be granted that this recognition of the prisoner running away on a dark night (it was apparently before the moon had risen) can be depended upon, in it is not stated at what distance the witness saw the person whom he declared to be Monirooddeen, nor was his evidence closely sifted on this point; it only results that Monirooddeen was seen running from the house nearly half an hour after the deceased had received his wound.

The Court of Session has not convicted this prisoner of the murder, but of abetment and being present at the commission of the murder so as to make him liable (under Section 114, Indian Penal Code) to be deemed to have committed the murder. It is clear that, to bring the prisoner within this Section, it is necessary first to make out the circumstances which constitute abetment, so that, "if absent," he would have been "liable to be punished as an abettor," and then to show that he was also present when the offence was committed.

Now, we find no evidence of any fact or facts which would amount to abetment of either kind. The only fact really in evidence against the prisoner would support a case of suspicion, not of the strongest kind, against the prisoner Monirooddeen, that he had himself committed the murder, if we had not the admission of Niruni herself that the deed was her own.

The whole case for the prosecution appears to point to Monirooddeen as a principal offender and not a mere abettor, but he has not been convicted or even charged as such; and whatever may be the inclination of our minds as a matter of private opinion, we cannot now direct the prisoner to be tried on that charge.

It follows, we think, that the conviction in the case of Monirooddeen must be annulled, and that we must acquit him and order his discharge.

As to Niruni, the examination is similarly informal and inadmissible; but, against her there is other very sufficient evidence; her crime is of the very deepest dye, and absolutely without any circumstance of extenuation.

We are obliged to confirm the sentence of death passed in her case, and to order that it be carried into effect.

We think it unfortunate that the Court of Session should not have noticed the irregularities to which we have adverted in the

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proceedings of the Committing Officer, and we desire that a copy of these observations may be sent by the Judge to the Magistrate of the district for communication to the Joint Magistrate, and to such others of his subordinates as the Magistrate may think necessary.

If any failure of justice has taken place in the present instance through the escape of a person really guilty, that will be mainly owing to the want of care evinced by the Joint Magistrate who was entrusted with the preliminary investigation.

It has been a matter of consideration with us whether, under the authority vested in us by Section 400 of the Procedure Code, we should direct additional evidence, such for instance as that of Johirooddeen, who has been acquitted, to be taken as bearing on the guilt of Monirooddeen; but, after mature consideration, we do not think that such a course would now be productive of any advantage, and we make no further order in the matter.

The 1st April 1867.

Present :

The Hon'ble J. P. Norman, *Judge.*

False Evidence—Separate charge.

Queen *versus* Bhairo Misser and others.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of giving false evidence in a stage of a judicial proceeding.

A conviction for false evidence was upheld in a case where the false statement was to stop the prosecution of certain Brahmins on a charge of riot or dacoity and murder.

The commitment and trial of several persons on separate charges, each man's statement forming a distinct offence, appfoved.

THE prisoner Bhairo Misser has been tried and convicted before the Sessions Judge of Shahabad, under Section 193 of the Indian Penal Code, on a charge of giving false evidence in a stage of a judicial proceeding.

The false statement was as follows: "I swear that I never mentioned the name of a single Chowbey before the Police at all. I swear that I never identified Deo or Ram Delawar or Sumpat Chowbey before the Police."

The object of the false statement, as appears from the finding of the Sessions Judge, was to stop the prosecution of the Chowbeys, who are Brahmins, on a charge of riot or dacoity and murder. The prisoner has been sentenced to three years' rigorous imprisonment and a fine of 50 rupees. The conviction appears quite correct, and I see no reason to interfere with the sentence.

I dismiss the appeal. The cases of Sewburn Misser, Chain Misser, Mohabeer Misser, and Jani Dhobee, are, in all respects, similar to that of Bhairo Misser.

The prisoners were properly committed by the Magistrate on separate charges, each man's false statement forming a distinct and separate offence. They were tried all together, a course which was in this case probably convenient, and by which I do not see that they have been, in any manner, prejudiced.

I dismiss their appeals.

The 5th April 1867.

Present :

The Hon'ble F. A. Glover, *Judge.*

Cheating—False personation—Abetment.

Queen *versus* Dhunput Ojhab.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of abetting false personation.

Where a person represented a girl to be the daughter of one woman when she was within his knowledge the daughter of another woman—HELD that he was guilty of cheating by personation under Section 416 of the Penal Code, and that it was unnecessary to bring in Section 109 relating to abetment.

THE evidence is perfectly clear against the present appellant that he represented the girl to be the daughter of Sona and of good family, she being all the time and within his knowledge the daughter of another woman.

He was therefore guilty of cheating by personation under Section 416, Penal Code, and it was unnecessary to bring in the Section (109) of abetment. The prisoner took an active part in the cheating. I see no reason to interfere with the Sessions Judge's conviction and sentence, and dismiss the appeal.

The 6th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 201, Penal Code—Disappearance of evidence.

Criminal Revisional Jurisdiction.

Queen *versus* Ramsoonder Shootar.

Section 201 of the Penal Code refers to prisoners other than the actual criminals who, by their causing evidence to disappear, assist the principals to escape the consequences of their offences. But the person who commits an offence, and afterwards conceals the evidence of it, cannot be punished on both heads of the charge.

Glover, J.—THIS case was sent for by the Judge in the English Department, with a view to ascertaining whether the Sessions Judge's conviction of the prisoner, Ramsoonder, on the second count was legal.

The case proved against the prisoner was that he had pushed one Dhamala, an elderly woman, and that she had fallen into a boat and died then and there, and that he had afterwards set the boat with the corpse afloat down the river, and had so concealed the evidence of his offence.

He was convicted by the Sessions Judge of hurt, and of concealing evidence of the commission of that offence under Section 201, Penal Code.

The conviction under Section 201 we hold to be illegal. That Section refers to prisoners other than the actual criminals who, by their causing evidence to disappear, assist the principals to escape the consequences of their offences. But the person who commits an offence, and afterwards conceals the evidence of it, cannot be punished on both heads of the charge according to the terms of the Penal Code.

So much of the Sessions Judge's order is, therefore, annulled, and the sentence of three months' rigorous imprisonment awarded on the second count remitted.

The 6th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover. *Judges.*

Jurisdiction—Section 509, Penal Code—Indecent gestures.

Reference by Mr. W. H. Doyly, Officiating Magistrate of Bhaugulpore, dated the 25th March 1867.

Mussamut Kulree *versus* Jhoonoo.

Offences coming under Section 509 of the Penal Code are triable by the Magistrate of the District only.

Case.—COMPLAINANT charges accused with having made indecent gestures to insult her modesty on her asking him for rent.

The Lower Court sentenced accused under Section 509, Indian Penal Code, to a fine of 5 rupees.

I think the order of the Lower Court should be reversed, because it is illegal. The Assistant Magistrate who tried the case had no jurisdiction, offences under Section 509 being only triable by a Magistrate of the District or Officer exercising powers of a Magistrate of District.

The Judgment of the High Court was delivered by—

Glover, J.—Under the circumstances stated by the Officiating Magistrate, the Court annul the conviction of Jhoonoo as having been passed without jurisdiction by the Assistant Magistrate.

The offence which came under Section 509 of the Indian Penal Code was triable by the Magistrate of the District only, and the Assistant Magistrate had no authority to entertain it.

The fine, if paid, will be returned to Jhoonoo.

The 6th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abetment—Excise Act, XXI. of 1856.

Queen *versus* Kullimooddeen.

Committed by the Magistrate, and tried by the Sessions Judge of 24-Pergunnahs, on a charge of illegal abetment of the illicit sale of liqour.

The Excise Act, XXI. of 1856, contains no provision for the punishment of abetment.

Glover, J.—We think that the view taken by the Magistrate of the 24-Pergunahs is correct.

The prisoner Kullimooddeen has been convicted of the illegal abetment of the illicit sale of liqour to an European soldier, and has been sentenced to pay a fine of 50 rupees, in default of payment to be imprisoned for three months in the Civil Jail. The special law under which the prisoner has been convicted, Act XXI. of 1856, contains no provision for the punishment of abetment.

The offence not being punishable under the Penal Code, it cannot be brought under the provisions of Section 109 of that Code, for Section 40 enacts that an offence denotes a thing made punishable by the Code, and this definition has not been enlarged *quoad* this offence by Act IV. of 1867.

We quash the conviction as illegal, and direct the refund of the fine, if paid, or the discharge of the prisoner, if it has not been paid, as the case may be.

We would observe, for the information of the Sessions Judge, that, in punishing offences committed after the Penal Code came into operation, he is bound to administer its provisions, and not those of former Regulations, and that, in this instance, the case is governed by a special law which, as observed above, does not provide for the offence of abetment of any breach of it.

The 6th April 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Accused persons (Mode of designating).

Queen *versus* Bidadhur Biswas and others.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of dacoity.

A Sessions Judge should designate accused persons by name, and not by number.

I have had the greatest difficulty in coming to a proper understanding of this case in consequence of the arbitrary way in which the numbers attached to each prisoner in the Calendar have been changed, and of the plan adopted by the Sessions Judge of distinguishing each prisoner by his number, and not by his name.

When there is no confusion of numbers, this plan may do very well, though, in all cases, I prefer the identification of prisoners by their names; but here the numbers in the Calendar do not correspond with the numbers in the Judge's decision; and, no names being given, it is with great difficulty that I have been able to reconcile the two. The evidence in this case has been taken under Section 369 of the Code of Criminal Procedure, all the witnesses, strange to say, having died in the interval between committal and trial.

The prisoners Nos. 2, 3, 4, and 7, of the Judge's decision, but Nos. 2, 3, 4, and 5 of the Calendar, *viz.*, Bidiadhur, Sheekur, Ram, and Oodhub, have been identified by several witnesses, whose evidence has been corroborated by the finding of various articles of stolen property in the prisoners' houses. The prisoner No. 2 was identified by independent evidence, and he appears to have been the ringleader; the other witnesses were approvers to whom a conditional pardon had been tendered.

I see no reason, on the whole, to distrust this evidence, which satisfied the Judge and the Assessors, and which has not been rebutted in any way.

I, therefore, reject the appeal of these prisoners. Prisoners Nos. 8, 9, 10, 11, 12, and 15 of the Calendar, corresponding with

Nos. 6, 7, 8, 9, 10, and 13 of the Judge's decision, *viz.*, Rajub, Mohadeb, Gobind, Sanookand, Mugunoo, and Aruth, confessed before the Deputy Magistrate to having taken a more or less active part in the dacoity, and property was found in their houses which has been identified as the prosecutor's.

The appeal of these prisoners is, therefore, rejected also.

The prisoner Gungai Kandew, No. 18 of the Judge's Memorandum, and No. 43 of the Calendar, was identified by two witnesses, and a brass-cup sworn to by the prosecutor was found in his house. Before the Magistrate he claimed this article as his own, but at the Sessions he denied all knowledge of it, and said that it was never found in his house at all. His defence is altogether unsupported, and I do not interfere with the sentence passed on this prisoner.

The Sessions Judge's attention should be drawn to the remarks noted above, and he should be requested for the future to designate accused persons by name, and not by number.

The 8th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Post Office Act—Abetment.

Queen *versus* Ramlugun Lall Moonshee and others.

Criminal Revisional Jurisdiction.

Act XIV. of 1866 does not provide for the punishment of abetting an offence under that Act.

Under Section 109 of the Penal Code, the abetment must be of an offence punishable under that Act, and not of an offence punishable under a distinct and special law.

Kemp, J.—This case was called for by the Judge sitting in the English Department. The reason for the call is not apparent on the record.

The sentences were passed by the Magistrate under a special law, Act XIV. of 1866, the Post Office Act, and these sentences have been upheld by the Sessions Judge on appeal.

We, therefore, can only interfere on being clearly satisfied that the order is illegal or improper.

The prisoners, employées of the Post Office of Mozufferpore, have been convicted of offences coming under the provisions of the above Act, but one of them, viz., the prisoner Ramlugun Lall, has been further convicted under Section 109 of the Penal Code of the offence of the abetment of an offence under Section 48 of the aforesaid Act, and has been sentenced separately for this offence. This conviction and sentence are, in our opinion, clearly illegal.

Act XIV. of 1866 does not provide for the punishment of the offence of abetment of any offence falling within the purview of the Act.

An "offence" denotes a thing punishable by the Penal Code, Section 40. The offence committed by the prisoner was punishable under a special Act applicable to a particular subject, Section 41, Indian Penal Code, viz. the Post Office Act, XIV. of 1866.

Under Section 109 of the Indian Penal Code the abetment must be of "any offence," that is to say, of any offence punishable under the Code, and not of an offence punishable under a distinct and special law. The conviction of the prisoner, Ramlugun Lall, of abetment under the above Section, is, therefore, illegal and must be annulled.

The 8th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Culpable Homicide not amounting to murder—Branding of Thief.

Queen *versus* Khedun Misser.

Committed by the Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of murder.

Causing death by branding a thief without the knowledge that the act was so imminently dangerous that it would, in all probability, cause death, or such bodily injury as was likely to cause death, is punishable under Section 304 of the Penal Code as culpable homicide not amounting to murder.

Seton-Karr, J.—In this case, we think the Sessions Judge was quite right in disregarding the opinion of the Assessors, whose reasons for acquitting the prisoner are altogether insufficient and inconclusive.

But we think that the offence of which the prisoner is guilty comes under the description of culpable homicide not amounting to murder. We do not think that the burns and marks, though deliberately inflicted by the prisoner, amount to the offence of murder under the description given of that crime in Section 300, as the offence was not, in our opinion, committed with the intention of

causing such bodily injury as the offender knew to be likely to cause death, or with the intention of causing bodily injury to him, which bodily injury would be sufficient, in the ordinary course of nature, to cause death.

The prisoner, we think, intended to cause injury to the thief whom he had apprehended, by way of punishment, as well as to set a mark on him for the future. In this view, he should have been found guilty under the latter part of Section 304, as we hold the opinion that the prisoner, at worst, did the act with the knowledge that it was likely to cause death, in the emaciated condition of the thief, but without any intention to cause his death. We alter the conviction to one under the latter part of Section 304, and reduce the sentence to one of 7 years' transportation.

Norman, J.—I concur in thinking that the offence is not murder.

The evidence appears to show that the prisoner did not intend to cause the death of the deceased, or intend to inflict any such bodily injury as would be sufficient, in the ordinary course of nature, to cause death.

Nor do I think that the prisoner knew that the act was so imminently dangerous that it would, in all probability, cause death, or such bodily injury as was likely to cause death.

It seems to me that he meant to brand the deceased as a thief to scar and burn his skin so as to punish and torture him, and that such injuries, extensive superficial burns, were likely to cause death. Though the prisoner did not know that, or intend to cause death, I think the offence comes within the definition in Section 299, not of Section 300. The conviction should be under Section 304, and I concur in reducing the sentence to seven years' transportation.

The 8th April 1867.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Cheating—False Personation.

Queen *versus* Dabee Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of buying a female minor under the age of 16 years for unlawful and immoral purposes.

Where two girls were bought by the prisoners on speculation, taken to a foreign and distant district, palmed off as women of a much higher caste than they really were, and married to two Rajpoots, after receiving the usual bonus—HELD that the prisoners could not be convicted under Section 373 of the Penal Code, but of cheating and false personation under Sections 415 and 416.

Seton-Karr, J.—I HAVE read all the evidence from the peculiar nature of the case, and I have no doubt that all the four prisoners were, more or less, implicated in the offence of taking away from the District of Sarun two girls under 16 years of age, and in marrying them to two Rajpoots, residents of Oude, under the false allegation that the girls were Rajpootnies, whereas the one was a Koormi, and the other was a Dome. The prisoners have really no defence at all, and nothing worth any notice is mentioned in the petition of appeal. But I think the prisoners ought to have been convicted of cheating (Section 415) as they certainly all, more or less, "dishonestly concealed facts," and intentionally induced the persons whom they deceived, to do what those persons would not have done without such deception; and they might have been convicted of cheating by personation under Section 416.

I entertain grave doubts whether the conviction, as it stands, can be sustained under Section 373.

That Section contemplates the prostitution of girls, minors, or their being employed or used for any unlawful and immoral purpose. But the purpose for which they were sold in this case was to give them, under false colors, a higher caste and higher social status than they were entitled to.

No doubt, the conduct of the prisoners was criminal, and it deserves punishment; but I would have convicted them of cheating,

and of cheating by personation (Sections 415 and 416) and of abetment of the same. I think that, in the words of the law (Section 416), they represented, or aided in representing, that the girls were persons other than they really were, and the prisoners have really pleaded to all the facts necessary to constitute offences under Sections 415 and 416. I do not think the immorality of their acts was that contemplated by Section 373.

In this view I would, under Section 426 of the Criminal Procedure Code, substitute a conviction under Sections 415 and 416 and 419 and under Section 109, for the sentences passed under Sections 373 and 109, and, as a necessary consequence, reduce the sentences of prisoners Nos. 1 and 3 to three years' rigorous imprisonment, which is the maximum that can be awarded under Section 419. The sentences of the others may stand.

Kemp, J.—The facts of this case have been most correctly stated by my learned colleague. It appears to me very clear that, on the evidence, the prisoners cannot be convicted under Section 373 of the Indian Penal Code. The two girls, though bought, were not purchased with the "intent" that they were to be employed or used for the purpose of prostitution, or for any unlawful and immoral purpose. They were bought on speculation, taken to a foreign and distant district, palmed off as women of a much higher caste than they really were, and married to two Rajpoots, after receiving the usual "pon" or bonus. The two Rajpoots, who married the two girls, on the faith that they were marrying women of their own caste and status, were fraudulently and dishonestly induced by deception to do a thing (that is to say, to marry women of a caste wholly prohibited to them) which, but for the deception practised upon them by the prisoners, they would have omitted to do.

The act was one clearly likely to cause damage to the reputation of the two Rajpoots, and comes under the description of cheating by personation, Sections 418 and 419—*see* also the explanation of Section 415, *viz.*, "the dishonest concealment of a fact is a deception within the meaning of this Section."

The sentences proposed by Mr. Justice Seton-Karr have my entire concurrence.

The 8th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Statement of prisoner overheard by Policeman.

Criminal Jurisdiction.

Referred under Circular Order No. 17, dated the 17th June 1863.

Queen *versus* Sageena and another.

The evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity, and uninfluenced by it, is not legally inadmissible.

Glover, J.—We do not think that the Police Officer's statement is inadmissible in evidence, although under the circumstances we should probably have attached little or no weight to it.

The woman's statement was not a confession made to a Police Officer under Section 148, Code of Criminal Procedure, nor a confession made to others whilst in the custody of a Police Officer, as provided for in Section 149 of the same Code.

The policeman, overhearing the women's conversation, appears to us to be in the position of an ordinary witness, and competent to depose to what he heard; the women at the time being in another room, ignorant of the policeman's vicinity, and uninfluenced by it.

The 8th April 1867.

Present:

The Hon'ble J. P. Norman, *Judge.*

Kidnapping.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of kidnapping a girl.

Queen *versus* Isree Panday and others.

Where a girl of 11 years of age was taken out of the custody of her lawful guardian by the first prisoner and offered for sale in marriage to another, and the second prisoner illegally concealed her, the conviction of the former was upheld under Section 363 of the Penal Code only, and of the latter under Section 368 only, while the separate conviction of both under Section 366 was quashed.

THE first prisoner has been convicted of kidnapping a girl, named Deodatea, a Rajputni, aged 11 years, by taking her out of the custody of her lawful guardian, *viz.*, her mother.

The facts as proved by the clearest evidence are simply these: The prisoner is a Brahmin, whom the child knew well, as she

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was in the constant habit of going to his house to see his wife. In June last he asked the child to go with him to pick his mangoes. She went. He then told her that, if she would go and see the tazzia, he would give her some rice and pice. She refused. He took her by the hand, and led her away to Jugdespore, to the house of Bissessur Tewary (since dead). He said I have brought this girl for your son. He agreed to sell her for 20 rupees. Bissessur paid 5 rupees, and agreed to pay the remainder in 15 or 16 days. The intention was to marry the girl to the son of Bissessur. The girl remained two days at the house of Bissessur. She says that, as she cried, Bissessur said he would cause her to be taken home. Bissessur then took her to the house of the second prisoner, who is said to be a relative of Bissessur. There she remained a month. The second prisoner then took her to the house of a female relative of his own, where she stayed 4 or 5 days, and thence from one place to another, till she was found by the police in a house in Sherepore, in Ghazeepore, about the 5th of September.

The Judge says he convicts the first prisoner of an offence under Sections 363 and 366. As only one offence has been committed, the conviction should have taken place under one Section only.

There appears to me to have been evidence to justify a conviction of the first prisoner under either Section. The sentence is four years' imprisonment. I think that the conviction may stand as a conviction under Section 363, and be quashed so far as it is a conviction under Section 366.

I have read the petition of appeal, and gone through the evidence as to the second prisoner. For reasons similar to those mentioned as to the other, the conviction must stand as a conviction under Section 368.

The appeal is dismissed.

The 15th April 1867.

Present :

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Theft—Claim of right.

Referred under Section 434, Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863.

Queen *versus* Ram Churn Singh.

A person acting under a claim of right (however ill-founded such claim may be) is not guilty of theft by asserting it.

Markby, J.—In this case it is quite clear that the Deputy Magistrate has taken a wrong view of the law. Assuming the account of the complainant and his witnesses to be correct, and that the property in the 23 maunds of cotton had completely passed to the complainant, so that he had a right to place it in his cart and remove it, still the circumstances of the case conclusively shew that the defendant, in re-taking possession of the cotton, did not intend to take it dishonestly within the meaning of Section 378. He was clearly acting under a claim of right, and, however ill-founded that claim might be, still the defendant is not guilty of the crime of theft by asserting it.

The conviction is, therefore, quashed, and the fine, if paid, must be returned to the defendant.

The 15th April 1867.

Present :

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Theft—Security.

Referred under Section 434, Criminal Procedure Code, and Circular Order No. 18, dated 15th July 1863.

Queen *versus* Kunee Sonar.

No security can be legally demanded from persons convicted of theft.

Markby, J.—We concur with the Judicial Commissioner. Section 295, Code of Criminal Procedure, does not apply to the case of pri-

soners who have been convicted and punished for theft, and who cannot, therefore, be said to be "lurking within the Magistrate's jurisdiction." Section 280, which does empower Magistrates to take penal recognizance after conviction from accused parties, refers to a totally different class of cases, *i. e.*, breaches of the peace.

There is, therefore, no Section which authorizes the demand of security from persons convicted of the crime of which the persons, who are the subject of reference, have been convicted.

The order for security is quashed.

The 18th April 1867.

Present :

The Hon'ble F. A. Glover, *Judge.*

Unlawful assembly.

Queen *versus* Dushruth Roy, No. 1, and others.

Committed by the Magistrate, and tried by the Sessions Judge of Sarun, on a charge of being members of an unlawful assembly in the prosecution of the common object for which grievous hurt was committed.

Where persons join an unlawful assembly for the purpose of committing an assault, and, instead of preventing those armed from using their weapons, encourage them to do so, they are in the same position as those members of the unlawful assembly who struck the blows.

THE evidence in this case proves that all the prisoners were present at the attack made upon Ram Nehora Panday and Priteeoraj; and, considering that all the prisoners went together, were all armed, and all had the same reasons for disliking the new landholder's servants, I think it may be fairly presumed that their common object in going was to assault those persons. That the prisoners Nos. 3 to 6, who do not appear to have taken any active part in the attack, are less culpable than the prisoners Nos. 1 and 2, is true; but they accompanied these prisoners seeing that they were armed with swords, and, so far from attempting to prevent the use of these weapons, they appear to have encouraged it by shouting "mar." They came, therefore, under Section 149 of the Penal Code, and, knowing that an offence was likely to be committed, they, as members of the illegal assembly, were in the same position as those members of it who struck the actual blows.

I see no reason to interfere. The Sessions Judge has, I observe, very properly awarded a less measure of punishment to the prisoners Nos. 3, 4, 5, and 6 than to prisoners Nos. 1 and 2.

The 27th April 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contempt—Absconded witness—Service of Summons.

Miscellaneous Case.

Queen *versus* Hurynath Chowdry.

The proclamation issuable under Section 159, Act VIII. of 1859, cannot be legally affixed to the *mal* cutcherry of a defaulting witness. Before the provisions of that Section can come into play, personal service of summons must be attempted. In the absence of process of legal service, the Magistrate's order of imprisonment for contempt, under Section 174 of the Penal Code and Section 168 of the Code of Criminal Procedure, was quashed.

Glover, J.—WE are of opinion that there was no legal service in this case; and we think also that the question as to whether there had been or not a sufficient service on the appellant was a question of law which the Judge should have taken up and disposed of.

There is no proof whatever on the record that any attempt was made to serve summonses personally as required by Sections 155 and 156 of the Civil Procedure Code; and before the provisions of Section 159 of the same Code could come into play, personal service must have been attempted.

But, even were it shown that an unsuccessful attempt had been made to carry out Sections 155 and 156, it is clear to us that the proclamation issuable under Section 159 could not have been legally affixed to the "*mal*" cutcherry of a defaulting witness. A place used for making temporary collections of rent, and abandoned as soon as the collection season was over.

The appellant's house was in the District of Furreedpore, and there was no proof that he was, at the time of the issue of proclamation, residing at his mal cutcherry.

We think, therefore, that, as there was no legal service on the appellant by the Civil Court, the charge made in accordance with the provisions of Section 168 of the Criminal Procedure Code, and punishable under Section 174 of the Penal Code, could not be sustained, and that the Magistrate's order, condemning the appellant to one month's imprisonment for contempt, should be quashed.

The 27th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Nuisances—Recognizances.

Referred under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen *versus* Mahomed Afzul and another.

A Magistrate ought not to direct a party to restore road and canal to their former state, and to show ause why he should not enter into recognizance to eep the peace, without hearing such party.

Kemp, J.—It does not appear under what ection of the Code of Criminal Procedure he Magistrate proceeded in this case. He as left the district, and his successor now uggests that the order was passed under ection 63. If that be the case, the Maistrate was doubtless competent to enjoin ny person not to repeat or continue a ublic nuisance; and the cutting of a public oad, and obstructing the channel of a avigable and public canal, are acts which ould come under the definition of public uisances. The informality in the proceedngs of the Magistrate consists in his having irected the opposite party to restore the oad and canal in their former state within 4 hours, and to show cause why they should ot enter into recognizances to keep the eace, without hearing that party, either in erson, or by duly constituted attorney.

The papers are, therefore, returned with irections to the Magistrate to proceed egally and in due form.

The 27th April 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

False Charge—False Evidence.

Committed by the Magistrate, and tried by the Sessions Judge of Purneah, on a charge of intentionally giving false evidence.

Queen *versus* Abdool Azeez.

The offence of making a false charge, and the offence of intentionally giving false evidence, are not cognate offences, or parts of the same offence, but may be punished separately.

Kemp, J.—The prisoner has been convicted under Sections 211 and 193 of the Indian Penal Code, and has been sentenced under both charges to six months' rigorous imprisonment on each charge.

It is contended, first, that, under Section 71, Penal Code, the prisoner can only be convicted of one offence, and that the punishment being cumulative, the sentence must be modified. The pleader has also addressed the Court, commenting upon the evidence as not sufficient to establish the guilt of the prisoner.

The offence of making a false charge, and the offence of intentionally giving false evidence in any stage of a judicial proceeding, are not cognate offences, nor are they parts of one and the same offence.

The Section quoted by the pleader does not apply, and the conviction is legal. The evidence is, in our opinion, sufficient for conviction, and the appeal is rejected.

The 29th April 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Adultery—Admission.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of adultery.

Queen *versus* Kallychurn Potial.

Case of a person convicted of adultery on his own admission coupled with the evidence.

As the offence of which the prisoner has been convicted is adultery, there would be an appeal even on the facts and merits of the case, which has been tried by a Jury.

It seems to me that the defendant must be convicted on his own admission coupled with the evidence. He admitted to the Magistrate that he went off with Chundra

Khola, though he says that she enticed him away; and he then further admitted that they were more than a month together in various places.

This admission, coupled with the evidence of the witnesses to the effect that the two lived together as man and wife, leads to the inevitable presumption that acts of adultery must have been committed. It is true that the woman Chundra Khola does not say as much in the Sessions as she had said before the Magistrate; but she admits going off with the prisoner; and other witnesses prove cohabitation as man and wife under feigned names for a considerable period. The defence in the Sessions is a simple denial of the abduction.

The case is aggravated by the relationship between the prisoner and the complainant. I shall not interfere.

The appeal is rejected.

The 29th April 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Sections 148, 149, and 324, Penal Code—Rioting—Unlawful assembly—Hurt.

Miscellaneous Case.

Queen *versus* Callachand and others.

The offence of rioting armed with deadly weapons and stabbing a person on whose premises the riot takes place are distinct offences, and punishable as separate offences under Sections 148, 149, and 324 of the Penal Code, Section 149 being read as a proviso to Section 148.

Norman, J.—We are of opinion that the offence of rioting armed with deadly weapons, and stabbing a person on whose premises the riot takes place, are distinct offences, and punishable as separate offences under Sections 148, 149, and 324.

The 149th Section may, with reference to such a case as the present, be read as if it came by way of proviso after Section 148.

There is no ground for interference with the sentence of the Magistrate.

The 29th April 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Murder—Proof of motive or previous ill-will.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of culpable homicide not amounting to murder.

Queen *versus* Jaichand Mundle and others.

Proof of motive or previous ill-will is not necessary to sustain a conviction for murder in a case where a person is coolly and barbarously put to death.

This is a peculiar case, because no motive is proved for the murder of Bishonath by the three prisoners, though one was once hinted at in the course of the trial.

The Sessions Judge was quite right in telling the Jury that the case really turned on the credit to be given to the evidence of the two witnesses, Hari and Bechoo. If the Jury believed that evidence, coupled with the evidence that the deceased was last seen alive in the company of Ram Coomar, there was sufficient to warrant a verdict of guilty.

But I do not understand why the Sessions Judge told the Jury that the mere want or failure of proved ill-will at once disposed of the higher charge of murder, or why the Jury found on the lesser charge, and acquitted of the heaviest offence known to the law. Granting that no motive was proved, if the murder was deliberately perpetrated by three men on one defenceless person, the murderers beating and strangling him, and then carrying away the body to a deep river, in which they carefully sunk it with a weight attached to it.

The Sessions Judge should have told the Jury that, if they believed the evidence of the main witnesses, they should not hesitate to convict the prisoners of culpable homicide amounting to murder, for I do not see any circumstance to take it out of that category. I should be sorry to say that, in *every case* where a fellow-creature is barbarously and coolly put to death, murder could not be sustained, unless a motive or previous ill-will were proved. As it is, I have only to reject the appeal.

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The 30th April 1867.

Present:

The Hon'ble C. P. Hobhouse, *Judge.*

Abetment—Grievous Hurt.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of abetting the commission of voluntarily causing grievous hurt.

Queen *versus* Doorgessur Surmah.

Where *A* ordered *B* and *C* to seize and forcibly take) in the contemplation of an assault upon D, and *D* 'as so beaten and tortured as to have died in conse- uence—HELD that *A* was guilty at least of abetting ie commission of voluntarily causing grievous hurt.

IN this case the facts which appear on the ecord, so far as they affect the appellant Doorgessur Surmah, are these.

The appellant is a *namghur* or local authority in the village of Pandao in the District of Assam; and, on the 19th of Assin ast, he directed two certain persons, accused nd convicted with him, to seize and take a ertain woman, since deceased, Goonai, to he house of a certain other woman, apparently the zemindar of the village, to answer o a charge of being with child, and, in so irecting the above persons thus to seize and ake Goonai, appellant was overheard o say that they would have to beat her, or itherwise she would not confess to her ffence.

According to appellant's directions, the two ersons above mentioned did seize the oman Goonai, and did forcibly take her to he house of the zemindar, and there she as so beaten and tortured that she died.

Whereupon appellant was charged, *first*, ith abetting the culpable homicide not mounting to murder of the woman oonai, and, *secondly*, with abetting the oluntarily causing of grievous hurt to the aid woman; and was, under the direction of ie Judge (who charged the Jury, if they elieved the evidence, to find appellant guilty f one or other of the above charges), found uilty of the second offence, and was sentenced by the Judge to five years' rigorous imrisonment.

These facts being so, pleader for appellant contends that the finding of the Jury nd sentence of the Judge are based upon n error in law, inasmuch as his client ever intended that a grievous hurt should oluntarily be caused to the deceased woman, nd that, therefore, he could not be said to ave abetted such hurt.

In this case, however, the law and the facts are equally against appellant; for it is clear upon the facts that appellant ordered, *i. e.*, in the words of the law "instigated," two other persons to seize and forcibly take the deceased in the contemplation of an assault upon her; and it is laid down distinctly in Explanation 2, Section 107, Indian Penal Code, that "whoever, prior to the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates it, is said to aid the doing of it."

Here, then, I find that appellant not only, prior to the commission of an act, did a thing which facilitated that act, and was, therefore, an abettor within the Statute, but that he even went further, and contemplated, to some extent at least, the commission of that very offence by which the death of the deceased was eventually brought about.

Not only, then, has appellant no ground of appeal, but upon the evidence I could have wished that the Judge had summed up more decisively, and that the Jury had found appellant guilty of the major offence with which he was charged, and that the sentence of the Judge had been heavier.

The 30th April 1867.

Present:

The Hon'ble C. P. Hobhouse, *Judge.*

Unlawful Assembly—Dacoity—Admission.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dacoity, or assembling for the purpose of committing dacoity.

Queen *versus* Kendra Kamar and others.

Case of an unlawful assembly, the members of which were held guilty of an offence under Section 402 of the Penal Code on their own admission that they not only knew that the assembly was an assembly for the purpose of committing dacoity, but also that all the persons (including themselves) constituting the assembly lived on the proceeds of dacoity, and had no other means of living.

THE facts of this case, as proved in evidence on the record, are these:—

The Police had received information that a gang of dacoits, of whom one of the leaders was said to be the prisoner Kendra, was assembled in temporary huts in a certain jungle for the purpose of committing dacoity; and that, in the neighbourhood of this jungle, several dacoities had been committed—so many, indeed, that the villagers were in terror of the place. Thereupon the Police set informers to obtain information, and these informers had proceeded so far as to have ascertained and informed the Police of the whereabouts of the supposed gang.

Meantime, a dacoity was committed in the house of the prosecutor, and at the time of that dacoity he, and at least one other person, identified the man Kendra as amongst the dacoits, and this identification seems to be placed beyond a doubt by the fact that these two had known Kendra well before; that they had plenty of time and opportunity for recognizing him on this occasion; that they were under no fear nor consequent confusion of mind; and that they at once mentioned to others the fact of the recognition.

Immediately after the dacoity, certain of the witnesses followed on the traces of the dacoits which would seem to have been sufficiently plain, marked the dacoits down in the huts of the jungle above referred to, and gave immediate information to the Police.

The Police at once came down in force, surrounded the temporary settlement of huts, arrested all the prisoners, and searched the huts, and found in them a quantity of property, some capable of easy identification, and all identified as the property of the prosecutor stolen at the dacoity.

Out of this occurrence arose the charge of dacoity against Kendra, and of assembling for the purpose of committing dacoity, against him and against the other prisoners.

The cases against the prisoners Kendra, Koka, Bhaima, and Sreemutty Josadah, admit of no doubt. Kendra was identified at the dacoity, and in his house was found property stolen thereat; and the others distinctly admitted that they formed a part of a number, more than five, of persons assembled to commit dacoity.

The admissions of these prisoners would not, of course, be evidence against any persons other than themselves; but there is ample independent evidence to shew that the assembly in the jungle was an assembly of persons for the purpose of committing dacoity.

If then these persons so assembled were assembled for the purpose of committing dacoity, it would follow that others assembled with them were, when it was shewn that they were aware of the purpose of the assembly, assembled for that purpose.

Now, in this particular case, all the prisoners admit, and these admissions are evidence against them, that they not only knew that the assembly was an assembly for the purpose of committing dacoity, but also that all the persons, including themselves constituting the assembly, lived on the proceeds of dacoity, and had no other means of living.

Reading, therefore, Section 402 with Section 142 of the Indian Penal Code together, I concur with the Judge below that the prisoners were guilty of an offence within the meaning of Section 402; and, as I think that the respective sentences are appropriate, I dismiss the appeal.

The 4th May 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Kidnapping.

Queen *versus* Mussamut Oozeerun.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of kidnapping.

An enticing away of a child playing on a public road is kidnapping from lawful guardianship.

THERE is no ground of appeal in this case. The Jury were directed to find on the evidence whether the prisoner enticed away the child from lawful guardianship, and they found that she did.

There was evidence in the record to support this finding, and the Jury chose to believe it; the question was one of fact.

On the question of law, the Sessions Judge's explanation, that a child playing about on a public road is still under the lawful guardianship of its parent or relative living close by, as the case may be, was quite correct.

The appeal is dismissed.

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* *Erratum in Original Edition.*

The 6th May 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Section 223, Penal Code—Public Servants—Convict Warders.

Referred Jurisdiction.

Queen *versus* Kallachand Moitree.

Convict warders are "public servants" within the meaning of Section 223 of the Penal Code.

Seton-Karr, J.—We think that the order of the Sessions Judge was wrong, and that "convict warders" are "public servants" within the meaning of Section 223 of the Penal Code. Whatever may have been their position formerly, there is no question that under the new Jail Rules (403-A) they are empowered to keep persons in confinement, and they are none the less so empowered because they are themselves in confinement. That being so, they fall under the definition of public servants to be found in Section 21, Clause 7, of the Penal Code.

As the effect of the Judge's order has been to acquit the prisoner, we do not reverse that order, but merely intimate our opinion that it was wrong.

The 6th May 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Section 94, Registration Act, XX. of 1866—Abetment of false personation.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of making a false statement in a proceeding under Act XX. of 1866, and false personation.

Queen *versus* Soleemooddeen and others.

Three persons, who put up a fourth to personate one whose authority was required to complete a conveyance of immoveable property, were held guilty under Section 94 of the Registration Act, XX. of 1866.

This is an appeal against a conviction of three persons under Sections 91 and 93 of the Registration Act, XX. of 1866.

The conviction has taken place by a Jury, and the appeal is therefore limited to a point of law. The pleader for the appellants lays stress mainly on the wording of Section 93, and urges that none of the prisoners can be correctly said to have "falsely personated another." The evidence discloses that some one was put up before an Ameen, who was acting under the law in question, to personate one Nussurunnissa, whose authority was required to complete a certain conveyance of some immoveable property, and that the three prisoners were the persons who got up the false personation. Strictly and technically speaking, then, the prisoners would not be guilty under Section 93, as they did not falsely personate any one themselves. But they would, all of them, be guilty under Section 94, which provides a penalty of imprisonment for seven years for abetment of any offences under this Act and within the meaning of the Indian Penal Code.

There can be no doubt that, from the indictment, the prisoners knew that they would have to meet a charge of getting up some one else to personate Nussurunnissa, and that they consequently have had every opportunity of pleading to, and of meeting and rebutting, all the facts requisite to constitute an offence punishable under Section 94.

In this state of things, Section 426 of the Criminal Procedure Code will come in; and, as the accused have not been sentenced to a larger amount of punishment than might have been awarded under Section 94, and as they have not been prejudiced by the mere technical error that has occurred, there is no reason to interfere or to order a new trial. Under Section 21, Criminal Procedure Code, trials under any local or special law would be conducted under the Criminal Procedure Code.

The offence is one deliberately perpetrated, and it requires a severe sentence.

The appeals are rejected.

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* *Erratum in Original Edition.*

The 6th May 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Waging war with friendly Power—Pardon—Mitigation of punishment.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of waging war against the Raja of Moneepore, an Asiatic power in alliance with the Queen.

Queen *versus* Sajowpa.

Application for pardon or mitigation of punishment for a political offence (*e. g.*, for waging war against a power in alliance with the Queen) should be made to the Executive Government.

THE petitioner has pleaded guilty to the offence of waging war against a power in alliance with the Queen (Section 125, Penal Code).

Nothing is stated in the petition of appeal, and the appellant has had a fair trial. If, for a political offence, he desires pardon or mitigation of punishment, he should apply to the Executive Government which, in such a case, can best say whether his offence has been too severely punished, and whether political considerations will admit of the exercise of the prerogative of mercy vested in the representative of the Queen.

I decline to interfere, there being no ground on which, as a judicial tribunal, I could properly interfere in such a case.

Appeal rejected.

The 7th May 1867.

Present :

The Hon'ble F. A. Glover and C. P. Hobhouse *Judges.*

Murder.

Criminal Referred Jurisdiction.

Queen *versus* Bishendharee Kahar.

Curious case of murder where a father sacrifices his son, because wealth had not accompanied its birth, and afterwards cut his own throat as a protest against the deity's injustice.

Glover, J.—THIS is a very peculiar case of murder. Bishendharee, the prisoner, was found on the morning of the 17th January last sitting at the mouth of a cavern which contained a locally celebrated shrine of Mahadeb, with his throat partially cut.

Information of his having been seen there was conveyed to the chowkeedar of Buckhola (witness No. 1) the evening before, by two travelling pilgrims, who had passed by the place, had seen the man sitting wounded in the manner described, and had been told by him that he had sacrificed his son to Mahadeb within the cavern. These men were wandering pilgrims, and their whereabouts has not been traced ; but, acting on their information, the chowkeedar proceeded at once to the nearest Police-station. He arrived there some time after midnight, and the next morning, accompanied by a head constable, policemen, and three other persons whom the party appear to have fallen in with on the road, started for the spot. They reached the place, a wild uninhabited spot, in the midst of a dense jungle, about 9 A.M., and found the prisoner Bishendharee still sitting there. He was badly wounded in the throat, and spoke with difficulty, so much so that the constable suggested that if he could write, it would be better if he made his statement in that way. The prisoner complied, and wrote in Hindee a paper marked A in the record, in which amongst other things, he declared that he had sacrificed his son to the god, and that the body was in the shrine. A bloody knife was lying close by Bishendharee, which he was unwilling to give up to the Police, and which eventually had to be forced from him. The prisoner also endeavoured to prevent the constable from searching the cavern, alleging that, if he did so, the benefit of his sacrifice

* *Erratum in Original Edition.*

would be lost, and that, if left alone, his son would come to life again in three days.

The Police lighted torches, and proceeded inside the cavern, leaving Bishendharee in custody outside. The shrine was situated low down in the mountain more than 1,000 yards from the entrance, and on a stone which jutted out from beneath the figure of the god was found the prisoner's little son, a boy of some 5 years, with his throat cut, and quite dead.

The above facts are clearly proved by independent testimony, as well as by the depositions of the Police.

At the entrance to the cavern were posted up two papers in Hindee, proved to be in the plaintiff's hand-writing, containing wild rambling complaints against his god, and statements to the same effect generally as those written in the paper A; in one of them he desired that his wife might be informed of what had happened.

The contents of the paper A are to the following effect: "I, Bishendharee, made "a vow, no one beat me. I sacrificed my "own life voluntarily; my son will come to "life on Tuesday; my son is on the Mahadeo. "If you take him down, it will be a sin to "you. I made a vow, in case a son should "be born to me, to sacrifice Ganges water, "and do pooja. A son was born, but no "wealth came; *for this reason I sacrificed "my son Ram Topsain.* I cut my son's "throat with this knife, and then my own. "You go and tell this to your master, the "Magistrate. If he does not believe your "statement, to save yourselves, shew him "this. If you remove me, I shall not "survive. I sacrificed him on Wednesday, "four days ago—it was past noon." The child's body and the prisoner were taken into Sasseram, where the latter was some time under medical treatment in Hospital.

On being brought before the Magistrate, he denied having written the paper marked A, and repudiated its contents. He asserted that, whilst at the cavern, he had been set upon during his sleep by five men, *viz.*, Gonesham Geer, the malik of his village, Neamut, Sirdar, and two others, that these men murdered his child, and very nearly succeeded in murdering him also by cutting his throat.

He called no witnesses to support this defence; but he conducted his case with considerable acuteness, and cross-examined the prosecution-witnesses shrewdly and well, without, however, being able to elicit anything favorable to his plea that the persons above named were at enmity with him, and had attacked him out of revenge.

The native doctor of Sasseram, however, did depose that the wound on the prisoner's throat was not, in his opinion, self-inflicted. He gave reasons for so thinking, the chief of which were that the cut was too uniform in depth, and too even, and that the blade of the knife, which was only 3 inches long, could not have made a cut of 4 inches long.

The Civil Surgeon of Arrah, who saw the prisoner afterwards when the wound was nearly healed, was not able to give a positive opinion, but considered that the appearance of the man's throat was not inconsistent with the hypothesis of attempted suicide.

Now, we see no reason whatever to doubt the credibility of the witnesses who saw the paper A written by the prisoner, and so much of the deposition of the head constable as relates to the discovery of the child's body in consequence of the information supplied by the prisoner in that document is admissible evidence, and both together prove that Bishendharee confessed to having sacrificed his child to Mahadeo.

This evidence is corroborated by independent proof that the paper A is in the prisoner's hand-writing, and that the knife which was found on the chowkhut of the cavern covered with blood belongs to him.

We consider it proved that Bishendharee killed his child.

The question remains whether there is any reason why he should not be convicted of the murder in consequence of his being at the time incapable of discerning between right and wrong, or of knowing that what he did was contrary to law.

Now, not only does the prisoner himself strongly deny the fact of his ever having been insane, but all the evidence points the same way. The witnesses, men of his own village, and in two cases connected with him by family-ties, say indeed that he was a confirmed drunkard, and, when in liquor, behaved himself outrageously, but not one, not even the prisoner's wife, asserts that he was ever out of his mind.

The prisoner's conduct at the time of his discovery by the police is inconsistent with the idea of insanity. He had sacrificed his son (he said) because wealth had not accompanied its birth, and had cut his own throat as a protest against his deity's injustice, and

* *Erratum in Original Edition.*

he advised the police to make the affair clear to the Magistrate, and to save themselves from any possible blame by shewing him what had been written.

In short, although there may have been some degree of religious enthusiasm or even hallucination, there is nothing to show that Bishen killed his child whilst in a state of mind that incapacitated him from knowing right from wrong. It seems to us rather that he did expect to receive some worldly benefit from the sacrifice of his son, and that wealth would come to him, and his dead child be restored to life again together.

A reason (though not a strong one) for supposing Bishen insane might have been found in the meaningless atrocity of the act, had not the prisoner's own explanation of his conduct solved the difficulty, and shewn that there *was* a meaning in his proceedings.

We convict the prisoner of the murder; but, taking all the circumstances into consideration, think that the ends of justice will be sufficiently met by a sentence of transportation for life.

The 7th May 1867.

Present :

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and F. A. Glover, *Judges.*

Perjury.

Queen *versus* Bishoo Bewa and Pipree Bewa.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of false evidence.

Case of perjury by females in which the majority of the Court refused to reduce the punishment.

Glover, J.—THE guilt of both these prisoners appears to me fully established, and the only question for consideration is the propriety of the sentence.

The Assessors recommended the prisoners to mercy on the ground that they were women, and had just suffered a severe domestic loss.

I do not think that their behaviour throughout these proceedings shows them to have been much affected by the death of Ali, but on the other ground, *viz.*, that the prisoners are ignorant women easily intimidated or led by the village authorities, I think it but fair to treat them somewhat more leniently than the generality of male offenders.

I do not forget their conduct in endeavouring to make the most of the Naib's difficulty. Still the sentences passed, 5 years' and 3 years' rigorous imprisonment appear to me disproportionate to the offence and, taking the recommendation of the Assessors into consideration, would reduce them to 3 years in case of Pipree, and to one year in the case of Bishoo. The imprisonment in both cases to be rigorous.

Seton-Karr, J.—I regret that I am unable to concur in the propriety of reducing the punishment of these two prisoners. I cannot take on myself what I call a serious responsibility in direct opposition to the reasons given by the Judge for not acting on the recommendation of the Assessors to mercy, which reasons I consider to be good and sound, and to be justified by the whole case.

It is clear that the two women were very little affected by the death of the chowkidar, who was the husband of one of them. They were quite ready to obstruct and paralyse justice on condition of receiving a reward. In spite of their suspicions against the Naib Ram Gobind Sandial as the instigator of the murder, they were both of them ready to ask for 100 Rs. and a beegah of lakheraj land as the price of their silence.

The Judge says that the prisoners by their demeanor in Court "show that they "know perfectly well what they are about "and that they could not have been persuaded into acting as they have done, unless they had been most ready to adopt "the course indicated to them; they acted "either from motives of cupidity or perverse and criminal indifference, and must "bear the consequences of their conduct."

I am always ready to listen to recommendations for mercy, or to lessen the punishment for false evidence, unhappily so common in our Courts, when the same is delivered partly from helplessness or ignorance, or from no very bad and corrupt motive, but merely from sheer indifference to truth. But here the perjury was clearly deliberate, and was committed from very bad and corrupt motives.

I would allow both the sentences to stand. I think the Judge in this case is much more to be trusted than the Assessors.

The case must go to a third Judge.

Kemp, J.—I concur with Mr. Justice Seton-Karr. There is, in my opinion, nothing in the case of these prisoners making them fit objects for mitigation of punishment. They seem to me to have acted throughout the matter with utter indifference to their domestic bereavement and with corrupt motives.

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* *Erratum in Original Edition.*

The 7th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Culpable Homicide not amounting to murder—Unlawful Assembly—Riot.

Queen *versus* Mana Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of being members of an unlawful assembly in prosecution of the common object of which death was the result.

In a case of riot in which a man was killed, the whole of the members of the unlawful assembly, as well the victorious as the worsted, were held equally guilty of culpable homicide not amounting to murder.

Kemp, J.—In this appeal there are two parties before this Court—the villagers of Aone on one side, and those of Deonee on the other; and the cause of the dispute was the right of user in a water-course—a fruitful cause of affrays in the Behar district. It is clear that the Deonee villagers erected a dam, and thereby obstructed the free passage of the water from the river Jumna.

It is said for the Aone party that, ignorant of the fact of the Deonee villagers being collected at the bund, they went for the purpose of removing the obstruction and restoring the natural flow of the water, but his hypothesis is entirely inconsistent with their acts as well as the evidence. The large number of the party, said to be one hundred, the being armed with heavy sticks and gorassas, a description of battle-axe of a deadly character, shews that they went anticipating a fight, and with the intention, by means of criminal force, to enforce a supposed right at all risks. There was time to have had recourse to the protection of the public authorities; indeed, if they had not gone to the disputed bund, there would have been no riot at all.

A man has been killed in this riot, struck down by a blow on the head. The offence is culpable homicide not amounting to murder; and as the offence was committed in carrying out the common and unlawful object of the meeting, the whole of the members of that unlawful assemblage are liable. Taking this view of the case, we confirm the conviction and sentence passed by the Sessions Judge, and reject the appeal.

The Deonee party are equally to blame, though they were, simply from inequality in number, worsted in the fight. They were wrong in the first instance in damming up the water-course by show of force, and in opposing the Aone party, instead of retreating and seeking the protection of the law.

The appeals are rejected.

The 5th May 1867.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Duty of Judge (in weighing Evidence).

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity.

Queen *versus* Kalu Mal and others.

A Judge cannot properly weigh evidence, who starts with an assumption of the general bad character of the prisoners.

Markby, J.—In this case nine prisoners have been convicted of dacoity, and have appealed to this Court.

The evidence consists entirely of that of the witnesses to the identification, no property having been found in the possession of any of the prisoners.

The prosecutor identifies the prisoners Kalu Mal, Gody Mal, and Boro Nundo Mal, whom he knew before. He says he recognizes the other prisoners as having been present at the dacoity, but did not know them before.

Witness No. 2 identifies all the prisoners, and says he knew them all before.

Witness No. 3 identifies all the prisoners, and says he knew them all before.

Witness No. 4 identifies Kalu Mal, Chundu Mal, and Cheedam Roy, and says he knew them before.

There can be no doubt that there is here (if true) ample evidence against all the accused; and if, after having been duly weighed, it

has been credited by the Sessions Judge and the Assessors, the conviction ought to be affirmed.

But I observe that, throughout, the witnesses seem most improperly to have given evidence of the general bad character of the prisoners, and that the Sessions Judge commences his observations on the case by remarking that "this is a case of dacoity "committed by *professionals*, of whom a "father and his two sons besides other "relations are at length brought to justice. "The father *has been punished before*. "But the *notoriously bad character of "each and all of the prisoners* may be "estimated from the fact that Doorga Churn "refused to have their houses searched, as "such *notorious robbers* would never keep "stolen property in their houses."

It is true that the Sessions Judge proceeds afterwards to consider the evidence, and states generally that he is satisfied with the identification. But to recognize persons at night by torch-light and in the confusion of a struggle, as the witnesses in this case professed to do, though by no means impossible, is not easy, and the evidence, therefore, ought to have been very carefully weighed and sifted. I do not think that a Sessions Judge can possibly perform this part of his duty in a satisfactory manner, who starts with an assumption of the general bad character of the prisoners. Such a consideration was wholly irrelevant to the issue which the Sessions Judge had to try in this case, and, so far from relying on this evidence as he appears to have done, he ought never to have received it, or, if by inadvertence he received it, he ought to have made every effort to shut out the effect of it from his mind when weighing the evidence given to prove the participation of the prisoners in this particular crime.

For these reasons, I am not satisfied with the verdict, and think it ought to be reversed, and that the prisoners ought to be put again upon their trial.

I also think that the Police Officer who conducted the enquiry ought to have been called, and that he did entirely wrong in refraining at the instance of the prosecutor from searching the prisoners' houses. I consider the explanation of this omission to be highly unsatisfactory.

Jackson, J.—I concur in reversing this conviction, and ordering a new trial, which should be before new Assessors.

The 18th May 1867.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Evidence—Kidnapping—Sale of girl for purposes of prostitution.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of disposing of a minor girl for the purpose of prostitution, &c.

Queen *versus* Doorga Doss and others.

The evidence of a kidnapped girl, if thoroughly credible, is legally sufficient for a conviction for kidnapping.

There is nothing illegal in passing separate sentences for kidnapping and for selling for purposes of prostitution.

THESE prisoners have been tried by Jury. The charge to the Jury is a proper one. They were properly told that the evidence of the principal witness, the girl who was kidnapped, if thoroughly credible, was legally sufficient for conviction; but at the same time, they were cautioned to receive it after mature consideration and scrutiny. I see no reason for interfering, and confirm the conviction and sentence, rejecting the appeals.

With respect to the appeal of Noba Bagdee, I have to observe that there is nothing illegal in passing separate sentences for the offence of kidnapping and for the offence of selling for the purposes of prostitution, which are separate and distinct offences. It does not follow that, because a person entices away a minor under the age of 16 years out of the keeping of her lawful guardian, it is necessarily with the intention of selling her for the purposes of prostitution.

The 20th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Perjury—Land Disputes.

Criminal Revisional Jurisdiction.

Queen *versus* Buloram and another.

A Magistrate has no jurisdiction to try, but may commit to the Sessions, a case of perjury committed before him in the course of a proceeding taken under Section 318 of the Code of Criminal Procedure.

Glover, J.—WE are of opinion that the Magistrate acted without jurisdiction in this case, and that his order should be quashed.

* *Erratum in Original Edition.*

The question turns upon the meaning of ıe words "judicial proceeding;" and there an, we think, be no doubt that proceedings ıken under Section 318 of the Code of :riminal Procedure are "judicial proceedıgs" in the sense of Section 193 of the enal Code, even though they may possibly ot terminate in a judgment.

Now, this Section leaves the officer who olds such "judicial proceedings" no aparent option. The words are "*shall* be unished with imprisonment," &c., and the chedule to the Code of Criminal Procedure, hich refers to it, makes the Court of Session ıe only Court that can pass sentence, and a Iagistrate can do no more than hold the reliminary enquiry.

Section 181 of the Penal Code, under rhich the Magistrate has acted in this case, ppears to us to refer to matters which do ot come under the definition of judicial roceedings; and, although the wording of the ection is apparently large enough to admit alse statements of every description, its ction is restricted as regards those made nder certain circumstances by the succeedng Section 193. Were it not so, the Magisrate of a District acting under Section 181 night try all cases of perjury himself nstead of committing them, as he is no loubt bound to do, to the Sessions.

It appears to us, therefore, that, as the ppellants gave false evidence in the stage f a judicial proceeding, the provisions of Section 193 must, of necessity, be applied to he case, and that the Magistrate had no urisdiction. His orders are quashed, and he s directed, if he see fit, to commit the ffending parties to the Sessions Court.

The 20th May 1867.

Present:

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and C. P. Hobhouse, *Judges.*

Misdirection—Perjury.

Committed by the Magistrate of Furreedpore, and tried by the Sessions Judge of Dacca, on a charge of false evidence.

Queen *versus* Rammoni Sein and another.

Where *O* deposed that he and *R* were 4 days in company at *M*, and the Judge charged the Jury that, if they found that *R* was not in company with *O* during those days at *M*, but was at *S*, it did not matter where *O* was, because it was clear that he could not have been in company with *R* at *M*, and must therefore have given false evidence when he said that he was during those days in such company at *M*—HELD by the majority of the Court (Seton-Karr, J., dissenting) that there had been no misdirection.

Seton-Karr, J.—IN this case I have read all the evidence against the two prisoners who have been convicted of giving false evidence.

Against Rammoni Sein the conviction appears to me good. The Jury had to choose between two stories: one was a long story which he himself set up to the effect that he went to Mymensingh about the end of Bysakh, stayed there two or three days, and came back to Dacca. He stated, also, that he had paid a visit to Noakhally, but this was at the beginning of Bysakh.

The other was a story supported by witnesses who had full reason to know what they were talking about, to the effect that Rammoni was, during *all Joisto* and up to Asarh, at Noakhally, and that, therefore, he could not have been, at the end of Bysakh, at Mymensingh. Seeing that Mymensingh and Noakhally, as far as the District of Dacca is concerned, are at the two opposite poles, and that the evidence to both versions was so precise and distinct as to be incapable of reconciliation, the Jury, it seems to me, were rightly directed, and were left to credit whichever version they preferred. It is a natural and legitimate consequence of their opinion on the evidence that Rammoni had sworn falsely and deliberately to his presence at Mymensingh, Dacca, and Jaydebpore in the end of Bysakh, and on the 3rd and 2nd of Joisto.

But with regard to the other prisoner, Obhoy, the case seems different.

It is not said by any one that he went to Noakhally with Rammoni. It is said for the prosecution that he was not at Mymensingh for four days at the end of Bysakh. But it is not shewn where he was during those days.

The Judge was, it appears to me, wrong in telling the Jury that, though the evidence for the prosecution, that Obhoy was not at Mymensingh on those dates but at home, was not very positive, yet, "if you find it "proved that Rammoni was not at Soodaram "(Noakhally) at the time the two prisoners "stated they were here and in each other's "company, the defect of the evidence as to "where Obhoy actually was is immaterial."

Obhoy ought not to be convicted of false evidence for simply saying that he was at Mymensingh, *because* it is clearly proved that his companion was at Soodaram, the sudder station of Noakhally. I cannot think that his case ought in fairness to be treated as if it was so entirely bound up in, and connected with, the case of his fellow-prisoner, though Obhoy did certainly say in a

general way that he was in the company of Rammoni. The evidence to convict him should, moreover, leave no reasonable doubt that he was not, and could not have been, at Mymensingh at the time when he says he was; and that he wilfully and knowingly made a false statement in saying that he was there. Now, Obhoy merely said as regards the Mymensingh visit: "We arrived in Mymensingh in five or six days; we were four days in Mymensingh. I went to Gopal Doctor as *Umedwar*," &c. Now Gopal Doctor, witness No. 2, certainly says, "the prisoners Rammoni and Obhoy Chunder never went to my residence at Mymensingh. I never saw them there." This does not amount to more than one oath against another, and it is quite possible that the prisoner Obhoy may have gone to Gopal's house at Mymensingh without having seen him. Another witness for the prosecution, Juggobondho Sein, states that Obhoy Sein was at *home* part of those two months (Joisto and Assar), and sometimes *from* home. This is not inconsistent with a visit to Mymensingh. The Jury should have been charged on this prisoner's case *quite differently* from the case as against Rammoni Sein. I hold that he has been prejudiced by a misdirection from the Judge, and that there is substantially nothing but the oath of Gopal against him, while nothing was put to this witness in cross-examination to ascertain if Obhoy might not have gone to Mymensingh without the witness becoming aware of the fact. The other evidence for the prosecution either has no bearing on the guilt of this prisoner, or is somewhat favorable to him. Witness No. 6, Mohima Chunder Baroi, does say that the two prisoners never went to his house at Dacca at the end of Bysakh or beginning of Joisto; but the prisoner Obhoy is not charged with falsehood for saying the contrary.

On the whole, I think, the misdirection and the want of sufficient legal evidence are enough to entitle this prisoner to a new trial, if not to his immediate acquittal. Let the case go to a second Judge.

Hobhouse, J.—I regret that I cannot concur with my learned colleague in the opinion that the prisoner Obhoy Chunder Sein was prejudiced by the summing up of the Judge in the Court below, and that his condemnation and sentence are therefore illegal.

The charges against this prisoner were two: *viz.*, that he gave false evidence when he deposed, *first*, that he and one Rammoni were four days at Mymensingh, and that he went to Gopal Doctor's house; and, *secondly*, that, on his return on the 2nd of Jeyt he saw one Nundo Koomar in one Kalimanir house.

When, therefore, on the first part of the first charge, the Judge below charged the Jury to the effect that, if they found that the above Rammoni was not in company with the prisoner Obhoy during the above four days at Mymensingh, but was at Soodeeram another place, then it did not matter where Obhoy was, because it would be clear that he could not have been in company with Rammoni at Mymensingh, and must, therefore, have given false evidence when he said that he was, during those four days, in such company at Mymensingh. I think that the Judge charged the Jury properly.

The statement of Obhoy was that, during four certain days, he was in company with Rammoni at a certain place in Mymensingh. The Jury were charged to find, and did find, that Obhoy was not, and could not have been in company with Rammoni during those four days at that place—Mymensingh: because, as a matter of fact, Rammoni was during those four days at Soodeeram, miles away; and followed on this finding that Obhoy was guilty of a false statement.

I think, therefore, that there is no error in law within the reading of Section of the Code of Criminal Procedure, on which to found any interference with this finding of the Court below.

The case must go before a third Judge.

Kemp, J.—On referring to the petition of appeal, I do not find that any complaint is made that the prisoner Obhoy Chunder has been in any way prejudiced by a misdirection to the Jury. I entirely concur with Mr. Justice Hobhouse, and for the reasons stated by him.

The 20th May 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Culpable homicide not amounting to Murder.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan on a charge of murder, &c.

Queen *versus* Rajoo Ghose and others.

Where a person snatches up a log of heavy wood and strikes another with it on a vital part with so much force and vindictiveness as to cause that other person's death almost on the spot, the act must be held to have

* *Erratum in Original Edition.*

one with the knowledge that it was likely to cause leath, but, if done without premeditation in the heat of passion on a sudden quarrel, the offence committed is culpable homicide not amounting to murder.

Hobhouse, J.—I HAVE heard pleaders in his case, and have carefully weighed their rguments, and considered the evidence n record; and I find the facts of the case o be these, *viz.*, that the prisoners Rajoo, Heeroo, and Neeroo, were three brothers of he deceased Cheedam living with him in ne homestead, though in a separate mess; hat the prisoners Umbika (a boy of 14 or 5) and Rajoo also lived in the above hometead, though in what capacity is not appaent; that the three brothers above-mentioned nd Cheedam had certain joint lands; that the lhan gathered from these lands had been laced in Cheedam's quarter of the hometead; that the three prisoners, brothers, had hreshed some of this dhan; that disputes, in vhich blows had been interchanged, had risen between three prisoners on the one and, and Cheedam on the other, in regard o the property in the dhan still left to be hreshed; that, on the 5th Magh, Cheedam roceeded to thresh this dhan; that the three risoners, brothers, forbade him; that he persisted; that a quarrel and a row ensued; that in he course of this Rajoo, Heeroo, and Neeroo, icked up some logs of sâl wood lying about; hat Neeroo instigated the others to beat Cheedam; that thereupon Heeroo kicked and uffed Cheedam; that, whilst this was going n, Umbika and Rajub stepped in, and held Cheedam by the hands and feet; that then Rajoo stepped in front of Cheedam, and truck him on the right temple, breaking the one, and causing immediate unconsciousness; and that Cheedam never after recovered is senses, but died a few hours after—the ause of death being declared by the medical estimony to be the blow of the sâl log on he temple.

These are the facts proved in the clearest nd most convincing manner; and though, on he other hand, certain of the prisoners alleged that Cheedam died of epilepsy, and certain others of the prisoners pleaded *alibis*, yet these pleas unmistakably broke down, and the Court below was warranted n not believing them.

Under these circumstances, the Court below and one of the Assessors (the other found the offence of murder) found the prisoners guilty of culpable homicide not amounting to murder, and the Court sentenced them severally to transportation for life.

When, as in this case, a grown-up man snatches up a log of "sâl" wood—a wood of a tough and weighty kind—and strikes another person with that log on a vital part, with so much force and vindictiveness as to cause that other person's death on the spot as may be said, it is impossible, in my judgment, not to hold that the act was done "with the knowledge" that it was "likely to cause death."

Therefore, I have no hesitation in finding with the Court below that the prisoner Rajoo, in committing the act of striking Cheedam on the head, was guilty of the offence of culpable homicide.

But it was culpable homicide not amounting to murder, because in my judgment it was an act within the meaning of Exception 4, Section 300, for it was done without premeditation in the heat of passion on a sudden quarrel.

I hold, therefore, that the Court below was right in finding this prisoner guilty of this offence.

And as to the other prisoners, they clearly were guilty of the abetment of this offence, for Heeroo instigated the assailants; Neeroo was actually one of them, and Umbika and Rajub facilitated the commission of the offence by holding Cheedam's arms and feet; and all those persons being present when the offence was committed must, under the provisions of Section 114 of the law, be deemed to have committed the offence.

The Court below was therefore right also in my judgment in finding these prisoners guilty of the offence of culpable homicide not amounting to murder, and I would not disturb the finding in any particulars.

But the indiscriminate sentences of transportation for life on one and all of the prisoners seems to me to be preposterously unfitting.

On the evidence, Umbika was but a boy of 14, and the offence that he and Rajub in truth intended to commit was that of holding Cheedam whilst Heeroo thumped and kicked him.

I would reduce the sentences on these men, therefore, to one year's rigorous imprisonment.

* *rratum in Original Edition.*

The offence that Heeroo, on the evidence and in truth, committed was that of thumping and kicking Cheedam ; and it is clear that he had no intention to go further, for he actually had a "sâl" log in his hand, and he did not use it, but resorted rather to the milder assault. And so, also, with the prisoner Neeroo : he instigated the others to assault, but he took no other part in it, and never even attempted to use the weapon he had snatched up.

I would, therefore, reduce the sentences on these men also to one year's rigorous imprisonment.

The offence of Rajoo is more heinous, for it was he who, with the former quarrel and present passion in his mind, struck the fatal blow. I would therefore sentence this prisoner to five years' rigorous imprisonment.

Jackson, J.—I concur in mitigating the sentence passed to rigorous imprisonment for one year in the case of all the prisoners except Rajoo, and three years in his case.

Hobhouse, J.—I concur that the sentence in mitigation on Rajoo should be three years.

The 27th May 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Charge of Judge.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of murder.

Queen *versus* Bhekoo Sing and others.

Bare statements of prisoners are not admissible in, and ought not to be alluded to by the Judge as, evidence. Nor is evidence taken before the Magistrate, unless contradictory of the evidence of the same witnesses as given before the Sessions Court, evidence in the trial, or proper to be put to the Jury.

Glover, J.—THE evidence in this case was very fully laid before the Jury, and no point of law is raised in the appeal which would justify our interfering with the finding.

There is one part, however, of the Sessions Judge's charge which we must notice, although, from the prisoner's not having been prejudiced by it, the error is of no direct consequence so far as this appeal is concerned.

Speaking of the prisoners Nos. 83 to 9[illegible], the Judge says : "They may be taken as "witnesses for each other ; and the question "is whether you will accept their story or "that of the prosecution, and for that pur- "pose you must compare them both, point "by point."

This, we observe, is not a correct view of the law, and there could be no comparison drawn between sworn depositions of witnesses on the one hand, and bare statements of prisoners on the other—statements which they had the most direct interest in making and which, if credited, would have the effect of absolving the makers from the offence charged against them.

Such statements were altogether inadmissible ; they were no evidence at all, and the Judge ought not to have alluded to them as evidence.

There are circumstances where any one of a number of prisoners jointly indicted can be called as a witness either for or against his confederates ; but in this case none of the prisoners were called as witnesses on behalf of any of their fellows (*vide* VI. Weekly Reporter 91).

We remark, further, that the Sessions Judge laid some stress on the evidence taken before the Magistrate : this evidence, unless it was contradictory of the evidence of the same witnesses as given before the Sessions Court, was not evidence in the trial, and should not have been put to the Jury.

But as these errors in direction were in favor of the prisoners, as we observed before, they form no ground of appeal.

The appeals of all the prisoners are rejected.

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* *Erratum in Original Edition.*

The 27th May 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Criminal Breach of Trust—Responsibility of Nazir.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of criminal breach of trust.

Queen *versus* Tofuzzal Ali.

A Nazir is the head of an important department, and must be responsible for the truth of what he reports or admits. He cannot be permitted to avoid responsibility by urging that his mohurrir deceived him.

THIS is a case in which a Nazir has been convicted of four different instances of criminal breach of trust, and by a Jury.

The prisoner has put in written grounds of appeal, some of which on the face of them are manifestly untenable; but he has been heard fully by his pleader, Baboo Chunder Madhub Ghose, who has urged on the Court all that was in his power as to misdirection on the part of the Judge, especially in regard to charges 1st and 2nd, which were taken and considered together at the Sessions.

The expressions laid stress on really amount to very little, and concern the receipt said to have been given by the acting Nazir, and the Judge's insinuation or expression that the receipt may have been given after the case had been brought against the Nazir. But it is not necessary to dwell at any length on this point. On charges 3 and 4 the pleader can say but little; and, in truth, there is nothing that could be said in them to make out error of law, or such misdirection that justice had thereby miscarried.

In these instances, the prisoner, being the Nazir of the Kooshtea Court, admitted that he had reported that certain monies had been paid in. The cases on which he so reported were struck off, being apparently cases of recovery of money in execution, and the Nazir cannot now be permitted to avoid his responsibility by urging that his mohurrir deceived him, and that he had been led to report that the money had been received through faith in his mohurrir or from inadvertence. An officer such as a Nazir is the head of an important department, and he must be responsible for the truth of what he reports or admits, and there is other clear evidence in addition, in the case.

I have come to the conclusion that there was no failure of legal and sufficient evidence, and no case of misdirection, such as would call for a new trial.

The appeal is rejected.

The 28th May 1867.

Present:

The Hon'ble J. P. Norman, W. S. Seton-Karr, and C. P. Hobhouse, *Judges.*

Receiving property stolen at a dacoity.

Queen *versus* Jogeshur Bagdee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of dacoity.

In order to sustain a conviction under Section 412 of the Penal Code of receiving property stolen at a dacoity, it is necessary to prove that the prisoner knew or had reason to believe that dacoity had been committed, or that the persons from whom he acquired the property were dacoits.

Norman, J.—I HAVE read the petition of appeal, the direction to the Jury, the verdict, and sentence. There is no ground for questioning the propriety of the conviction or sentence, except as to two of the prisoners, Denoo Manjee and Sadoy Mitia.

As to Denoo Manjee, it is proved that, *immediately after the commission* of the dacoity, he was seen to conceal a gold pauchnor, part of the property taken from the house of the prosecutor, in the ashes.

The Sessions Judge, Mr. Pigou, told the Jury that, if they believed the evidence, it was proved that, very shortly after the dacoity, the prisoner had possession of the pauchnor stolen in the dacoity; that he refused to say how he got it, and therefore the legal presumption was that he joined in the dacoity and stole it, and that the Jury would be justified in convicting of the dacoity. If they disbelieved the witnesses, they would acquit him.

The Jury found him guilty of retaining stolen property, the possession of which he knew to have been transferred by the commission of dacoity.

And the Sessions Judge sentenced him to seven years' imprisonment.

It appears to me that the Judge left the question quite properly to the Jury. so far as regards the evidence on the charge of dacoity.

The possession of stolen property *immediately* after the commission of such an offence by a person who does not appear to be a receiver, or where there is no reason to suppose that the property has been obtained from a third person, may fairly lead to the inference that he who has profited by the crime was the person or one of the persons who committed it.

But I think that there was no evidence to warrant the verdict of the Jury. If the

* *Erratum in Original Edition.*

prisoner was not himself one of the dacoits, but a mere receiver, there is no legal inference—and, in fact, in the majority of instances, there is no probability that the receiver would be informed of the crime by the person from whom he might purchase or acquire stolen property.

A receiver of stolen property would, in ordinary cases, ask no questions. I think a person cannot be convicted under Section 412 of receiving property the possession whereof he knows, or has reason to believe, to have been transferred by the commission of *dacoity*, unless there is some positive evidence that he knew, or had reason to believe, that dacoity had been committed, or that the persons from whom he acquired the property were dacoits.

I think, as there is no evidence sufficient in law to support the conviction, that conviction cannot stand. In fact, the evidence against the prisoner as a receiver was such as to warrant his conviction under Section 411, but not under Section 412.

As regards the prisoner Sodoy, the Judge says: "If you believe the evidence of Poran and Kali Churn (as to the property in the mul-mul), you will convict the prisoner of retaining stolen property, the possession whereof he knew to have been retained by dacoits, for it is his business to know where it came from; and, as he does not do so, the legal presumption is that he knew it was so obtained." He adds: "I think the charge of dacoity cannot be proved upon the mere presumption of having the property, because it is not proved that he had it *very* immediately after the dacoity, and it is not proved when the property was found in his house."

The Jury convicted this prisoner also under Section 412. My observations on the case of Denoo apply to this case also. I would quash the conviction as to these two prisoners, and, under Section 426, would substitute a conviction for receiving stolen property, the prisoner knowing or having reason to believe the same to have been stolen. And I would sentence the two prisoners to three years' rigorous imprisonment.

Seton-Karr, J.—I think, after looking at the evidence on the record, which I sent for, that there was evidence sufficient to go to a Jury as to the retention of the property by the prisoners with the knowledge that the same had been actually acquired by dacoity.

The dacoity, and the almost immediate apprehension of some of the dacoits with bundles containing some of the property, must have become widely known and discussed in the neighbourhood; and though I admit the general force of Mr. Justice Norman's remarks, yet I think, in this particular case, that there was no failure of legal evidence from which the Jury might justly believe or lawfully infer that the two prisoners whose sentences he would reduce, took the property, not merely knowing it had been stolen, but knowing that it had been obtained by dacoity.

I would let the sentences stand as they are.

Hobhouse, J.—This case has been submitted to me as to a third Judge on the occasion of a difference of opinion between my learned colleagues, Messrs. Justices Norman and Seton-Karr, as to the degree of guilt attaching to two certain prisoners, *viz.*, Denoo Manjee and Sodoy Mitia.

It is found that a dacoity took place in the house of the prosecutor on the night of the 9th November last at a village called Kurtapookur, and that a pauchnor and a piece of mul-mul cloth respectively proved to have been stolen at that dacoity were, on the 11th and 15th November respectively, found concealed in the houses of the said prisoners.

The question is, whether or not these prisoners or either of them are guilty of retaining property stolen at a dacoity under Section 412, or simply of retaining stolen property under Section 411.

In the matter of the prisoner Denoo I have no hesitation in concurring with my learned colleague, Mr. Justice Seton-Karr, that he is guilty under Section 412.

The facts against him are these, viz.: that the dacoity occurred at Kurtapookur on the night of the 9th of November. That at daybreak on the morning of the 10th November, six of the dacoits were caught red-handed at the village of Chundeepore; that he, Denoo, was a resident of Chundeepore; that this same day, the 10th, he brought the pauchnor stolen at the dacoity into his house, just shewed the witness Nistarinee what it was, and at once hid it in his ash-heap; that the very next day the property was there recovered; and that meantime he, Denoo, had absconded.

Now, when six dacoits were at daybreak following the dacoity, arrested with dacoity-stolen property at the village of Chundeepore, it is clear to demonstration that the fact of the dacoity would at once be known universally in that village, and it would follow, *first* of all, that, if there was any

* *Erratum in Original Edition.*

lacoit belonging to the village who had not been arrested, such a person would not be able to dispose of any plundered property he might have upon him; and, *secondly*, that, if any person should be found in immediate receipt of property stolen at the dacoity, he only (to my mind) reasonable or possible presumption would be that that person had received with a guilty knowledge of dacoity.

And so the facts are that this dacoity occurred on the night of the 9th; that all Chundeepore knew of it at day-break on the 10th; that, on that very 10th, prisoner Denoo had some of the stolen property on him, and was concealing it; and that, on the 11th, it was found on him, he meantime having absconded, and he subsequently having pleaded an *alibi*, to shew he was not at the dacoity, which broke down.

Applying every test that my learned colleague, Mr. Justice Norman, would apply, I still think with Mr. Justice Seton-Karr that Denoo Manjee was legally found guilty under Section 412 (indeed, I should have been prepared to find him guilty under Section 395), and I would let the sentence on him stand.

In regard to Sodoy Mitia, the facts found are different.

The dacoity occurred at Kurtapookur on the night of the 9th. There is nothing on the evidence to shew how any property stolen at the dacoity was traced to Sodoy at all; and all that I can discover from the record is that, whilst Sodoy is a resident of Jamsola in one district, the stolen property was, six days after the dacoity, found on him at Tantoolmumia in another district.

How and when he received the property, there is nothing to show; and there are no means of presuming accurately, for we don't even know how far Tantoolmumia was from the place of the dacoity, much less whether or not the fact of the dacoity was known at all in Tantoolmumia, much less still whether it was known to prisoner, and, if so, when it was known.

The first object of a robber is to get rid of his plunder; and, in doing so, he is not likely to mention, and the guilty receiver is not likely to ask, how and when he got it. It is a case of give and take, and no uncomfortable or compromising questions put or answered on either side; and thus it is quite possible that prisoner, the inhabitant of a stranger district, and, for anything that is in the evidence to the contrary, of a stranger village, six days after the dacoity, may have received and retained, knowing, indeed, that the property was stolen, but not knowing precisely that it was stolen at a dacoity; and at any rate, I would give him the benefit of the doubt.

I concur, therefore, with my learned colleague Mr. Justice Norman in amending the sentence on this prisoner as he proposes.

The 28th May 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

False charge of Murder.

Queen *versus* Peetumloll Puddhun.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of instituting a false criminal charge with intent to injure.

Remarks on the comparatively light sentence passed without any reason in a case where a false charge of murder was preferred and persisted in.

THERE can be no doubt that the prisoner did institute a serious charge of murder against Mudhusoodun and others, for he persisted in the same story in his defence, and he persists in it still in appeal against all the clear evidence to the contrary effect.

The only question, then, is whether there is any reason to imagine, either that the charge is true, or that the prisoner made it in perfect good faith. Now, as already said, there is every reason to conclude that there is no basis for the charge whatever. The evidence for the prosecution clearly shows that the two persons said to have been murdered died of cholera. The evidence of some witnesses for the defence is tantamount to nothing at all. Even if that of Gungaram Mundul and Gour Mundul could be believed, which it cannot, it would be wholly insufficient to support a charge of murder, though, if two persons had been really seen to be beaten for stealing sugar-cane, and if they had died immediately afterwards or on the next day, such an occurrence might form a ground for some cautious enquiry.

But it rests on evidence that the two men said to have been murdered died of cholera, and were known at the time to have so died; and it is also in evidence that the prisoner's father and uncle had been sentenced as dacoits for a dacoity in the house of the very person now charged with murder.

There is, therefore, every ground for concluding, not only that the charge was utterly false, but that the prisoner must have known

that such a charge was false when he made it and persisted in it. Had it really been true, it would scarcely have been preferred in the way it was preferred.

I assume that the comparative lightness of the sentence is due to the prisoner's youth, and to the bare possibility that he may have been the tool of some one else, though the Sessions Judge does not assign such reason, nor, indeed, any reasons for the comparatively light sentence passed; otherwise it is not easy to conceive a charge of a more virulent and malignant character dictated from sheer spite, or one in which a heavy punishment would be more imperatively called for.

I can only regret that Act VI. of 1864 does not empower the Sessions Court to inflict a salutary whipping on such an offender in addition to imprisonment.

The appeal is rejected.

The 28th May 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Forgery (Mode of sending records in appeal cases).

Queen *versus* Broond Shahoo *alias* Chundra Chatterjee.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of fraudulently using as genuine a forged document with guilty knowledge.

In all forgery cases sent up in appeal, the particular paper or papers said to have been tampered with should be readily accessible, and should be put with the Sessions record, instead of being buried in the record of the committing officer.

A GREAT deal of time has been wasted over this case, because the most important paper on which the whole case turned, *viz.*, the *original* pass marked A, said to have been altered, had been buried in the mass of the record from the Magistrate's Office, instead of being put, as it ought to have been, in a prominent place with the duplicate marked A, the paper B, and the paper C, which were all with the Sessions record.

It is most important that, in all forgery cases sent up in appeal, the particular paper or papers said to have been tampered with should be readily accessible.

It is quite clear that the pass A has been altered in several places; the said alteration concern the amount of the salt, the name the person to whom the pass was granted, the number of the carts, and the place destination.

It is equally clear that the pass so altered was uttered or used by the prisoner at the Cuttack Collectorate, and, under all the circumstances, the inference is most legitimate that the prisoner knew that he was dealing with and uttering a forged document.

He had no defence to speak of; but he says in his petition of appeal that he had no object in making the alterations, and that he could derive no advantage therein.

But, as the Sessions Judge has remarked, it is clear that he did expect some advantage in applying for an atrafee rowannah for 221 maunds when he had only paid duty to Government on 100 maunds of salt.

The unanimous conclusion of the Jury and the Assessors as to the prisoner's guilt is that he fraudulently used as genuine a document which he knew, or had reason to believe, was forged, seems to me quite justified.

The sentence is not excessive.

The appeal is rejected.

The 29th May 1867.

Present :

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Land disputes—Right of defence.

Queen *versus* Sachee *alias* Sachee Bolee.

Committed by the Magistrate, and tried by the Sessions Judge of Chittagong, on a charge of culpable homicide not amounting to murder, &c.

Where *A* is in actual peaceable possession of land, and *B* attempts to recover possession of it by force is an illegal act, which *A* has a right to resist. If *B* uses force in carrying out his attempt, *A* has a right to oppose force to force, and to inflict upon *B* such injury as is necessary to compel him to desist.

Markby, J.—IN this case the prisoner has been convicted of voluntarily causing grievous hurt, and sentenced to five years' rigorous

* *Erratum in Original Edition.*

mprisonment, and has appealed to this Court.

It appears that there were three brothers, Bakur Ally, Hyder Ally, and Suffer Ally, who nherited from their father a right of occupancy in certain land, and which, after their father's death, they divided into three shares, and held separately. The prisoner purchased he shares of Bakur and Hyder, and took possession soon after. However, he re-let to Hyder his share, remaining in possession of Bakur's share. Subsequently (as the Judge finds) "the prisoner either truly or falsely 'gave out that he had obtained from the 'zemindars a talooky lease for the land on 'which stood Suffer's *bheela*, and because 'Suffer refused to give him a fresh kuboo-'leut as talookdar, the prisoner took pos-'session of this share also.

Suffer, upon this, appears to have laid a complaint before the Magistrate, which, however, he failed to substantiate. Suffer in the meantime took up his quarters elsewhere n the village, and 15 days after he had ceased to be in possession, an attempt was made o settle the matter by reference to the neighbours, who accordingly met to hear and determine the question at the house of one Ahsaud Mullah.

Before the proceedings at Ahsaud Mullah's house had commenced, Suffer proposed an adjournment to the spot where the land in dispute was situated. The prisoner opposed his; but Suffer and his brother Bakur left he house of Ahsaud Mullah, the former declaring his intention to go and take possession of the disputed land. The prisoner also then left, and, passing the other two, was the first to reach the spot in question. There is evidence uncontradicted that, when Suffer and Bakur left Ahsaud Mullah's house, they had sticks in their hands, but that the prisoner had none.

It is very difficult to say exactly what was the nature of the affray which took place when the parties met at or near the land in dispute, and which is the origin of these proceedings. We have against the prisoner the account of Bakur, who was present and took part in it, and of Hyder who witnessed it from a distance; but we do not think that any reliance can be placed on their testimony, which is obviously exaggerated, and given with considerable acrimony against the prisoner. What is certain is that Bakur, Suffer, and the prisoner, were each wounded: Bakur and the prisoner slightly; Suffer, as it afterwards turned out, severely; and there is no reasonable doubt that the affray arose from Suffer and Bakur attempting to take forcible possession of the land in dispute, which the prisoner forcibly resisted.

Both Suffer and the prisoner complained to the police; but it does not appear that any notice was taken of the matter.

Nothing more was heard of the case for about 14 days, when a policeman brought Suffer to the first witness, a native Medical Officer in charge of the Dispensary. He says that he at first thought nothing serious would result from the wound; that the prisoner could walk, though apparently weak and exhausted from insufficient food. On the evening of the following day, however, Suffer became drowsy, and unwilling to speak, and on the day after that he died. A *post mortem* examination shewed that the cause of death was inflammation of that part of the brain situated immediately beneath the wound from which the Doctor inferred that the inflammation was caused by the wound. The Doctor describes the wound as a severe one, but the skull was not fractured.

The main question which will have to be considered in this case is, whether the prisoner was justified, under the circumstances, in striking Suffer any blow at all; but, before coming to this, it may be as well to premise that we do not consider that there is any evidence that, assuming the prisoner had a right to use force at all, any more force was used than was necessary, although, according to the medical testimony, death was the result of the blow. It does not appear to have been at all more severe than a man attacked by two others would have a right to inflict.

Whether or no the right of possession in this land was in Suffer or not, has not been determined. But the prisoner was, at the time of the affray, in actual peaceable possession of it, and had been so for 15 days; and the act of Suffer, in attempting to recover possession by force, was clearly illegal. But more than this, we think the act was one which the prisoner had a right to resist; and if (as we think was the case) Suffer used force in carrying out his intention, then we think the prisoner had a right to oppose force to force, and to inflict upon Suffer such injury as was necessary to compel him to desist.

We do not consider it necessary in this case to take any measures for making further enquiry upon the question whether or no the real title was in Suffer or the prisoner; because we think that the prisoner having been 15 days in continuous peaceable possession, it must be presumed that his possession was lawful. What would have been the consequence if it had been shown on the part of the prosecution that the real title to the property was in Suffer, it is not necessary to say, though we should even then have grave doubts, whether, looking to the length of time during which the prisoner had been in possession, and to the circumstances that Suffer had expressly agreed to submit his right to recover possession to arbitration, the prisoner would not have been justified in resisting the forcible entry which Suffer attempted to make. We do not, however, express any opinion on this point. We are satisfied that in this case the facts proved are not sufficient to establish any crime against the prisoner, and we therefore reverse the Judge's decision. We annul the sentence passed upon the prisoner, and we order him to be discharged.

The 29th May 1867.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Evidence—Depositions.

Queen *versus* Bheekun Doss.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of voluntarily causing grievous hurt in committing robbery.

When a deposition is received in evidence under Section 369, Code of Criminal Procedure, at a trial before a Sessions Judge, there ought to be on the record distinct proof of the existence of such a state of things as makes the deposition legal evidence.

I DISMISS this appeal.

There is ample evidence to support the conviction. The only point on which I have had any doubts is that the deposition given by the prosecutor before the Magistrate was, in the prosecutor's absence, received at the trial before the Sessions Judge as evide against the prisoner, without there, in being any proof of any real attempt ha been made to produce the prosecutor o account for his absence, and withou proof that the deposition was taken in prisoner's presence. If it were not tha case was well established quite indepen of this deposition, I should have consi the receiving of the deposition in manner a fatal objection to the proceed As it is, I dismiss the appeal; but I ha remark that, when a deposition is receiv evidence, under Section 369 of the Cri Procedure Code, at the trial before Sessions Judge, there ought to be o record distinct proof of the existence of a state of things as makes the depos legal evidence.

The 30th May 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glo *Judges.*

Tender of Pardon.

In the matter of Nistarinee Debia, Petitioner.

A Sessions Judge is not competent, before a tria instruct a Magistrate to tender a pardon under Sec 210 of the Penal Code.

Kemp, J.—THE prayer of the petitio to be permitted to appear at the Sessio Court through her agent is wholly i admissible.

With reference to the other points r in this petition, we think that a Sessio Judge is competent in trials, whet conducted with a Jury or with the assis of Assessors, to instruct a Magistrate t tender a pardon under Section 210 of th Code of Criminal Procedure. This, we thi is clear from the wording of Section 400 b it must, we think, be done at the time of tr and, therefore, a Sessions Judge is not, in o opinion, competent before the trial instruct a Magistrate to tender a par under Section 210.

* *Erratum in Original Edition.*

Withdrawal of charge duly laid.

No. 33.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judicial Commissioner of Chotanagpore, dated Calcutta, the 11th January 1867.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—With reference to letter from the Deputy Commissioner of Lohardugga, a copy of which was forwarded by your office memo. No. 1, dated the 3rd instant, I am directed to state that the Court cannot accept the explanation that the charge of kidnapping laid against four persons and withdrawn a day or two after "was never brought upon the file," for, if the charge were duly laid, the case should have been on the file, and dealt with according to law.

2. In regard to the case in which a charge of theft was allowed to be withdrawn after a police-enquiry had been made and the accused had appeared, I am to add that the Magistrate should have dismissed the case under Section 250 of the Code of Criminal Procedure.

Pleaders and Mooktears are capable of serving as Jurors or Assessors in Sessions trials.

No. 34.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Magistrate of Rajshahye, dated Calcutta, the 11th January 1867.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—With advertence to your memo. No. 372, dated the 4th instant, I am directed to state, though the reference forwarded by it is altogether informal, as it should have been submitted through the Judge of your District as enjoined in Circular No. 17, dated 17th June 1863, that pleaders and mooktears are not holders of office, and are, therefore, capable of serving as jurors or assessors in Sessions trials.

Court of Session competent, not itself to tender a pardon, but to instruct the Magistrate to do so.

No. 196.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of the 24-Pergunnahs, dated Calcutta, the 15th February 1867.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—I am directed to acknowledge the receipt of the Jail Delivery Statements of your district for September last, and, with advertence to your remarks in the case of Shaik Meajan and another (Case 2, Statement 4) regarding your having tendered a pardon to Shukar Bibi, and admitted her as a witness in the case, I am to point your attention to the terms of Section 210 of the Code of Criminal Procedure, which declares the competency of a Court of Session, not itself to tender a pardon, but to instruct the Magistrate to do so.

Charge, finding, and sentence in a case of dacoity.

Extract (paras. 2 and 3) of Letter No. 216, from the Registrar of the High Court, Appellate Jurisdiction, to the Sessions Judge of Tirhoot, dated the 18th February 1867.

2. In the case of Koonee (Case No. 12, Statement 4) I am to point out that the charge should have been laid under Section 395, Indian Penal Code, and not under Section 397, which does not provide any punishment for dacoity, but merely regulates the punishment already provided for that offence, by fixing a *minimum* term of imprisonment when its commission has been attended with certain aggravating circumstances. As the prisoner, however, was convicted under Section 397, it was illegal to sentence him to less than 7 years, the language of the law being "shall not be less than 7 years."

3. As you say, however, that nothing more than an attempt was proved, and convict the prisoner under Section 511, Penal Code, *coupled with Section 397*, I am to point out that, if he did not *commit* dacoity, he could not have been convicted of "causing grievous hurt" *at the time of committing it*, which is the element of guilt of which you convict him under Section 397. You are requested to sent up the record of this case, with a view to the revision of your finding and sentence.

Presumption of intention in cases of deliberate acts.

No. 220.

From the Registrar of the Appellate High Court Jurisdiction at Fort William in Bengal, to the Sessions Judge of Rungpore, dated Calcutta, 19th February 1867.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

Sir,—In continuation of my letter No. 1610, dated the 30th November last, I am directed to state, with advertence to your remarks in the case of Radahmonee (Case 7, Statement 4), wherein you find first that the drug within the knowledge of the prisoner was likely to cause death, and, again, that he did not intend to cause that which he knew was likely to result from the administration of it, *viz.*, death, I am to point out that a person is generally supposed to intend the consequences of his deliberate act. To presume otherwise, in ordinary cases, would cause justice frequently to miscarry.

Misdirection by a Judge in a case of approver's evidence—Substitution of transportation for years' imprisonment.

Extract (paras. 4 and 5) of Letter No. [illegible] from the Registrar of the Appellate [illegible] Court, to the Sessions Judge of Moorshedabad, dated the 21st February 1867.

4. With reference to your summing up to the Jury in the last case of Beharry [illegible] and others, Statement 4, I am to observe generally that, although you were [illegible] warranted in bringing to the notice of the Jury the dates on which the persons who were afterwards admitted as approvers made their confessions upon which a conditional pardon to them was based, and also the contents of those confessions contrasted or compared with their subsequent evidence, with a view of testing the value of the latter, still you were wrong in bringing before the Jury, for any purpose, the fact that one accused person, on any particular date in his confession, mentioned another. Such a fact could not, under any circumstances, be evidence, and therefore its mention would have a tendency to, if it did not actually, mislead the Jury.

5. The commutation to transportation of the sentence of five years' rigorous imprisonment passed upon Baluck Pasi (Case 13, Statement 4) is illegal, as transportation cannot be imposed in lieu of five years' imprisonment. So much of the sentence as awards transportation instead of imprisonment on this prisoner is accordingly hereby annulled.

Unsupported declaration by a prisoner.

Extract (para. 3) of Letter No. 254, from the Registrar of the Appellate High Court, to the Sessions Judge of Backergunge, dated 23rd February 1867.

3. Alluding to the Officiating Sessions Judge's remark in the same case, that "in criminal cases the unsupported declaration of a prisoner is entitled to some weight," I am to remark that, if the case for the prosecution be proved by evidence, the unsupported statement of a prisoner is entitled to no weight. To entitle it to weight, it must be supported by evidence on the record.

High Court unable to alter its decision directing a new trial after a verdict of guilty—Hearsay Evidence by Police Officers—Identification of property—Custody of property produced at trial pending appeal.

No. 486.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Dacca, dated Calcutta, the 2nd May 1867.

(Criminal Side.)

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

SIR,—With reference to your letter No. 254, dated the 28th March last, wherein you request further instructions of the High Court in the case of Pittamber Sirdar and others, as a difficulty of a very serious nature had arisen, which rendered it impossible to carry out the orders of the Court conveyed to you by Memorandum No. 157, dated the 2nd February last, I am directed to state that the Court do not consider that they have any power to alter a decision once regularly passed directing a new trial after a verdict of guilty against the prisoners.

2. The Court remark, however, with reference to the observations in your letter that, bearing in mind the express provisions of Section 149 of the Code of Criminal Procedure and the rule which excludes hearsay evidence, they cannot admit that a Police Inspector can relate all that he has heard in the course of the investigation of a case, in order to explain how he came to search in a particular place, or to arrest a particular person. On the contrary, he can relate nothing of this—whether it has been heard from the prisoner or any other person; nor do they see any practical difficulty in excluding this evidence. The Police Officer can say "in consequence of information I received" (not saying what or from whom), "I went here and searched there, and found this or that."

3. The Court also wish to draw your attention to the fact that several of the prisoners had nothing to do with the three articles of which the identification was more satisfactory; and, as the case against these prisoners was one almost entirely of presumption arising out of the possession of stolen property, the identification became of the utmost importance.

4. The verdict of the Jury being conclusive on the facts, it becomes necessary for the High Court sitting in appeal to satisfy itself that the Jury have given their verdict on legal evidence, and legal evidence only, and that you have directed their attention to the true points for consideration.

5. The Court also think that property, which it is necessary to produce on the trial of a criminal case, should remain in the custody of the Court until the prisoner's appeals are disposed of.

6. The Court direct that the prisoners be put upon their trial as soon as they conveniently can be after the receipt of these directions. Should there be any definite prospect of better evidence being obtained against them at an early date, it will be discretionary with you to adjourn the trial. If, when the case is called on, it appears that there is no chance of procuring sufficient evidence for a conviction, probably the best course will be, instead of putting the prisoners on their trial, to release them on their own recognizances to appear and answer when called upon.

Re-call and re-examination of witnesses by Magistrate after examination by Joint Magistrate.

No. 622.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Rajshahye, dated Calcutta, the 18th May 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

SIR,—With reference to the doubt expressed in your judgment in the case of

Shiboo Koorul and others (Case 1, Statement 5 for November 1866), whether it is incumbent on the Magistrate of the District to examine the parties and witnesses before passing an opinion in a case in which a preliminary investigation was held by the Joint Magistrate who heard the only evidence which was of importance, I am directed to state that the Court do not think Section 276 or 277 of the Code of Criminal Procedure applicable to such a case.

2. The case from its nature could not be finally disposed of by an Assistant Magistrate. The enquiry was commenced by the Joint Magistrate, who was transferred to another district after he had recorded part of the evidence, but before he had completed the investigation. It would have been very hard upon witnesses to oblige them to appear a second time before the Magistrate, or to make it imperative in the Magistrate before committing the case to re-examine the witnesses. It appears to the Court that, under circumstances such as those above stated, if the Magistrate or other Officer who takes up the case second-hand find enough on the recorded evidence to warrant the committal of the prisoners, he is not bound to examine the witnesses *de novo*, though, of course, he is at liberty to do so whenever he is not satisfied with the evidence already recorded. As cases of this kind are not finally disposed of by the Magistrate, it would be waste of time and unnecessary vexation to the witnesses to require the Magistrate in all cases to re-call and re-examine them.

Right of Private Defence when a justification for murder.

Extract (para. 7) of Letter No. 623, from the Registrar of the High Court, to the Sessions Judge of Cuttack, dated the 18th May 1867.

7.—Adverting to the case of Mano Mullick and another (No. 14 of Statement 4), the Court do not consider the sentence satisfactory, at least so far as the facts appear from the statement. Two persons went to steal grain, and were caught by the prisoners and other villagers who were watching the fields. The prisoners and their companions set upon the two men, and beat them with *lattics*, the skull of one of them being fractured so that he died on the spot. Mr. Wauchope says that the homicide would be murder, but that it falls within the 2nd Exception in Section 300 of the Indian Penal Code. But Section 99, Clause 4, of the Code declares that "the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

Now, in this case it does not appear that the infliction of any harm whatever was necessary for the purpose of defence, inasmuch as the thieves might have been apprehended. The act of the prisoners was not, therefore, the Court think, lawfully excused.

Attestation of Deputy Magistrate prima facie proof of Examination.

Extract (paras. 7 and 5) of Letter No. 621 from the Registrar of the High Court, to the Sessions Judge of Hooghly, dated the 18th May 1867.

4. Alluding to the acquittal of Dewa Shaha in the same trial (No. 3) as entered in Statement No. 5, in which your predecessor also disagreed with the verdict of the Jury, the Court is not very much surprised at the verdict, considering the way in which the Judge put the prisoner's examination before the Jury. He really suggested the *possibility* of the Deputy Magistrate having invented an untrue confession, and told the Jury it was for them "to say whether it is proved that he did state," &c. The fact is that the Deputy Magistrate's attestation constitutes *primâ facie* proof of the examination, and, unless disproved by the prisoner, absolute proof.

5. A similar remark applies to trial 5 of Statement 4 (Poran Bagdi and others), in which there is a careful, and, upon the whole, an excellent, charge to the Jury, but in which the Judge unfortunately said to the Jury, "If you believe the Deputy Magistrate's attestation." They were bound to believe it unless disproved.

CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

Returns to precepts directing enquiry into the value of securities in appeals to the Privy Council.

CIRCULAR No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judges of Zillah Courts, dated Calcutta, the 4th January 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor and L. S. Jackson, *Judges.*

MUCH inconvenience being occasioned by Zillah Judges making returns in the vernacular, and not in the prescribed form, to precepts directing enquiry into the value of the securities in cases of appeal to Her Majesty in Council, and to other orders in such cases, which returns must afterwards be translated for incorporation in the proceedings, the attention of the Zillah Judges is called to the subject, and they will be good enough invariably to make their returns, in matters connected with appeals to Her Majesty in Council, in the *English language.*

The Court will expect this order to be carefully observed, and the Judge's attention is further drawn to the Rules of Practice* in respect of such appeals, by which the duty of making enquiries as to the sufficiency of security is imposed in the first instance on the Judges themselves, and is not to be delegated to subordinates. This need not prevent the Judges from directing a local enquiry upon any particular point in the investigation which, for special reasons, they may find it necessary to order, and which they cannot conveniently conduct themselves.

* Resolution of the Presidency Court of Sudder Dewanny Adawlut, dated the 7th of December 1858, *viz.* :—

Rule X.—For this purpose † it will be merely necessary for the Zillah Judge, instead of ascertaining questions of possession and value by the agency of his Nazir, as has been the usual practice, to pursue the enquiry himself (*first*) by a proclamation of the tender made in the Court of the Judge, and of any Moonsiff within whose jurisdiction any portion of the property may be situate, and (*next*) by requiring the surety to present *primâ facie* proof of possession, *viz.*, his deeds, papers, and documents, and to produce witnesses personally cognizant of the fact.

† That is, that the Judge may certify to the sufficiency of the security tendered by the appellant, after due enquiry and hearing of such objections as may be urged, within two months from the date of receipt by him of this Court's orders. Rule IX.

Maps sent up in appeals to be pasted upon cloth.

CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 14th January 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE High Court is pleased to direct that, in civil cases sent up to it in appeal, in which the preparation of maps may have been necessary for the elucidation of any points of importance, such maps may be pasted upon cloth before being despatched with the Records. The Court has at times been subjected to much inconvenience, from the tattered condition in which maps in important cases have come before it.

Early transmission of Annual Statements and Returns.

CIRCULAR No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges and Judicial Commissioners, dated Calcutta, the 16th January 1867.

(Civil and Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

CIRCUMSTANCES having rendered it very desirable that the annual statements and returns in the Civil and Criminal Departments should, on this occasion, be furnished to the Court with as little delay as possible, I am directed to request that you will use your best endeavours, and submit those records as much earlier than the 15th proximo as may be practicable.

Memorandum of appeal to be embodied in decrees of Lower Appellate Courts.

CIRCULAR No. 4.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all the Civil Appellate Courts in the Lower Provinces, dated Calcutta, the 16th January 1867.

(Civil Side.)

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor and L. S. Jackson, *Judges*.

THE Court having observed, in several cases which have recently come before them, that the decree of the Subordinate Appellate Court has not contained the Memorandum of Appeal, and much inconvenience being found to result from the omission, the attention of the Zillah Judges and Principal Sudder Ameens is directed to the provisions of Section 360 of the Civil Procedure Code, which requires that the Memorandum should be embodied in the decree; and to the terms of Section 334, which points out what the Memorandum itself must contain.

2. It is not enough, the Judges will observe, to set out the first ground of appeal before them followed by the words "et cætera," but all the grounds of appeal must be stated *seriatim*, so that the High Court may know, when the judgment on appeal comes before them, upon what grounds the appeal was preferred to the Lower Appellate Court.

Records of Execution Cases appealed to the High Court to be sent up complete.

CIRCULAR No. 5.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 4th February 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge*.

THE High Court is pleased to direct that the Records of Execution Cases, sent up in appeal to it, be invariably submitted complete, that is, that all the papers connected with them in the Lower Courts, whether original or appellate, be sent up, so that they may be at hand, should a reference to the same be required by the Court.

Transmission of records in Civil Suits appealed to the High Court.

CIRCULAR No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, Lower Provinces, dated Calcutta, the 18th February 1867.

(Civil Side.)

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, Chief *Justice*, and the Hon'ble C. B. Trevor, G. Loch, J. P. Norman, and L. S. Jackson, *Judges*.

IT is the practice, in pursuance of a Circular Order of the late Sudder Court dated 3rd March 1852, No. 167,* to divide the papers making up the record in civil suits into two portions, called respectively Nuthi A and Nuthi B. It was the intention of that Court, in issuing the circular in question, to separate from the record all papers formal and useless papers, so that the material parts thereof might be presented to the Appellate Courts unencumbered with what was unimportant and indeed useless.

* Page 469, Carrau.

2. It has been found in practice that from want of proper attention, many papers come to be attached to the Nuthi B, which ought not to be there, and which are in fact, important papers in the cause. The result is that, in some cases, the pleaders on both sides as well as the Court are in ignorance of the existence of material papers, and that, when the absence of such papers is discovered, the procuring them from the Court below occasions no trifling delay.

3. By Section 343, Civil Procedure Code, it is provided that, on receipt of intimation that an appeal has been preferred, the Lower Court shall * * * transmit to the Appellate Court, with all practicable despatch, all material papers in the suit, or such papers as may be specially called for by the Appellate Court. If this direction of the law were carefully followed by the Zillah Judges and Principal Sudder Ameens, the High Court would not have so much cause to complain of the evil above mentioned as it now has.

4. With a view to the strict observance of this rule in future, the Court now directs that, in all cases where the record is called for on appeal, it shall be invariably accompanied by a separate certificate under the

ignature of the Principal Ministerial Officer f the Court from which the case is transnitted, to the effect that he sends up all naterial papers in the suit. Such certiicates should be in the words following : —

Regular (or special as this may be) appeal No. of

——— *Appellant.*

——— *Respondent.*

I, *A. B.*, of the Court om whose judgment the present appeal is referred, certify that the record herewith ansmitted under orders of the High Court, ated

86 , contains all material papers in the uit, and that I have satisfied myself that o papers, essential to the determination of he appeal, have been kept back under the enomination of Nuthi *B*, or otherwise.

Zillah *A. B.*

(or as the case may be).

Dated

5. The High Court have had also freuent occasion to observe the want of order n records transmitted to them, and the ransposal, as well as the occasional disppearance, of documents and papers from he misl. This could rarely happen if the y-leaf or Index prescribed by Circular Order No. 186, dated 24th October 1861, ere properly kept up, and transmitted ith the record sent up on appeal. But the ourt have observed that this fly-leaf is, in umerous instances, entirely wanting.

6. They desire, therefore, that every illah Judge will satisfy himself and report a month from this time whether the ircular Order in question is observed in is own Court, and in the Subordinate ourts of the District; and that, where it as fallen into disuse, it may be revived nd carefully maintained, and that the flyaf kept up in pursuance thereof be in all ases transmitted to this Court, together ith the Nuthi sent up on appeal.

Exemption of certain Native Gentlemen from personal attendance in the Civil Courts.

CIRCULAR No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces, dated Calcutta, the 20th February 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court circulate, for general information and guidance, the accompanying copy of a letter No. 884 of the 8th instant, from the Secretary to the Government of Bengal, exempting the following Native gentlemen from personal attendance in the Civil Courts:—

Baboo Prosono Coomar Tagore, C. S. I.
„ Ramgopal Ghose.
Moonshee Ameer Ali Khan Bahadoor.
Baboo Degumber Mitter.
Khaja Abdool Gunny.
Baboo Romanath Tagore.
Rajah Anundo Nath Roy Bahadoor, C. S. I.

No. 884.

From the Secretary to the Government of Bengal, to the Registrar of the High Court, dated Fort William, the 8th February 1867.

Judicial.

SIR,—I am directed to request that, with the permission of the Hon'ble Judges of the High Court, you will be so good as to include the gentlemen named in the enclosure in the list of persons who have been exempted from personal attendance in the Civil Courts under the provisions of Section 22, Act VIII. of 1859.

List of Names.

Baboo Prosono Coomar Tagore, C. S. I.
„ Ramgopal Ghose.
Moonshee Ameer Ali Khan Bahadoor.
Baboo Degumber Mitter.
Khaja Abdool Gunny.
Baboo Romanath Tagore.
Rajah Anundo Nath Roy Bahadoor, C.S.I.

Indents to be made to Superintendent of Stationery for printed Forms A and B for the preparation of Registration Memoranda.

No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 26th February 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Officiating Registrar-General, Lower Provinces, having intimated to the High Court that printed Forms *A* and *B*, for the preparation of Memoranda under Sections 41 and 42 of the Indian Registration Act, referred to in para. 11 of their Circular No. 24, dated 19th June 1866, are ready for distribution, the Court request that indents may be made direct to the Superintendent of Stationery for a sufficient supply of the Forms.

Reception of Documentary evidence.

CIRCULAR No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges in the Lower Provinces, dated Calcutta, the 26th February 1867.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges.*

THE Court find it absolutely necessary to call the attention of Subordinate Courts of every grade to the Sections of the Code of Civil Procedure applicable to the reception of documentary evidence, the laxity of practice prevailing on this head being productive of most serious inconvenience, and evincing in many cases total disregard of the wholesome provisions of the law.

2. Section 39 provides that, "when the "plaintiff sues upon any written document, "or relies upon any such document as evi- "dence in support of his claim, he shall "*produce the same in Court* when the "plaint is presented, and shall *at the same* "*time deliver a copy* of the document to be "*filed with the plaint:* if the document be "an entry in a .....book, the "plaintiff shall produce the book to the "Court, together with a *copy of the entry* "on which he relies. The Court shall "forthwith mark the document ..... "and, after examining and comparing "the copy with the original, shall return "the document to the plaintiff. The plain- "iff may, if he think proper, deliver the "original document to be filed instead of "the copy .....; any *document* not "*produced in Court* by the plaintiff when "the plaint is presented *shall not be re-* "*ceived in evidence* on his behalf at the "hearing of the suit, without the sanction "of the Court."

This latter part of the Section has reference to Section 128, which regulates the reception of documents at the first hearing, and is in these words:—

"The parties or their pleaders shall bring "with them, and have in readiness at the "first hearing of the suit, to be produced "when called upon by the Court, all the "documentary evidence of every descrip- "tion which may not already have been "filed in Court, and all documents, writings "or other things which may have been speci- "fied in any notice which may have been "served on them respectively, within a rea- "sonable time before the hearing of the suit, "and no documentary evidence of any kind "which the parties or any of them may de- "sire to produce, shall be received by the "Court at any subsequent stage of the pro- "ceedings, unless good cause be shown to the "satisfaction for the non-production thereof "at the first hearing."

This hearing, it will be observed, is the defendant's first opportunity (and last unless good cause be shown) for production of documentary evidence. It is also an opportunity (and the last, unless good cause

be shown) for the plaintiff, *with the sanction of the Court*, to produce any documents which he may not have produced in Court with his plaint.

3. A plaintiff occasionally has to prove his case, or a defendant to substantiate his defence to a suit, by documents in the possession or power of some other party to the suit, which documents, of course, cannot be produced by the party whose case they are to serve.

4. When this is the position of the plaintiff, he may, under Section 40 (and ordinarily he ought), "at the time of presenting the plaint, deliver to the Court "a description of the document, in order that "the defendant may be required to produce "the same;" when this is done, the summons (*vide* Section 43) is to "order the "defendant to produce any written document in his possession or power, of "which the plaintiff demands inspection, "or upon which the defendant intends to "rely in support of his defence;" and where the production of such document is required by a defendant, or when the demand has not been made under Sections 40 and 43 on the part of the plaintiff, Section 107 provides that "he shall, at the earliest "opportunity, deliver to the Court two "notices in writing to the party in whose "possession or power he believes the document, writing, or other thing to be, calling upon him to produce the same; and "one of such notices shall be filed in Court, "and the other shall be delivered by the "Court to the Nazir or other proper officer, "to be served upon such party."

When such notices have been served within a reasonable time before the hearing of the suit, the party served is required by Section 128 to produce the documents therein specified at the hearing.

5. A party to the suit, or any other person, may also be *summoned* to produce a document (Section 153), if necessary, and the Court has power, under Section 170, to deal with persons being parties to the suit who fail to comply with orders to produce documents.

6. It follows from these several Sections that documentary evidence is to be produced in open Court; that it must be produced at the earliest opportunity, and not afterwards without the special sanction of the Court, or without good cause shown; and that, where the production of such evidence rests with a party other than the party requiring it, the Court is bound, on application made to it in reasonable time, to afford its aid in enforcing the production of such evidence, and it is the duty of all Judges to take care, as far as their Courts are concerned, that these principles are observed.

7. The attention of the Subordinate Courts is further called to the mode in which documents (called "exhibits"), including those produced by a plaintiff when his plaint is presented, and which, or copies of which, have been filed with the plaint pursuant to Section 39, are to be received and dealt with.

8. By Section 129 they are to "be received and inspected by the Court, but it "shall be competent to the Court, after inspection, to reject any exhibit which it "may consider irrelevant or otherwise inadmissible, recording the grounds of such "rejection."

This means that the Court is to take care that parties are not allowed to put in exhibits which are—

1. Irrelevant or
2. Inadmissible.

9. The High Court cannot here lay down what documents ought to be rejected for these reasons, but they may advert to the most frequent violations of rule in this respect. These are generally (*1st*) the production of decisions and proceedings *inter alios;* and (*2nd*) the production of copies or offering secondary evidence of the contents of documents when the originals ought to be produced, or their absence accounted for.

10. If the Courts are only resolute in exercising the vigilance which the law requires of them, common sense will usually prevent any Judge from going far wrong in the admission or rejection of evidence. The inconvenience of which the superior Courts have to complain is almost invariably the result of lax procedure by which the Courts receive documents, or permit them to be received, sometimes in open Court, sometimes by Ministerial Officers, and at all stages of the proceedings; and sometimes even look upon all exhibits which have been filed with the plaint as if they were evidence in the cause, before the Court has inspected them, or determined whether they are admissible or not. Such practice as above shown is wholly opposed to the letter and spirit of the Procedure Code. But the Court should be careful always, as the law requires, to record its reasons for rejecting a document, and it should also make a note of any objection which may have been made to the admission of a document.

11. Next, an exhibit when received and admitted is to be endorsed and filed (Section 132). It would be of great assistance to the Courts of Appeal if every Judge, when trying a case in the exercise of original jurisdiction, were to make reference, in his notes of the trial, to every exhibit which is received and admitted in evidence, referring to it by a distinguishing number. The Court, therefore, direct that, in addition to the memorandum of the substance of the evidence required by Section 172 of Act VIII. of 1859, or to the evidence itself, if taken down by the Judge, a note shall be made by the Judge of every exhibit which shall be admitted in evidence, referring to it by a distinguishing number, and of the date on which it was received, and the name of the party producing it, and also a note of the rejection of every exhibit which shall be rejected, and of the grounds of such rejection.

12. Section 132, it will be observed, repeats the direction contained in Section 39, that, if the exhibit (or document) be an entry in any shop-book or other book, the party on whose behalf such book is produced shall produce *a copy of the entry, which copy shall be endorsed* as aforesaid, and be filed as part of the record, *and the book shall be returned* to the party producing it, and the Court ought, doubtless in these cases as under Section 39, to *mark* the document, *i. e.*, the entry in the book for the purpose of identification before returning it.

It will be observed that the words as to the return of the book are imperative, and the party has not the option (as under Section 39) of delivering the book to be filed instead of the copy of the entry.

13. From inattention to this rule, it has been matter of frequent occurrence for great numbers of account and other books to be received and actually filed in the Subordinate Courts, and to be afterwards sent up to the Appellate Courts, to the serious inconvenience of the Courts themselves, and probably of the parties, except in those cases where the books have been prepared *pro re nata*, a thing which occasionally happens.

But the inconvenience reaches a climax when the importance of the suit and the determination of the parties bring about an appeal to England. It then becomes *primâ facie* necessary to translate, and to print the whole of the contents of these voluminous books and other papers, and the resulting costs are frequently enormous.

14. This Court is occasionally, at very great trouble to itself and to the pleaders engaged, able to apply some check to the evil, but in many instances the check has not been applied, and in consequence the Lords of the Judicial Committee of the Privy Council have in several instances made complaints and observations upon the nature of the evidence sent home from this country.

The answer of this Court on these occasions has been that the evil is one with which the Appellate Courts can but imperfectly cope, and that the effectual remedy must be applied in the Courts of first instance.

And it is very much with a view to obviate these particular complaints, and to remove this just reproach from the procedure of the Courts in India that the present instructions are issued.

15. To avoid, however, any inconvenience which may in some cases arise from the Appellate Court's having a copy of an entry in a shop-book or other book instead of the original, the Court direct that, in any case in which a Court of Original Jurisdiction shall have reason to distrust the original of any such entry from anything which appears on the face of the document, such, for example, as from the entry or part of it being on an erasure, or from its being interlined or written with a different colour of ink or the like, the Judge's notes should call attention to the fact, so that the Appellate Court may, if it think it necessary, send for the original instead of acting upon the copy.

16. The Court have too much reason to apprehend that, in the subordinate tribunals practice is regulated more by daily habit and tradition than by intelligent and careful study of the Code on the part of the Judges themselves, of their Ministerial Officers, and of the pleaders; and, until that study has been fully and conscientiously established, the procedure of the Courts will not be what it ought to be, remands and reversals of decisions will be frequent, the course of justice will be impeded, and suitors will be harassed.

17. The Court, therefore, desire it to be understood that, in issuing directions like the present, they do not wish to give undue prominence to any particular portion of the Code, but simply to remedy errors and inconvenience as they arise, while at the same time they urge upon the Subordinate Courts the necessity of a perfect familiarity and attention to the Code in every part.

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Statement called for showing the amount of fees paid by candidates for admission as Pleaders and Mookhtears.

CIRCULAR No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 1st April 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Government of Bengal having requested the submission of a report on the financial results of the examinations which were held in January and February last, of candidates for admission to practise as Pleaders and Mookhtears in the Mofussil Courts, the Court requests you will be good enough to furnish, with as little delay as possible, a statement showing the amount of fees paid by those candidates under Rules 13, 24, and 22 of the Rules drawn up in accordance with Section 4 of Act XX. of 1865.

Time for Uncovenanted Judicial Officers joining their appointments.

CIRCULAR No. 11.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Civil Authorities, Lower and Extra Regulation Provinces, dated Calcutta, the 9th April 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

WITH reference to the object of the rule laid down in Circular Order No. 30, dated the 24th September 1864, *viz.*, to place Uncovenanted Judicial Officers on a footing with Covenanted Civil Servants in regard to the time allowed them for joining their appointments, and the fact that that time, in the case of the latter class of Officers, has been reduced by order of the Secretary of State, the High Court is pleased* to prescribe the following rule in substitution of the one laid down in the Circular above mentioned:—

* Letter from Bengal Government, No. 1319, dated 2nd April 1867.

2. Whenever an Uncovenanted Judicial Officer of any grade is appointed to a station or transferred from one appointment to another in a different station, he shall be allowed seven days for preparation, 100 miles a day, when he travels by rail or steamer, and 15 miles a day when travelling by dawk.

Applications for enrolment by successful candidates passed as Pleaders and Mookhtears, how to be dealt with.

CIRCULAR No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 9th April 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

REFERRING to the names of the successful candidates who have been passed Pleaders of the higher and lower grades respectively, and Mookhtears in the Mofussil Courts of the Lower Provinces, published in the *Calcutta Gazette* of the 27th March last, I am directed to draw your attention to Rules 15, 16, 26, 27, 35, and 36 of the High Court's Rules of the 2nd May 1866, prescribing the course to be followed by successful candidates in applying for enrolment, and by Judges of Districts in forwarding their applications to this Court.

Return called for showing scale of establishment attached to each Small Cause Court.

CIRCULAR No. 13.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Small Cause Court Judges, dated Calcutta, the 11th April 1867.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

I AM directed to request that you will be so good as to submit as soon as practicable a Return showing the present scale of establishment attached to your Court and the salary of each officer upon it, with the monthly expenditure for stationery and Office contingencies.

Toll on Civil Court Peons to be debited to the Peons' Fee Fund.

CIRCULAR No. 14.

The following letter is circulated for the information and guidance of the Civil Authorities in the Lower Provinces, with reference to Act VIII. of 1851 and Act XV. of 1864:—

No. 2342.

From the Under-Secretary to the Government of Bengal, to the Registrar of the High Court of Judicature at Fort William in Bengal, dated Fort William, the 9th April 1867.

Judicial.

SIR,—I AM directed to acknowledge the receipt of your letter No. 1014, dated the 1st instant, and in reply to inform you that the toll of 3 pies each, levied at the bars on District Roads and Bridges from Peons of Civil Courts employed in the service of processes, may, as proposed by the Hon'ble Judges of the High Court, be debited to the Peons' Fee Fund.

Register prescribed by Circular Order No. 62 of 1845, and separate book for copies of Mookhtearnamahs.

CIRCULAR No. 15.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judge of , dated Calcutta, the 10th May 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

SIR,—I AM directed to enquire whether the Register prescribed by Circular Order No. 62, dated 31st January 1845, and the separate book for copies of Mookhtearnamahs enjoined in para. 5 thereof, are still kept up in your office.

Travelling Allowance Bills of Small Cause Court Judges.

CIRCULAR MEMO. No. 16.

Copy of the following letter is forwarded to the Judges of Small Cause Courts for their information and guidance, in modification of Circular Order No. 21, dated 28th May 1866:—

No. 340.

From the Deputy Accountant-General, Bengal, to the Registrar of the High Court of Judicature at Fort William in Bengal, dated the 16th May 1867.

SIR,—I HAVE the honor to acknowledge the receipt of your letter No. 1124, dated the 8th April, and in reply to observe that the practice of requiring travelling allowance bills to be countersigned by the Controlling Officers of Departments prior to payment at local treasuries has been generally continued under the new system of accounts, and is essential as a check against over-payments.

The orders of the Government of India of the 21st December 1864 introduced a modified system of payment for contingent charges alone, which do not apply to travelling allowances; for these a special provision is made in a distinct item in every Departmental Budget, and they should not, I would observe, be included in the Grant for contingent expenditure. Since the issue of the letter from this Office, No. 127B of the 11th May last, the distinction between travelling allowances and contingencies has been more clearly defined, and the issue recently, with the concurrence of the Comptroller-General of Accounts, of separate printed forms of bills for travelling allowances in every Department, has removed any doubts that might formerly have been entertained on this point. I would beg to suggest, therefore, that, with the approval of the Hon'ble Judges of the High Court, the necessary instructions on the subject may be issued to Small Cause Court Judges, who have been advised by this Office of the issue of the printed bill form for travelling allowances, and may obtain them on indent from the Superintendent of Stationery.

CRIMINAL CIRCULAR ORDERS OF THE HIGH COURT.

Relative to the Procedure enjoined in Chapter XII. of the Code of Criminal Procedure.

CIRCULAR No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, Lower and Extra Regulation Provinces, dated Calcutta, the 12th February 1867.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges*.

THE Court are pleased to issue the following instructions relative to the procedure enjoined in Chapter XII., Act XXV. of 1861.

2. Section 226 of the Code of Criminal Procedure enacts that, when evidence has been given before a Magistrate, which appears to be sufficient for the conviction of the accused person of an offence which is triable exclusively by the Court of Session, or which, in the opinion of the Magistrate, is one that ought to be tried by the Court of Session, the accused person shall be sent by the Magistrate for trial before the Court of Session. The Section then proceeds to provide for a case in which the accused person is a European British subject.

3. Section 225 enacts that, when a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session, or for remanding him, he shall discharge him, unless it shall appear to the Magistrate that such person should be put upon his trial before himself, in which case he shall proceed under Chapter XIV. of the said law.

4. By Section 40 of the Penal Code, the word 'offence' denotes a thing made punishable by that Code, and by Section 6 every definition of an offence shall be understood subject to the exceptions contained in the chapter, entitled 'General Exceptions.' If, therefore, the evidence given before a Magistrate upon a preliminary enquiry relating to an offence exclusively triable by a Court of Session satisfies him that the act or omission charged against the accused is brought within one of the general exceptions of the Penal Code, the Magistrate would be wrong in committing the accused person for trial. This would be the case whether the evidence by which the Magistrate is so satisfied is that which arises from the examination and cross-examination of witnesses called in support of the prosecution or of witnesses summoned by the Magistrate on behalf of the accused under the provisions of Section 207 of the Code of Criminal Procedure. By the last mentioned Section, it is left entirely to the discretion of the Magistrate upon such preliminary enquiry either to summon or not witnesses offered on behalf of the accused person to answer or disprove the evidence against him.

5. The discharge of a prisoner under Section 225 of the Code of Criminal Procedure does not amount to an acquittal, and the accused would be liable to further proceedings, if necessary; and, under Section 435 of the same Code, the Court of Session may order him to be committed.

Meaning of the term "immediately subordinate" in Section 434 of the Code of Criminal Procedure; and power of Magistrate of District to call for and examine the record of any Magistrate within his district.

CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, dated Calcutta, the 25th March 1867.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor,

H. V. Bayley, G. Loch, and L. S. Jackson, *Judges.*

THE High Court, having reason to believe that some misapprehension exists amongst Magistrates as to the meaning of the term "immediately subordinate" in Section 434 of the Code of Criminal Procedure, and, consequently, as to the power, under that Section, of the Magistrate of the District to call for and examine the record of a case tried by an officer subordinate to him who exercises the full powers of a Magistrate, are pleased to circulate the following instructions for the guidance of all officers:—

The Court do not interpret the words "*immediately* subordinate" in this Section as having any reference to the *judicial* powers vested either in the Courts described as subordinate, or in the Court to which they are described as subordinate. They consider that all Magisterial Officers in a district, except the Magistrate of the District, are within the meaning of this Section *immediately* subordinate to the Magistrate of the District, whatever their judicial powers may be. It follows that, in the opinion of the High Court, the Magistrate of the District has power to call for and examine the record of any Magistrate within his district, for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such Magistrate.

He is not, however, competent to comment upon the proceedings of an officer exercising the full powers of a Magistrate, or to point out what he considers to be errors of law or irregularities. If he is of opinion that the sentence or order is contrary to law, he should forward the case, through the Sessions Judge, for the orders of the High Court.

Preparation and issue of Warrants prescribed by Sections 383, 384, and 386 of the Code of Criminal Procedure.

CIRCULAR No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Officers in charge of Jails, dated Calcutta, the 25th March 1867.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

As some misapprehension seems to have existed in regard to the warrants prescribed by Sections 383, 384, and 386 of the Code of Criminal Procedure, the Court is pleased to issue the following explanations and instructions, with a view to the proper observance of the provisions of the Code in the preparation and issue of such warrants.

2. Sections 383 and 384 provide, in cases in which the sentence of the Sessions Court is confirmed by the High Court, as well as where it does not need to be referred for such confirmation, for the issue *by the Court of Session* of warrants to Magistrates or other officers in charge of Jails, to carry the sentence passed to be carried into execution. Under Circular Order No. [illegible] dated 20th November 1865, which was based upon the expressed intention of Government to appoint officers other than Magistrates to the special charge of large Jails, *such* warrants should be addressed to the officer in charge of the Jail, instead of the Magistrate of the District. But the Code in force now does not require that the Sessions Judge should issue a separate warrant of this nature in the case of each prisoner sentenced; a single warrant should include all who are involved in one sentence.

3. By Section 386 the *Magistrate or other officer in charge of the Jail* is required, in executing the warrant of the Sessions Judge referred to in the foregoing paragraph, in every case of imprisonment under the sentence of the High Court or a Court of Session, to issue his warrant to the Jailor, stating the offence of which the accused person has been convicted, and the period during which he is to be imprisoned and the nature of the imprisonment. As regards warrants of this nature, a separate warrant should be issued to the Jailor for each prisoner, and it should accompany the prisoner to whatever Jail he may be transferred. It is to such warrants also, and not to the warrants issued by the Sessions Court, that the provisions of Circular Order No. [illegible] dated 15th August 1859, must be considered to apply under the present procedure.

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ules for the Regulation of the business of the High Court on its Appellate Side, dated the 16th May 1867.

On reading a report from the Select Committee of the Judges (appointed for the urpose of drawing up a scheme for the conuct of the English business in the Court id for the distribution of appeals to the veral Benches), and after considering the me—

The Court resolves:—

That there shall continue to be an English Committee, composed, as heretofore, of five Judges the Court, who shall exercise the powers id authority of the Court, in the matters reinafter specified.

English Committee.

That one Judge shall continue to have executive charge of the English Department with e following powers and functions, and all be always a Member of the English ommittee.

Judge in English epartment.

The Judge in the English Department shall have submitted to him, primarily, all correspondence in the English language, and all eturns and Statements (not being Returns to eccepts and judicial orders or explanations lled for by particular Judges or Benches), cept the periodical Sessions Statements nt up by the Judges in the interior, which all be submitted for revision to a Bench of Court sitting for the despatch of criminal business.

Powers of Judge in nglish Department.

Such correspondence and other matters all either be disposed of by the Judge in English Department under his own wers, hereinafter conferred, or laid by him fore the English Committee, or the Court large, according to the nature of the case, hereinafter provided.

The Judge in the English Department is empowered singly to dispose of—

A.—Matters arising out of the revision of all periodical Returns and Statements furnished by the Subordinate Civil and Criminal Courts, except the Sessions Statements above referred to and the annual Statements, for which provision is made elsewhere; and the necessary resolutions shall be recorded and issued under his orders.

Revision of Periodical Statements.

B.—The appointment and transfer of Moonsiffs, subject to consultation with the Chief Justice, leave of absence of Moonsiffs, and the correspondence with the Local Government touching the appointment, promotion, transfer, and leave of Subordinate Judges, in respect of which the Court is consulted by the Government. As regards promotion and transfers, he will confer with the English Committee.

Appointments, &c., of Subordinate Civil Judges.

C.—Applications and routine references connected with the admission and enrolment of Pleaders and Mookhtears under Act XX. of 1865.

Admission, &c., of Pleaders and Mookhtears.

D.—All other correspondence not relating to matters judicial or to orders of other Judges, unless there be, as to any subject, an express rule to the contrary, or unless the importance of the subject may render it, in his opinion, fit to be laid before a greater number of Judges.

Other correspondence.

The English Committee are empowered to dispose of the following matters, which are to be laid before them by the Judge in the English Department; and the signatures of not less than three Judges of the English Committee shall be attached to all orders passed by the Committee.

E.—The issue of Circular Orders to the Mofussil Courts.

Circular Orders.

F.—Letters and communications from the Government.

Letters from Government.

G.—Letters from other High Courts, or Authorities exercising similar powers.

Letters from other High Courts.

H.—Communications relating to proposed changes in the law, subject to the rule hereinafter specified in letter L.

Changes in law proposed.

I.—Resolutions on the Annual Returns and Statements prepared under the direction of the Judge in the English Department.

Resolutions on Annual Statements.

K.—References under the Circular Order No. 17, dated 17th June 1863, regarding doubts in connection with the Penal Code and the Code of Criminal Procedure:

References touching Penal and Procedure Codes.

Provided that all questions, in respect of which a requisition to that effect shall be made by two Judges of the English Committee, shall be referred to the Court at large.

On the following matters all the Judges are invariably to be consulted, and the decision shall be according to the opinion of the majority who shall be present at a meeting to consider the subject.

L.—Proposed changes in the law where the proposition emanates from Government, or in other cases, where the English Committee or any Judge of the Court considers that action is called for.

Specially proposed changes in the Law.

M.—The Administration Reports yearly submitted to Government when passed by the English Committee.

Administration Reports.

N.—General Rules of the High Court.

General Rules.

O.—Subjects connected with the relations between the Privy Council and the High Court.

Privy Council.

There shall be meetings of the English Committee on the 1st Saturday of every month, or oftener if necessary, at 2-30 P. M., unless another day and time shall be, on any occasion, specially appointed.

Meetings of English Committee.

The proceedings of the English Committee at such meetings shall be recorded in a book to be kept by the Registrar.

Record.

All papers relating to matters of the kind hereinbefore expressly reserved for the decision of all the Judges shall be forthwith circulated to them by means of additional printed copies to be obtained for the purpose.

Immediate circulation of all important papers to Judges.

There shall be a meeting of all the Judges or as many as can attend on the last Saturday of each month, at 2-30 P. M., or oftener, if necessary, to be convened by a notice to be circulated two days previously with a list of the subjects to be considered. If there be no subjects for consideration, notice shall be circulated by the Registrar on the day previous, stating that no meeting will be held.

Meetings of Judges.

The proceedings of the Judges at all meetings shall be recorded in a book to be kept for that purpose by the Registrar, and shall be at all times open to inspection when called for by the Judges.

Record.

With a view to the better distribution of the Appellate business of the Court, it is ordered by a majority of the Judges (the Chief Justice, Mr. Justice Seton-Karr, and Mr. Jus-

Groups of Districts.

tice Shumbhoonath Pundit dissenting) that from and after the first day of June next, and for the space of six months next ensuing, all appeals of a Civil nature, except Miscellaneous, from the decrees or orders of the Zillah or Subordinate Judges and the Collectors or Deputy Collectors of the several districts within the jurisdiction of the Court, be placed on the general Register; but with the addition of a letter denoting the files of the several Benches of the Court, according to the scheme which follows:—

A.	B.	C.	D.
Assam (including Eastern Dooars).	Tirhoot.	Bhaugulpore.	East Burdwan.
Beerbhoom.	Backergunge.	Monghyr.	Cooch Behar (including Western Dooars).
Chittagong.	Cuttack.	Cachar.	Cossyah and Jynteeah Hills.
Gyah.	Chota Nagpore.	Dacca.	Dinagepore.
Moulmein.	Hooghly.	Furreedpore.	Maldah.
Mymensing.	Nuddea.	Jessore.	Moorshedabad.
Rungpore.	Sarun.	Midnapore.	Patna.
Boghra.	Tipperah.	Purneah.	Rajshahye.
Shahabad.	Noakhally.	Sylhet.	Pubna.
		West Burdwan.	24-Pergunnahs.

As the cases are ready for hearing, they are to be placed on the *Lists* of the several Division Benches to which, according to the foregoing arrangement, the Chief Justice shall have assigned the cases belonging to the several groups of districts respectively.

Bench for Miscellaneous Appeals, revision of Sessions Statements, &c.

One of the Benches of the Court shall take the Miscellaneous Appeals, and shall also undertake the revision of the Sessions Statements, hear motions relating to, and take cases of, revision under Section 434 of the Code of Criminal Procedure, and shall also, when practicable, hear Criminal Appeals or References, or, if need be, assist either of the other Benches in hearing Regular or Special Appeals, on days to be previously fixed, provided that at least three days' notice shall be given of the transfer of any such Regular or Special Appeals to be heard by such Bench.

Motions.

Motions shall be taken every day at the sitting of the Court by one of the Benches. If on any day the particular Bench appointed to hear Motions on that day shall not sit, then the Motions shall be taken by the next Bench in seniority.

Lowazima or Miscellaneous References.

Each Division Court shall pass orders on the "Lowazima" or Miscellaneous References, and all other matters arising out of, or connected with, the cases on its own file.

Judge in Miscellaneous Department.

One Judge shall take the Miscellaneous Department, and shall dispose of matters relating to the following subjects:—

(1.)—Appeals to Her Majesty in Council.

(2.)—Appeals from Omlah.

(3.)—Applications to appeal *in formâ pauperis*.

(4.)—Applications for admission of Special Appeals uncertified by a Vakeel.

References from Small Cause Courts and Recorders.

References from the Small Cause Courts in the Mofussil and from the Recorders in British Burmah shall be heard by such of the Benches as the Chief Justice shall appoint.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 15th December 1866.

Present:

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Mahomedan Law—Marriage and Legitimacy—Presumption.

On Appeal from the Judicial Commissioner of Oude.

Ashruffoodowlah Ahmed Hossein and another

versus

Hyder Hossein Khan.

According to Mahomedan Law, mere continued cohabitation, without proof of marriage or of acknowledgment, is not sufficient to raise such a legal presumption of marriage as to legitimize the offspring. Marriage and acknowledgment may be presumed, but the presumption must be one of fact, and, as such, subject to the application of the ordinary rules of evidence. A subsequent marriage, so far from furnishing a ground for presuming a prior marriage, *primâ facie* at least excludes that presumption.

THIS is an appeal from a decree of Mr. George Campbell, made by him when Chief Judicial Commissioner of Oude, which reversed a decision in favor of the appellants, the plaintiffs, in the suit made by Mr. Fraser, the Civil Judge at Lucknow. The case comes before their Lordships *ex parte*, and, difficult in itself, occasions, by its being heard *ex parte*, an increase of anxiety and difficulty. The appellants are son and daughter, and, as such, heirs of Ameenooddowlah Bahadur, the late vizier of the ex-king of Oude. The respondent claims to be also a legitimate son, and as such a co-heir of the late vizier, founding his claim on a moottah marriage of his mother, and on his birth in due course, as a son conceived in wedlock of that marriage. He relies also on acknowledgment for many years of him by the late vizier as his legitimate son. The appellants deny the alleged parentage, legitimacy, and acknowledgment.

The suit which gave rise to this appeal results from a precedent litigation between these parties, of which some account is necessary to a complete understanding of the case.

At the time of the vizier's death, the respondent was not *de facto* a member of his family, having been some time previously expelled by his reputed father, the vizier, from the house, and renounced as a son, under a suspicion of a grave offence imputed to him. On that occasion the vizier executed a formal instrument, which is described in the suit as a deed of renunciation, declaring the respondent not to be his son. At the time of the vizier's death, the respondent, whatever his legal status, was not *de facto* an apparent heir of the vizier, and the possession of the vizier's estate was, after his death, in some one or more of his undisputed heirs, and no risk of disturbance from disputes as to possession seems to have existed.

A portion of the property appears from the statements on the record to have consisted of Company's paper, endorsed generally to the heirs of the vizier. But this state of endorsement did not require the institution of a merely possessory suit. In this state of things, the respondent preferred a claim to be admitted as co-heir to a joint possession of the estate of the late vizier, and his claim being disputed by the appellants, this gave rise to a summary suit to enforce his claim to possession. If a suit of this kind, which cannot determine right, be instituted where the actual possession is quiet, and where the question in dispute necessarily involves right, the claimant should at once be directed to proceed in a regular suit; for if he proceeds under the Acts subsequently referred to, an expensive and inconclusive litigation is the probable result.

It is unnecessary to go through the history of this previous litigation in detail, or to examine the correctness of the course adopted in its several stages. It was attended with varying success, and finally ended with a decree of Colonel Abbott on appeal, in favor of the respondent, which is to be found at page 9 of the Appendix. That gentleman, the Commissioner and Superintendent of the Lucknow Division, after referring to the Acts of the Indian Legislature, XIX. of 1841, XX. of 1841, and X. of 1851, under which, or one or more of which, the summary proceeding was instituted, observes of them: "They cannot determine right, but they place the *primâ facie* heirs in possession, and leave the subject to litigation in the proper course of law." This decision, then, was intended to establish a *primâ facie* title in the respondent as co-heir, leaving the right undetermined; but in this case no *primâ facie* title exists distinct from the complete title in dispute; the whole subject of litigation resting on legitimacy alone. The right to that status was left undetermined, and was to be decided in a regular suit, to which the appellants were referred.

In consequence of this decision, the plaintiffs brought their suit in the Civil Court at Lucknow on the 6th June 1861. The object of their suit, as it appears from the plaint, was to be relieved from the effects of that summary decree, and to establish the respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plaint in that suit is set out at page 19 of the Appendix. The plea is not set out at length, but an abstract of it is to be found in Mr. Fraser's judgment at page 30 of the Record. The issues are set out in the same page; they, as also the findings on them at page 35, are carefully framed, and evidence an accurate knowledge of the Mahomedan Law as to legitimacy. The 1st, 2nd, and 3rd issues are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the 4th issue, which relates merely to the share if legitimate, and a claim to maintenance if illegitimate. The 1st, 2nd, and 3rd issues are as follow:—

1st.—Did Nawab Amenooddowlah (deceased) contract moottah with defendant's mother before or after his birth?

2nd.—Has the deed of repudiation (A, dated 23 Suffur 1272 Hijree) the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made?

3rd.—If defendant be not a legitimate son, is he an illegitimate son of deceased?

It was admitted on the pleadings that a moottah marriage at some time had been contracted between the late vizier and the respondent's mother, but the plaintiff stated in effect that the conception and birth of the respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a date to it, and alleged the legitimacy of the respondent as a child born of that marriage. The existence of a moottah marriage, therefore, at some time was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word "sonship," which might include an illegitimate son, the word "legitimacy," and uses the word "acknowledgment" in its legal sense, under the Mahomedan Law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as son. The first and second issues include the two legal grounds of legitimacy, *viz.*, marriage and acknowledgment to which the plea is limited. Acknowledgment in the sense of treatment, as evidence simply of marriage or of legitimation, could not have been included with propriety in the issues, though as evidence it would not lose any part of its efficacy by reason of the wording of the issues.

It is not necessary to state the evidence in detail, nor to weigh the conflicting direct evidence; since both Courts, *viz.*, the Civil Court and the Court of the Commissioner, agreed in their view of the facts generally on which the decision turned, the latter adopting the facts as stated in the judgment of Mr. Fraser. Mr. Campbell's judgment was founded mainly on the inferences which he drew from those facts.

Mr. Fraser was assisted in his decision of this important and difficult case by a punchayet as it is termed, formed out of twenty Mahomedan gentlemen, selected with care, and reduced to ten by five challenges on either side; and as the reduced number consisted of ten men, including the high priest, and another Mussalman priest, all of whom are stated to have been mutually approved on both sides, a more competent tribunal could hardly have been appointed for the decision of such a case. Their opinion against the claim of the respondent was unanimous. Their opinion had substantially the concurrence of the Judge, Mr. Fraser, who made it the ground of his decision, treating them as assessors and concurring in their finding.

On a question of Mahomedan Law, so closely allied as it is with the religion of the Mahomedans, the opinion of priests, of the dignity of these, would be entitled to respect, since they are unlikely to be ignorant of it, or consciously to swerve from it. Such a decision, therefore, creates a more than ordinary presumption in favor of its correctness. It cannot readily be supposed that the high priests would sanction so irreligious an act, in the view of Mahomedans, as the sacrifice of a son's legitimate status, conferred by acknowledgment of a father, to mere caprice, or to resentment working on the mind of the father; and their decision does not seem to be open to the suspicion of a tendency in the members of the punchayet unduly to augment a father's power. Upon turning to the findings of the issues, they appear to furnish no ground for questioning the care, or learning, or impartiality of the punchayet.

On the first issue they find that the moottah marriage took place after birth. Mr. Fraser says that, according to the stronger

evidence, impregnation took place during the service, and therefore *primâ facie* before the marriage. The second finding is as follows: "We do not find that deceased's acknowledgment that Hyder Hossein was born of his body *has been proved according to the conditions of the law; therefore* the deed of repudiation is correct." This finding, if it were construed literally, and disconnected from the context, would seem to favor the belief which Mr. Campbell seems to have entertained, that the punchayet may have been proceeding on some stricter rules of evidence, under the Mahomedan Law, than the procedure of the Courts at Lucknow authorized; but there is no proof that such was the case, and it cannot be presumed that any rules of the Mahomedan Law of evidence were adopted by them which they could not legally adopt. The presumption should be in support of the regularity of their course.

The rules of evidence of the Mahomedan Law were not generally in force there: it cannot be inferred without proof that they meant to be governed by rules of evidence foreign to the tribunal. The whole sentence must be read together. Their conclusion, "*therefore*, the deed of repudiation is correct," is a conclusion from the former part of the sentence, and they are plainly referring to that species of "acknowledgment" which the second issue embodies, *viz.*, one of legitimation, and not one simply constituting a piece of evidence. This is explained also by what follows in the statement of the priests as to the law constituting proof of sonship. "They reply, had the Nawab distinctly stated defendant is to be his son, whether orally or in writing, that would have been *conclusive*." They say nothing here of any peculiarity of proof of such a statement, as a necessary condition of its legitimating power. The conditions of law to which this passage probably refers are those which are to be found in the 3rd Volume of the Hedaya, p. 168, title "Miscellaneous Cases," which treats of acknowledgment of parentage; and the terms "conditions of law" would refer on that supposition to "acknowledgment," and not to the more immediate antecedent "proved." But, supposing that the learned Commissioner was correct in his conclusion that the punchayet had proceeded on some special rule of evidence under the Mahomedan Law applicable to acknowledgment of parentage, the rejection of their finding on that ground merely would not be reconcileable altogether with the opinion expressed by the Privy Council in their judgment (at p. 518 of the 3rd Vol. of Moore's Indian Appeals) in the case of Khajah Hidayut Oollah *v.* Rai Jan Khanum :* "We apprehend," say their Lordships, "that, in considering *this question* of Mahomedan Law (that, is, the question of legitimacy), we must, at least to a certain extent, be governed by the same principle of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question."

The general rules of evidence of the Mahomedan Law did not prevail in the Courts in which that cause was heard, any more than they prevail in the Courts at Lucknow; but, in relation to that particular subject, so intimately connected with family feelings and usages, that deference was recommended, if not enjoined.

Taking the whole of this finding together, and viewing it with relation to the particular issue which it finds, it appears to do no more than say, as sonship does not appear, that is, as the respondent is one of doubtful parentage, the deed of repudiation is correct, whereas it would have been untenable after an established acknowledgment; this reconciles the opinion here expressed with that of the priest at p. 6 of the Appendix, 1. 68.

On the third issue they find thus: "We do not find it proved that Hyder Hossein is a son begotten of the body of the deceased Nawab." The propriety of this finding with reference to the matter in dispute, *viz.*, legitimacy, resolves itself into the question whether, on the whole evidence in this cause, legitimacy ought to have been declared to be established. The consideration, therefore, of this part of the case is for the present postponed.

The judgment of Mr. Fraser is to be found at p. 35 of the Appendix. He states in the commencement of it "that the *onus* of proof in this case was thrown on the plaintiff, for the defendant had acquired the right of being regarded as one of the legitimate sons of the late Nawab Ameenooddowlah, such being the summary judgment passed by the Commissioner." The reason assigned seems to admit the correctness of the general rule, and to assign to the appellant the burthen of proving what is substantially a negative, to the inversion also, in this case, of the ordinary course of proceeding as to possession. The title of the respondent, if established, was one in privity with the appellants' title. The mere fact of possession of a portion of the disputed property by either party was not a matter of any importance to the decision of the question on whom the burthen of proof rested in this cause: that depended on the nature of the issues.

* *See* 6 Weekly Reporter, p. 52.

Mr. Leith made this inversion of the usual order of proof a subject of complaint against the decision. In many cases, undoubtedly, an unauthorized transfer of possession would work serious injury and injustice to a claimant; but, in this particular case, it does not appear that the mistake as to the transfer of possession, and as to that of the *onus probandi* which, in the judgment of Mr. Fraser, it involved, worked any real injustice, or imposed any difficulty on the appellants, from which they would otherwise have been free; and their Lordships' decision is unaffected by this objection.

This preliminary objection to the mode in which the case was dealt with below being removed, it becomes necessary to view the whole of the facts in proof in the cause; for the case really depends on a conflict of evidence and the due application of presumptive proof. The facts on which the Commissioner grounded his decision he took from the judgment of Mr. Fraser in the Court below, but they require to be stated, with one not unimportant addition, the want of which was made, on the argument, a ground for questioning the correctness of his view of the facts.

It appears to have been a mere omission of statement; the fact does not appear to have escaped the attention of the Commissioner. The addition required is this, that the mother of the respondent entered the vizier's family as a servant in a menial capacity, and served in that capacity for some time, and after some period of service was taken behind the purdah. The vizier, it may be observed, was then simply a darogah, not much elevated in position above the woman whom he hired and afterwards married. The facts, then, when stated more fully, should stand thus: that the mother of the respondent entered the service of the darogah, afterwards the vizier, in a menial position as cook; that she was a widow; that the date of her husband's death was not proved; that she went out in the course of her service into the bazaar to make purchases, and was taken subsequently behind the purdah; that the date of the commencement of her co-habitation with the darogah was not proved; that the date of her pregnancy and of the birth were not proved; that the date of the moottah marriage was not proved; and that it was not proved that any change in her position or treatment occurred before the date of her pregnancy. There is, therefore, a total failure of proof whether marriage preceded or followed pregnancy. Mr. Fraser said that pregnancy commenced during the service. Mr. Campbell removed the difficulty by a presumption of an antecedent marriage. Can the defect of the evidence in this case be supplied by a presumption placing that marriage itself at a time anterior to pregnancy? This is the main question in the cause.

It is to be observed, in considering the propriety of strengthening the weakness of the direct proof by this last presumption, that the mother was living at the time of trial, and that the date of her marriage was a fact which she was competent to prove, as well as the time of the birth of her child. No explanation has been afforded by the Judges who have heard this cause, why the evidence is on these important points, or why that is to be worked out by a presumption from marriage which living testimony might support, especially in a case where the treatment has been interrupted, and an impediment of more or less weight interposed by the repudiation of the parentage by the reputed father. It would be an easy matter to legitimatize a child conceived before marriage by withholding proof of the time of marriage, and rest on an inference from the marriage itself. These or similar reasons may have been present to the minds of the punchayet when they found, on the first issue, that the boy succeeded the moottah marriage. It is important to consider the real nature of such a document. It has no effect whatever on the status of a legitimate son, whether legitimate by birth, or made legitimate by acknowledgment. The finding of the punchayet does not contravene that position. Their finding on the issues as to acknowledgment and sonship leaves the respondent in the position of a son of an unacknowledged father. On the status of such a son, the renunciation may be operative according to the Mahomedan Law; but it is not conclusive, and may be contradicted and disproved, and does not seem to be more weighty in itself than a declaration by a deceased parent in a case of pedigree. The punchayet say that the renunciation is correct, that is, that their law admits it to have effect; whereas in either of the other cases "the denial is untenable," p. 6. It might be inferred from the proceedings of the punchayet alone that such an instrument was in use amongst the Mahomedans; a similar document was admitted in proof in a case which came before the Privy Council, Jeswant Singhee *vs.* Jet Singhee (3 Moore's Privy Council Cases, p. 253).* Had this deed of renunciation been evidence on which reliance could be placed as to the denial of sonship which it contained, then it might have sufficed to displace a mere presumption of legitimacy founded on treatment as a son of one in

* *See* 6 Weekly Reporter, p. 46.

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illegitimate. It might be designed and suffice to remove a growing repute. That document, however, cannot be relied on. It was executed under great resentment; it spoke the mind of one irritated by a grievous sense of wrong, and it would be dangerous to give effect to such a document, so prepared and executed, and to place it in the power of an irritated man to bastardize his offspring by an instrument executed under a sense of wrong, especially amongst a vindictive race. It is so difficult to credit the story that the vizier adopted the respondent, who on that supposition would be the bastard son of a loose woman of low degree by some unknown father, that the insertion of that statement in the deed detracts greatly from its credit; an untrue account of the origin of the vizier's connection with the respondent gives rise to some degree of suspicion that the disclosure of the real state of the case might aid the respondent's claim to be deemed legitimate.

As it appears, then, that the punchayet below, and the Court which adopted its finding, attached an undue importance to this deed of renunciation, and as this undue estimate of its weight may have greatly influenced their findings on the other issues, the learned Commissioner seems to be substantially correct in forming his own judgment independently of the findings, in which there had been a miscarriage. Whether he was correct in deciding the issues in favor of the respondent, is a doubtful and difficult question. It would be desirable to know to what authorities, if particular cases were in his contemplation, Mr. Campbell refers at page 44, para. 12.

Unfortunately he does not name any, but he refers to Mr. Baillie's Book on Inheritance as questioning the broad assumption that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimatize the offspring." This statement drops the important qualification "with acknowledgment."

The binding decisions on this subject must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption, or which, when rightly understood, is in conflict with the law as stated by the priests in this case.

The presumption of legitimacy from marriage "follows the bed," and whilst the marriage lasts, the child of the woman s taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favor of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of Mahomed Buker Hossein Khan *vs.* Shurfoon Nissa Begum (8 Moore's Reports, p. 159)* affirms this principle.

Their Lordships said in that case, which was one of legitimacy under the Mahomedan Law:—

"In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan Law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference."

Their Lordships are not aware that these principles have ever been lost sight of in the Courts in India. They believe that they have been constantly observed by, and have guided the decisions of, their Lordships in the Judicial Committee.

In the case in 3 Moore's In. Cases at p. 323, already cited (Khajah Hidayut Oollah *vs.* Rai Jan Khanum), it is observed in the judgment:—

"Without going into the question of the oral evidence, whether there was an express acknowledgment of the child by Fyz Ali Khan, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecu-

* *See* 3 Weekly Reporter, p. 37.

tive course of treatment both of the mother and the child for a period of between seven and eight years under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued except from the presumption of the cohabitation, and of the son being the issue of the loins of Fyz Ali Khan." The cohabitation alluded to in that judgment was continual: it was proved to have preceded conception, and to have been between a man and woman cohabiting together as man and wife, and having that repute before the cohabitation commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth, with treatment tantamount to acknowledgment, sufficed to prove legitimacy. The presumption throughout the whole judgment is treated as one of fact.

It would be much to be regretted if any variance on this important matter arose between the decisions of the Courts and the text of the Mahomedan Law of legitimacy as understood and declared by the high priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case at p. 35, Appendix, and the position contained in Mr. Campbell's judgment, at p. 12, that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This position, if established, would have sufficed to legalize the status of the claimant in the case before referred to in 8 Moore, for in that case there was abundant evidence of continued cohabitation between the father and the mother of the claimant; but, as there was no proof in that case, either of marriage or of acknowledgment, he was adjudged to be illegitimate.

This case, then, must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favor of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment, and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and whilst matters of the highest import are capable of being inferred, and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation.

Mr. Campbell's conclusion that the respondent was the son of the late vizier seems to their Lordships a just inference from the facts, nor does it seem to be at variance with the opinion of Mr. Fraser. Mr. Campbell, in p. 6, treats this as the only question of fact in the case. But the issues distinguished properly between sonship and legitimate birth. Mr. Fraser keeps that distinction clearly before him in his judgment. Mr. Campbell, indeed, does not appear to have lost sight of it, but to have considered that he was entitled to presume the respondent's legitimacy, if cohabitation of his parents, and his birth from them at any time, whether before or after the marriage, were established as facts.

Mr. Campbell does not question, in his judgment, the correctness of the opinion expressed by Mr. Fraser that pregnancy commenced during the service. At that time cohabitation, in the sense of permanent intercourse such as takes place ordinarily between man and wife, is not proved to have existed between the late vizier and the mother of the respondent. The evidence forbids the presumption that that kind of cohabitation commenced with her service, for a change in the treatment of her ensues when she is taken behind the purdah, and the antecedent relation, according to the evidence, was that of ordinary servitude. If pregnancy occurred as Mr. Fraser is of opinion that it did, during that service, and when she was in the habit of going from the house freely into the bazaar, sexual intercourse then in that state between her and her master would not have the character of cohabitation of a permanent nature, such as under this head of law distinguishes concubinage from casual intercourse. If the subsequent marriage was adjudged to have relation back, by presumption of law, to the time of impregnation, this such a *præsumptio juris* would destroy altogether the difference between a law which admits to inheritance, and a law which excludes from inheritance, an ante-nuptial child. As a presumption of fact. such a presumption is admissible, but then it must be subject to the application of the ordinary principles of evidence.

A subsequent marriage, so far from furnishing, as Mr. Campbell supposes, a ground for presuming a prior marriage, *prima facie* at least, excludes that presumption. Therefore, no ground exists for presuming a marriage antecedent to the mootah marriage which at some period or other was established be-

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seen the vizier and the mother of the defendant. Laying, then, this presumption aside, it appears to have been found in the Court below, on evidence which justified that finding, that pregnancy commenced during the time when the mother of the respondent was in service, and before she had the acknowledged status of a moottah wife. There was a marriage, but when it does not appear. It does not appear when the intercourse began which led to the birth, nor what was the nature of it, whether casual or of a more permanent character. It is obvious that the pregnancy might induce the desire to give the woman the reparation of marriage. No difficulty is suggested about rendering these dates certain, which are now left utterly uncertain.

The treatment of the respondent by the Nawab appears for many years to have been that of a son by its father; this, however, is correctly treated by Mr. Fraser as inconclusive in itself, since a son conceived before marriage, and whom his father desired to recognize at some time as a legitimate son, would receive similar treatment. The treatment itself, therefore, does not suffice to dispel the darkness in which this case is left. The *onus* of proof lay on the respondent, on the pleadings in this cause, to prove his mother's marriage, and his own legitimacy as a child of that marriage. There has been no continuing treatment up to the time of the father's death; there has, on the contrary, been an absolute denial of paternity by the reputed father; there is no proof of any acknowledgment, but there is proof of treatment strong enough to prove legitimacy in an ordinary case, but of treatment not inconsistent with the status of a son conceived before marriage. It is shown that the respondent did not receive all the honors which his brother received. This circumstance is much pressed against him by the appellants.

It may be, however, that the inferiority of mother's condition, or his own later birth, caused the difference; or, on the other hand, the father may have postponed a legitimating acknowledgment, being as yet undecided as to his future treatment of him, and he may have waited to see how the youth conducted himself at puberty. The circumstance of some inferiority of condition, having been continued down to the time of final rupture, to some extent supports the case of the appellants, that the respondent was not legitimate. Their Lordships are, therefore, of opinion that the decision of the Commissioner is founded upon presumptions not warranted by the facts of the case, and in some degree upon a misconception of the authorities, and ought not to be allowed to stand. They will, therefore, humbly advise Her Majesty to reverse that decision, and to affirm the judgment of the Court of first instance. Considering, however, that the uncertainty as to the status of the respondent has been mainly caused by the acts of the deceased vizier, the residue of whose estate will, in consequence of this decision, fall to the appellants, their Lordships are not disposed to subject the respondent to the costs in the Commissioner's Court or to those of this appeal.

The 8th February 1845.

Present:

Lord Brougham, Vice-Chancellor Knight Bruce, Dr. Lushington, T. P. Leigh, Sir E. H. East, Sir A. Johnstone, and Sir E. Ryan.

Religious Ceremonies — Jurisdiction.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Namboory Seetapaty and others

versus

Kanoo Colanoo Pullia and others.

Quære.—Whether the Courts in India have any jurisdiction to determine a question involving a mere declaration of a right to perform religious ceremonies.

Lord Brougham.—BEFORE stating what the judgment of their Lordship is, it is necessary that I should, upon two points, guard it from the possibility of misconstruction. One of these points is exceedingly important in this case, and with a view to the merits of cases of this description. The other is of equal importance with a more general view, in reference to other proceedings, and other cases at large.

In the first place, their Lordships wish to guard very carefully against its being supposed that in what they are about to do, namely, to reverse all the three previous decisions—the decisions, that is, of the Zillah Court, the Provincial Court, and the Sudder Adawlut Court—they give any opinion whatever upon the question, whether those Courts had a right to proceed, or had jurisdiction to proceed, to the determination of the question as a matter of law, merely. Whatever the inclination of their Lordships' opinion may be, that not having been the subject of argument, of discussion,

or of decision below, they do not consider that upon that point they are entitled, or that they are called upon, to give any judgment, and they gladly withdraw from it.

The other point is with respect to the operation of that most beneficial regulation in Section 3 (to which I would add Section 4, for that is even stronger and clearer than the third, showing distinctly that it is not directory, but mandatory and imperative) of the 10th Chapter of Regulation XV. of the year 1816. Holding the regulation in that Chapter, generally speaking, but especially that part of it with which we are more particularly dealing here, to be a most wholesome and most beneficial regulation, requiring to be most jealously guarded, and most carefully kept in view, and, if possible, extended, as I hope it may be, to the other Presidencies (but that is my own private opinion merely), it would be highly inexpedient that any doubt should exist of the determination of their Lordships on all occasions henceforth, as on all occasions hitherto (and I allude particularly to a judgment which was pronounced last June by my Right Hon'ble colleague near me, Dr. Lushington), to abide by and support that beneficial regulation. Nothing, therefore, to be done to-day is to be taken as in any way impeaching or as doing otherwise than showing forth and testifying the high respect for that regulation which their Lordships continue to feel.

Having made these preliminary observations, I have only further to state the opinion of their Lordships, in which we all agree, and in which we have the concurrence of the able and learned persons who are the Assessors of their Lordships in these Indian cases, that their Lordships think fit to determine that, the plaintiffs not having, in their opinion, alleged any case of injury done to them by the defendants, upon which they were entitled to go into evidence, and not having, therefore, established any case for damages in their suit against the defendants, no question remained but one of a mere declaration of a right to perform certain religious ceremonies; that, if the Courts below had jurisdiction to proceed to the determination of that question in this suit, upon which their Lordships guard themselves in their judgment, as well as in the prefatory observations which I have made, against giving any opinion, the plaintiffs have not produced sufficient evidence to establish such a right; that, under these circumstances, all the decrees, therefore, ought to be reversed, and the plaint to be dismissed (the reversal by the Sudder Court amounts, in fact, to a dismissal of the plaint, but it is not as it ought to be—a dismissal without costs), and that this decision should be without prejudice to the existence or the non-existence of the right claimed by the appellants in any other suit in which such a question may be properly raised.

It is fit that I should add in order to prevent all mistakes and all applications to us henceforth on the subject, that the result of the decision of their Lordships clearly is that all the costs of each party must be borne by that party himself, both in the Zillah and Provincial Courts, the Sudder Court, and here. We do not deny that there is a right to give costs in the way in which the Sudder Court gave them, but we do not think that this was a case for it. There is also, no doubt, a right here to give costs to the party supporting the decree, but it is very rarely done.

The 14th June 1845.

Present:

Lord President Wharncliffe, Lord Brougham, Vice-Chancellor Knight Bruce, Dr. Lushington, Sir F. H. East, Sir J. Johnstone, and Sir E. Ryan.

Punchayet — Boundary — Evidence — Practice (of Privy Council).

On Appeal from the Sudder Dewanny Adawlut of Bombay.

The Mokuddims of Mouza Kunkunwadi, in Pergunna Jumcundi (the original Plaintiffs),

versus

The Enamdar Brahmins of Mouza Soonpal *alias* Moorgnoor, in Pergunna Gottah (the original Defendants).

The practice of the Privy Council has been never to favor objections merely of form.

An agreement between the parties to abide by the determination of a punchayet fixing the line of boundary, and the determination of the punchayet, were held to be not conclusive evidence, so as to bar either party from showing the determination of the punchayet to be inequitable.

Vice-Chancellor Knight Bruce.—THEIR Lordships have felt, and, even with the aid of the information communicated this morning by the appellants' Counsel, still feel, some difficulty in following some parts of the proceedings below. With regard, however, to the objections merely of form taken here on the part of the appellants, after considering them, and specially giving due weight to Mr. Buller's observations upon the reference made by the Sudder Judge to Chapter 2, Section 34, of Regulation XVII. of 1827, and upon the fourth and fifth Sections of Regulation VI. of 1830, their Lordships, though not thinking those objections unreasonably taken or without colour, do not feel disposed to accede to them.

The tendency of the Judicial Committee since its institution, and of the Privy Council before, has been not to give way unnecessarily to objections of that nature. And, in the present instance, the nature of the jurisdiction whence the appeal comes, the nature of the proceedings themselves, and the course pursued by the appellants below, render it right, in their Lordships' judgment, to deal with the matter before them upon its substance and its merits. And the case so viewed has mainly two questions: *first*, ought the Court below to have treated the decision of the punchayet as correct and binding? *secondly*, if not, have the Collector, or Sub-Collector, and the Court of Sudder, adopted the right line of boundary?

Upon the first question, the appellants have conceded that the decision of the punchayet is, by the Bombay Regulations of 1827, prevented from having the force of a judicial sentence or judicial determination, or of a regular award in a technical sense; while the respondents, on their side, have not denied that it is receivable in evidence, and to be considered as part of the materials in the cause. But its conclusiveness, denied by them, is asserted by the appellants, who insist that there was a binding agreement between the parties to abide by the punchayet's opinion and determination, which the appellants say ought to be upheld. Their Lordships, however, are of opinion that, if there was in effect an agreement to abide by the punchayet's opinion and determination, and if the opinion was expressed, and the determination made by those who, it was agreed, should do so (a point not necessary to be decided), it was, nevertheless, and is, the right of the respondents to contend that the agreement and determination do not necessarily bind, and to bring forward all the circumstances of the case, for the purpose of showing it to be inequitable that they should bind. In a word, to resist the appellants' demand so far as it rests on what the punchayet did, on grounds analogous to some of those on which the specific performance of an agreement may be resisted in English Courts of Equity. What may be the rule in the case of an effectual reference to arbitration, and an award, properly so considered, their Lordships do not think it necessary to say, for, in their judgment, having regard to the Bombay Regulations of 1827, and the undoubted facts of the case, an effectual reference to arbitration, and an award, properly to be so considered, did not exist in the present instance; though, if there had been an award, their Lordships are not satisfied that grounds do not appear upon which it is invalid, or might have been set aside. Viewed as a matter of agreement, it is their Lordships' opinion, from the circumstances of the case, and the whole course of proceeding, that reliance cannot be placed on what the punchayet have done, and that it would be unjust to enforce their decision against the respondents.

With regard to the true line of boundary, their Lordships think that there is sufficient evidence to show that fixed by the punchayet not to be the true line—a conclusion which they do not solely form from the circumstance that it did not accord with the case alleged on either side. That the line fixed by the judgments against which the appellants have appealed is the true line does not, in their Lordships' view, clearly appear; but the evidence does not prove any other line, or make any other line more probable. Assuredly, the appellants have not established that either of these judgments is substantially wrong, and as Mr. Shaw appears to have examined the surface of the disputed land himself, and to have bestowed care and attention upon the subject, and it does not seem likely that any further investigation can materially advance the cause of truth or justice, their Lordships, on the whole, consider the right course to be to dismiss the appeal without costs.

Appeal dismissed without costs.

The 16th November 1866.

Present:

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Sale in execution—Allegation of benamee purchase—Onus probandi—Examination of witnesses by High Court.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Sreemunchunder Dey

versus

Gopaul Chunder Chuckerbutty and another.

Where a person became the purchaser of a talook under a decree for sale obtained by judgment-creditors of the owner, and an assignee of a judgment-creditor sued to have it declared that the purchase did not effect any transfer of the ownership of the talook—HELD that the *onus* was on the plaintiff to prove that the talook in question was still the property of the judgment-debtors, and not the property of the purchaser. In matters of this description it is essential to take care that the decision of the Court rests, not upon suspicion, but upon legal grounds established by legal testimony.

In considering a case of alleged fraud in the purchase of an estate, it is material to enquire what relation the purchase-money paid bore to the value of the estate.

The power given to the High Court by the Code of Civil Procedure, of taking of its own motion original evidence anew, should be exercised very sparingly, and, when exercised, it is desirable that the reasons for exercising it should always be recorded or minuted by the Court in the proceedings.

THE appellant in this case became the purchaser of the talook under a decree for sale obtained by judgment-creditors of the owner.

A summary application, to set aside the sale, having been refused, the respondent brought the present action for the purpose of having it declared that the purchase did not effect any transfer of the ownership of the talook.

The respondent is not himself a judgment-creditor, but he is the assignee of a judgment-creditor. It appears that the respondent is a tenant upon the estate, and that, after some dispute had arisen between the tenants and the appellant, he purchased this outstanding judgment, and, by virtue of that purchase and a transfer of the judgment, has taken the present proceedings. The issue which was raised in the action so brought by the respondent, and the affirmative of which he has to maintain, is that the talook in question is still the property of the judgment-debtors, and not the property of appellant who was the purchaser. The affirmative lies upon the respondent; he is to prove his case.

Undoubtedly there are in the evidence circumstances which may create suspicion and doubt may be entertained with regard to the truth of the case made by the appellant; but, in matters of this description it is essential to take care that the decision of the Court rests, not upon suspicion, but upon legal grounds, established by legal testimony.

The case relied upon by the respondent is mainly this—that the purchase-money, which appears to have been actually paid by the appellant, was not, in reality, the money of the appellant.

In considering a case of alleged fraud in the purchase of an estate, it is material to enquire what relation the purchase-money paid bore to the value of the estate. We have here a statement made by the respondent himself, that the talook was worth about 19,200 or 19,300 rupees, and we find that it was sold at the sale at which the appellant (being the assignee of the original bidder) became the purchaser for 19,000 rupees which was actually paid.

That circumstance is not conclusive proof of a *bond-fide* purchase; but it is a strong circumstance, in considering a case which consists of allegations, that there was a collusive agreement between the judgment-debtor, that is, the original owner of the estate and the appellant, to buy in the estate for the benefit of the judgment-debtor.

The transaction appears to have been this: A person of the name of Petumber attended the sale as the agent of another person, who appears to be a man of property of the name of Mohesh Chunder. Petumber was declared best bidder, and consequently

the purchaser. It seems from the evidence that Petumber exceeded the authority which had been given to him by Mohesh Chunder, his principal. Mohesh Chunder had limited the price to be given to a sum of money less than the amount which Petumber had bid; Mohesh Chunder, therefore, either repudiated the contract, or was desirous of getting rid of it. In that state of things, Petumber applied to the appellant to take a transfer of the contract, and the appellant agreed so to do. The reason for the appellant purchasing the property does not appear. It does not appear, nor is there any testimony that would warrant at all the inference that Mohesh Chunder, in sending Petumber to the auction, was acting as the agent or on behalf of the judgment-debtor. It is said that Mohesh Chunder was a distant relation of the judgment-debtor, but there is nothing like testimony to warrant the conclusion that Mohesh Chunder was acting on behalf of the judgment-debtor.

No doubt, that would not be material, if it were proved that the appellant, the assignee of Petumber, was himself the agent or trustee of the judgment debtor. If he was so, of course the estate in the hands of the appellant might be made available for the satisfaction of the judgment-debts existing unsatisfied.

To prove this, the circumstances relied on by the respondent are, first, the fact which, it is alleged, appears on the judicial proceedings under which the sale was made, that two previous sales had been effected of this property, in both of which the real, though not the apparent, purchaser was the judgment-debtor, and that those sales had consequently been set aside. The Courts below and the respondent here appear to have considered that those facts justified the inference that the judgment-debtor had formed the design in the present case, for the third time, to acquire the property through the instrumentality of a person acting apparently on his own behalf.

Although the fact of these former sales may be referred to, as they appear on the proceedings in the cause in which the sale was made, yet no legal inference affecting the integrity of the present proceeding can with any propriety be drawn from them.

The next circumstance relied upon by the respondent is this: that the appellant and the judgment-debtor appear to live still on good terms together; that they are not open and avowed enemies, which, it is said, would have been the necessary consequence if the appellant had in reality been the purchaser of the judgment-debtor's estate for his own benefit.

That is a circumstance, again, from which we are of opinion that no legal inference results.

The next thing relied upon by the respondent, and which is one of the main grounds of his case, is this: that the appellant is unable to give a satisfactory account, nay, may be supposed perhaps to have given a false account in part, as to the manner in which he became possessed of the money in question.

Their Lordships have been much struck with the unsatisfactory character of the account given by the appellant of the manner in which he alleges he obtained the money; but we cannot help feeling that it is an enquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But this circumstance, although it may excite doubt, is not a thing from which we can legitimately infer that the appellant was a bare trustee of the purchase so made by him.

And, if it inclined us to doubt the appellant's ownership of the money, there is still a great interval between that doubt and the conclusion that it was the money of the judgment-debtor, or that the appellant acted in the matter on his behalf.

It is for the plaintiff to prove that the money was the money of the judgment-debtor, or that it was supplied or found by some third person for the benefit of the judgment-debtor; but we find nothing which can be accepted either as direct proof of the fact, or as materials from which any such inference can be justly drawn. Two witnesses, called by the respondent himself, state that, as far as their knowledge extends, the circumstances and the condition of the judgment-debtors were such that they had no the means of supplying the money in question. The other evidence given by the respondent is that a person of the name of Mohesh Chunder, some time after the transfer of the contract to the appellant, raised a sum of 19,000 rupees, and that Mohesh Chunder was a friend and second cousin of the judgment-debtor, and, therefore, the respondent would have us infer that the 19,000 rupees so raised by Mohesh Chunder, being about the amount of the purchase-money for the

talook, was raised by him on behalf of the judgment-debtor for the purpose of completing the purchase of the talook, or of re-paying the money, which, it appears, the appellant obtained from certain bankers at Calcutta, in order to complete his purchase.

We are asked, therefore, to hold that the distant connection between Mohesh Chunder and the judgment-debtor and the equality in amount of the sums are sufficient grounds for the conclusion that the purchase-money was, in reality, the money of Mohesh Chunder, and that he found and advanced it for the benefit of the judgment-debtor. If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe.

It is material that this purchase is not really challenged by the judgment-creditors. They have not originated this action, but it is the fruit of the angry feeling of a tenant on the estate, who has sought out a judgment-creditor, and got a transfer of his interest for the purpose of bringing forward this claim; and, therefore, the origin of the action and the circumstances under which it is brought are to be taken into account, when we are considering the truth and reality of the purchase by the appellant.

It is natural to suppose that, if this purchase had been generally felt not to be *bonâ-fide* purchase, it would have been questioned by the judgment-creditors themselves, and that they would not probably, for a small consideration, have parted with their judgments to another person, but would have instituted the suit themselves.

In the conduct of the suit, there is a circumstance which their Lordships think it right to advert to.

When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly; because, where it is done, not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new original enquiry by the Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice.

The opinion of their Lordships is that the evidence which has been given (there having been the fullest opportunity of giving evidence against the appellant) is not sufficient to warrant the conclusion that the appellant was acting as the agent of the judgment-debtor.

It is easy to suppose a case in which the appellant might not, in reality, be the *bonâ-fide* purchaser on his own account, and yet in which there would be no ground for holding that the estate was the property of the judgment-debtor. It is possible to suppose that some of the family of the judgment-debtor might have been willing to find either wholly or partly, the money for the purchase; but, if it were established that the money was not the property of the appellant, we could not derive from that the conclusion that the estate was, therefore, the property of the judgment-debtor.

It was said by the Counsel for the respondent that no other owner was suggested by the appellant. There was no obligation upon him to suggest any other owner. He was under no obligation to show whence the money was derived; but, taking everything against the appellant upon that plaint, there is still a great chasm between that inference and the conclusion which alone would support the action of the respondent, *viz.*, that the estate is the judgment-debtor's property both at law and in equity. That is neither established, nor can be legitimately inferred from any of the facts which have been proved.

We are, therefore, of opinion that the decree of the Court below must be reversed, and we shall humbly advise Her Majesty in order that it be reversed accordingly; and that the action of the respondent in the Court below be dismissed with costs. It follows that the appellant must have the costs of this appeal.

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The 25th February 1867.

Present:

Sir J. W. Colvile, Sir. E. V. Williams, Sir R. T. Kindersley, and Sir L. Peel.

Mahomedan Law—Marriage and Legitimacy—Evidence (Native Cases).

On Appeal from the late Sudder Dewanny Adawlut of Calcutta.

J. P. Wise and others,

versus

Sunduloonissa Chowdranee and others.

The celebration of the seventh month of pregnancy, and the celebration of the birth of the son, are sufficient to prove the marriage and legitimacy of the son.

A native case is not necessarily false and dishonest, because it rests on a false foundation, and is supported in part by false evidence.

THIS case comes before their Lordships as an *ex-parte* appeal, brought by Mr. J. P. Wise and Juggunath Roy Chowdhry, two only of the original plaintiffs, from a decree of the late Court, the Sudder Dewanny Adawlut of Calcutta, which reversed a decree of the Civil Court of Dacca in favor of the plaintiffs.

The original plaintiffs in the suit were Deenomoney, suing in her own right as a widow of a Mahomedan zemindar named Aklakoollah, and as mother and guardian of her minor son Fyzoollah, to establish their respective rights, as such, to the succession of Aklakoollah and the appellants. Deenomoney died pending the suit, which was continued, on behalf of Fyzoollah, by one Mamtazooder Chowdhry, as his guardian. The appellant Wise claims to be the assignee of the whole of Deenomoney's share, and of a portion of her son's share, under conveyances from her; and the other appellant claims to be assignee of a portion of Deenomoney's share under a conveyance from Wise, and of a further portion of the minor's share under a conveyance from Deenomoney.

The defendants were Sunduloonissa Bebee, widow of Aklakoollah, Olioollah Chowdhry, his son, and Meer Saadut Ally, the husband of a deceased daughter of Aklakoollah, who survived him, and was entitled to share in his estate.

The object of the suit was to establish the marriage of Deenomoney with Aklakoollah, and the parentage and legitimacy of her son Fyzoollah, as a son and heir of Aklakoollah, and consequently the titles of both to succeed to Aklakoollah, the widow to her share, and her son as a residuary and heir of Aklakoollah.

The suits could have no operation in any question which might hereafter arise as to the effect of Deenomoney's conveyance of part of her son's property, between him and both or either of the co-plaintiffs Wise and Juggunath.

The cause was decided by the Judge of the Civil Court at Dacca, a Mahomedan, in favor of the marriage of Deenomoney, and of the legitimacy of Fyzoollah; but this decision was reversed by the Sudder on appeal, and from that last decree the two plaintiffs, Wise and Juggunath, alone appeal, Deenomoney having died previously to the institution of the appeal. Fyzoollah, not joining in the appeal, is named by the appellants as a respondent.

Their Lordships in this as in other *ex-parte* cases from India are placed in a position of embarrassment and difficulty. It is not explained why Sunduloonissa, who is in possession of the estate, which is large, does not appear to support the decree in her favor. It is possible that, had the case of the respondents been argued before their Lordships, some view of it, amidst the conflict of evidence and the opposing presumptions which arise from the evidence, might have been offerred to their Lordships' attention which has escaped their own careful and anxious consideration of the evidence and judgments. The Counsel for the appellants, Sir Roundell Palmer and Mr. Leith, have argued the case with great candor and completeness. The whole evidence on both sides has been fully presented by them to the attention of their Lordships; but still in such a case there is room for much anxiety and hesitation. The appellants ought not, however, to suffer by reason of this natural hesitation in a tribunal about the correctness of its judgment, induced by an omission of the opposite party, nor ought the absence of the latter from the arena to weaken the presumption in favor of a judgment which is given on their side. The *onus* must still lie on the appellants to show manifest error in the decree appealed from.

The pleadings in this case require attention. The plaint assigns a date to the marriage, and treats the marriage as having taken place at the time when Deenomoney's intercourse commenced, or a few days after; but in a subsequent portion of her plaint Deenomoney states the celebration of the seventh month of her pregnancy, and the celebration of the birth of Fyzoollah, circumstances which, if truly alleged and proved, would suffice to prove her marriage and the legitimacy of her son. Consequently, on the plaint

as framed, the plaintiffs would be entitled to recover if this latter portion of the plaint were credited by the Court, and the allegations as to the ceremony and its time disbelieved. The plaint alleges, by anticipation, that Sundaloonissa caused a will to be forged after her husband's death, and enters into arguments to prove that it was forged. The answer of Sundaloonissa sets up that will, and asserts it to be genuine, and relies upon it. In that will are contained a reference to an acknowledgment by the testator Aklakoollah of a kabin executed by him on his marriage with Sundaloonissa, which, if it were established, would show a prior title in her to the zemindary, by conveyance on good consideration at her marriage, and so overrule entirely the claim of a second wife and her son; whereas a will simply would be inoperative, even as to a third without their assent. Sundaloonissa in her answer relies also on a kabooleut executed to her by Deenomoney for a certain part of the estate, which is, if genuine, an acknowledgment of Sundaloonissa's title by Deenomoney.

These documents are alleged by Deenomoney to be forgeries.

The issues which are stated at page 32 of the record embrace all these questions; the marriage of Deenomoney, the parentage of her son Fyzoollah, his legitimation, and the genuineness of the will.

The pleadings in this case, as it has been observed, state the case of each party fully. Nothing comes out in the evidence on the main points in the cause of which some mention is not made in the respective pleadings of the parties.

The case alleged by Deenomoney is that she was married by a nicka marriage to Aklakoollah at the time of her first consorting with him. She gives the date of the marriage in her plaint. Her case, therefore, as stated by her, excludes the supposition that Aklakoollah raised her to the status of wife subsequently on her proving pregnant with a son which he acknowledged to be his. Still the case may be that she was acknowledged directly or by implication as a nicka wife at some subsequent period of the cohabitation. In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it, by fabrications of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. The subsequent allegations in the plaint as to the celebration of the seventh month of her pregnancy, and the celebration of the birth of her son, suffice to let in this proof of marriage also.

The plaint does not disclose the history of Deenomoney previously to her introduction into the house of Aklakoollah. But the answer of Sundaloonissa supplies that omission. The evidence on each side supports the general account about Deenomoney, which the answer of Sundaloonissa contains in the 15th page of the record, in the 6th paragraph, viz., that she was a singing girl, and that she attracted the fancy of Aklakoollah, who brought her to, and maintained her in, his house. It is said, in the statement of Sundaloonissa, that Deenomoney was brought there while still very young. There is no evidence that her life had before then been licentious. The imputation then on her character at this time which is found in the answer seems to be founded on her profession of a public nautch songstress; and, though it is not a profession in India which is followed by women of character, it is by no means a reasonable presumption that a very young girl, a member of such company, should be in her early years grossly profligate. This, however, is what the answer of Sundaloonissa insinuates as to Deenomoney, even at this early age, for she says of her that, "instead of leaving off her former vicious habits, she continued to indulge her vicious passions," and then she imputes to her four paramours in succession, to one of whom, Shumfutoollal Sirdar, she ascribes the parentage of Fyzoollah.

In viewing the evidence given in this case it will be important to bear in mind that many of the witnesses for the defendants support these allegations in the answer by evidence as inconsistent as the answer itself, by imputing to Deenomoney the utmost continuing profligacy of conduct in this respect, as little likely to be condoned by a man of a race prone to jealousy and to the seclusion of their women, and yet not accounting for her continued abode in the zenana. Thus she is represented as very profligate at a very early age, as continuing to be very profligate during her whole cohabitation in the zenana of Aklakoollah, intriguing with various men, openly, without disguise, and to the knowledge of a hostile wife; and yet as continuing in the zenana, preserving her status there unimpaired whatever it was, and treated with outward demonstrations of respect. And what is not a little singular in the alleged life of this woman, to whom such early, such

long-continued profligacy is imputed, is that, after the death of Aklakoollah, there is no evidence of any profligate life whatever, and she is found to be for a time received as an inmate in the house of a respectable Mussulman on the footing which she ascribes to herself of widow. All this story, therefore, of her previous and continuing profligacy is found on an examination of it inconsistent and incoherent; it does not cohere, and it is not consistent with any of the ordinary presumptions which would be formed on such an intercourse with the master of a native house in that rank of life.

Some of the witnesses describe her as being in the zenana, not for the ordinary purpose of such an introduction, but simply to divert Aklakoollah with her songs; others say that she was there for the ordinary purpose; Sunduloonissa says she was there as a slave girl, of which there is no proof or likelihood. She does not expressly deny the existence at one time of sexual intercourse between Aklakoollah and Deenomoney; but her answer puts forth that subsequent case of alleged impotency in Aklakoollah to which many of the witnesses including two native doctors depose.

The testimony of these doctors, on examination of it, proves to be utterly worthless and inconclusive in a medical point of view, even supposing that any dependence could be placed on its truth.

For what purpose is this worthless evidence produced? It is to prove that Aklakoollah could not possibly be the father of Fyzoollah; but it proves also that he could not possibly suppose himself to be the father of the boy.

If the story were true, which the answer sets up on this point, it is inconceivable that Aklakoollah should believe himself to be the father of this child; for the story is that he had become some years before its birth incurably unable, to his own knowledge, of having any sexual intercourse; that the knowledge of his complaint and its consequences was general in the house; and yet this very man, in this state who had a legitimate son and daughter, is supposed to be keeping in his zenana a woman who was conducting herself with open profligacy with menial servants, discovered and yet not dismissed. What reason does the answer of Sunduloonissa give for such a toleration of offences, generally so little likely to be pardoned by a Mussulman? She says: "The truth is that, for her bad character, he ordered her to be put out of the house, but kept her there at the request of other parties." No further explanation is given; that given of so startling an improbability is, by reason of its generality, and the entire absence of evidence to support it, unworthy of any credit. Consequently the attempt has been made, and has wholly failed, to render this marriage improbable by reason of the turpitude of the alleged wife. The improbability is reduced to this: that he married a female by a nicka marriage, whom he might probably have obtained on easier terms as an inmate of his zenana. The failure of this attempt and of this evidence to blast the character of the rival claimant as wife certainly tends to strengthen the case that she sets up.

There is no other intrinsic improbability, then, in this story of his having married, by a nicka marriage, a girl of this profession, than that which attaches to it as a disreputable connexion with one who probably would have made no difficulty about entering his zenana on easier terms.

This is an improbability not of a light character, and the evidence to support it ought to be evidence probable in itself and free from suspicion. The burthen of the proof was, of course, on the plaintiffs. It is impossible for their Lordships to form any opinion on the credit due to witnesses by reason of their status and apparent claims to be trusted, which is at all worthy to be compared to that which is formed by a Judge fit for his office, who sees them, hears them, and probably knows something of their antecedents. This cause between Mahomedans was tried before a Mahomedan Judge. Of the probability of the acts imputed to a Mahomedan zemindar, he is a more competent Judge than either the European Judge of the Sudder Court or their Lordships can be. His judgment seems to have been carefully formed, and his observations upon the witnesses are entitled to a respectful consideration. Had their Lordships found that his observations upon the witnesses themselves were opposed to the opinion of the Sudder Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided, in a conflict of testimony nearly balanced, by the preponderance of probabilities. But, if there be found, even in a native case, positive credible testimony unimpeached, and credited by a Judge competent to judge of the credit due to witnesses, it would seem to be equi-

valent to a total disregard of native testimony, to say, despite of this positive testimony, we will put all evidence aside, and act alone on the probabilities of the stories and the inference from the conduct of the parties.

When the cause came by appeal before the Judges of the Sudder Court, they, unfortunately, instead of reviewing the whole case, and expressing their opinion upon all the points on which the Court below had based its conclusions which were conclusions of fact, narrowed their enquiry to the simple question whether the plaintiff Deenomoney had proved her marriage. Now, the Judge below, in dealing with that question, had brought, and properly brought, to the consideration of it, certain inferences from the conduct of Sunduloonissa, which he judged corroborative to some extent of the truth of the plaintiff's story. These were inferences which he drew from the fabrication of documents set up by the defendants, and which the plaintiffs alleged to be forged, *viz.*, an alleged will, a kubooleut, and certain receipts, which they, the plaintiffs, alleged to have been fabricated to defeat a claim which the defendants dreaded. The argument for the plaintiffs was this: Unless Deenomoney's claims and that of her son were judged to be formidable, why this fabrication of documents? The answer given below was, the documents are genuine. The Judge below found that they were forged. Their bearing on the issue as to the marriage was direct and important. Yet the Court of Error dismissed entirely from their consideration the question of the genuineness of those documents.

Again, the Judge below had believed the witnesses for the plaintiffs who deposed to the marriage of Deenomoney and the legitimacy of the son Fyzoollah. The Sudder Court did not examine at all into his reasons for believing the evidence. So far from saying that the evidence for the defendants was more weighty, they attached but little weight to it; but they decided against and reversed the finding of the Judge below, merely on inferences from the conduct of Aklakoollah and from that of Deenomoney herself. Though they appear to have been mistaken in calling Deenomoney a Hindu, who, according even to some evidence of the defendants, had conformed to Mahomedan usages, they say, and say truly, that the marriage was an improbable occurrence; but, though improbable, it was certainly capable of being proved by direct and credible testimony as to the value of which they forbore from enquiring. W were the inferences on which they The first is, that Aklakoollah took no in his lifetime to make a public official ation of any kind of his nicka marriage, of the legitimation of his child. This was little more than three years old Aklakoollah died. He died suddenly suddenly-contracted disease, cholera; inference against the marriage can re ably be drawn from such light data. respect to Deenomoney's own conduct non-opposition to the mutation of name the production of the will is mainly on. But it is to be observed that months only elapsed between the de Aklakoollah and this act; that know of it is not brought home to Deenom and that it would be too much to pre her—a native lady whose very status wa puted, and without means—armed at all with means of knowledge and pecuniary and friends able to assist her then. Th the less reason for making this presum in the present case that it plainly ap that Mr. Mackillop, the Magistrate enquired into the circumstances and hea evidence as to the alleged imprisonme her, and the duress practised on her believe the story, and attributed the drawal of her charge to some influence cised upon her. His view of the case an air of probability to her version o conduct on this occasion. These pres tions, then, seem to their Lordships too f to overpower, or materially to weaken evidence in proof of her marriage and timacy on which the Judge below acted; as the Sudder Court went not at all into consideration of the evidence for the mar and legitimation, and opposed only inse ent inferences to it, the weight of the op of the Judge below on these facts is really unshaken.

The answer, it has been shown, sets will; it also alleged that Deenomoney cepted a pottah of certain land, and g kubooleut to the defendant, and took ce receipts. These were all found by the ju below to be fabricated documents. Sudder Court expressed no opinion a them; and it remains for their Lords now to do, unaided by any judgment of Sudder, that which they would have b better able to do if assisted by such ju ment, *viz.*, to examine the grounds w the Court below had for such conclus Their Lordships conceive that, if in this the defendants are found fabricating d

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ments, and getting up false testimony to meet the case alleged, the reasonable conclusion is that it must have appeared at least a formidable case. But, if it were, *primâ facie*, a formidable case, then a considerable part of the oral proof of the defendants must be false; for where would be the risk of meeting in a Court of Justice a claim of this nature, raised by a profligate woman, living in abandoned life in the house of her keeper, intriguing with his menial servants to his knowledge, and threatened by him for it with expulsion, bearing a child to one of his menial servants, and confessing to several her shame and the real paternity; never married, nor so reputed to be, and her child never even reputed to be the son of her master, notoriously and by his own confession impotent at the time of its conception before and continually after. If such a woman should have had the strange audacity to prefer so desperate a case before a Court of Justice, who would be found to espouse it?

The fabrication of the documents, then, supposes a formidable case at least, and a great part of the oral evidence presents one hopeless and desperate. A native, even with an honest case, or his advisers, may fabricate evidence to meet a case which they fear, though they know it to be groundless; and, if this woman and her child stood in an ambiguous relation to the deceased, and the real heir feared that a Court would draw in favor of marriage and legitimacy really groundless conclusions from a plausible appearance of marriage and legitimization, the fabrication might, however wicked, not be fatal to a defence; but in this case the defendant's oral evidence presents a desperate and hopeless case as the real case of the claimants. If, then, the fabrication be established, proof of that fabrication supports the plaintiff's case to some extent; for it lays a foundation for, and supports the evidence of, those apparently respectable witnesses for the plaintiff, who say that the deceased treated Deenomoney as his nicka wife, so called her, and treated her child Fyzoollah as his own; and these acts would suffice to prove both marriage and legitimacy, even if the Court refused to believe, or hesitated to believe, the direct testimony as to the ceremony.

Their Lordships have, therefore, directed their attention, in the first instance, to that part of the judgment in the Court below which treats these documents as fabricated. Their Lordships regret to say that they have no hesitation on this part of the case; that they agree entirely in opinion with the Judge below who pronounced them forgeries. The kubooleut, when it is viewed in conjunction with the evidence which accounts for its being given, destroys itself. Deenomoney is described on the face of it as the widow of Rajub, the man to whom she is said to have been contracted, and for whose dwelling-place she was about to build a house on the ground included in the lease. The receipts, of course, fall with it. The full recital in all three of the titles of the defendant explains the motives for their fabrication, and the date of them shows the most incredible degree of inconsistency in the conduct of Deenomoney, admitting and opposing about the same time the title of her opponents. The will also is surrounded with suspicion, which its internal evidence tends to confirm. It sets up a kabin, never produced, and the non-existence of which, if it ever existed, is wholly unaccounted for. This will is not likely to have been executed by the deceased in favor of his wife with whom he had been at variance. The extract from the criminal register shows that such was the case. If her claim under the kabin had been real, it would most probably have been produced as a check upon her husband during their active warfare; she represents her husband as merely her surburakar; and, if that were so, he must have been acting fraudulently in mortgaging her property. His management is not interfered with, even after he had in his lifetime suffered her trust-property to be taken in execution for a debt of his own. This appears from the judgment of the Court in the mortgage-suit. Taking all these circumstances together, the Court rightly judged the will to be fabricated; and the observations of the Judge on the factum are most weighty. Turning, then, with this assistance to the examination of the positive testimony, this portion of it, at least, may be trusted which shows the woman and her child to be the woman cohabited with, at least, and the child of the woman acknowledged and declared to be the legitimate child of the father; and this acknowledgment made in words which import a precedent nicka marriage. There appears to their Lordships to be no ground for distrusting the evidence, on which the Judge below relies, of the witnesses Surenloollah and Juggunath Gooho, who, though they were not present at the nicka, nevertheless both speak to acknowledgment of parentage and acknowledgment of nicka. Without going the length of saying that the acknowledgment of a son as legitimate, who might be a legitimate son of his acknowledger, necessarily in all cases, raises

its mother to the status of a wife—a point which it is not necessary to discuss—it is clear that such an acknowledgment as the present, which acknowledges the mother as wife, involves that consequence. Their Lordships, therefore, cannot find, on a careful consideration of the evidence, and of the reasons given by the Judge in the Civil Court, in his finding on the facts, any sufficient reason for reversing his decision. His judgment seems to be founded on facts fairly inferrible from the evidence, and sufficient under Mahomedan Law to confer on the child the status of legitimate son, and on its mother to whom the declaration extends that of a lawful wife. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decision appealed from, and to confirm the decision of the Principal Sudder Ameen, with the costs of the appeal in the Sudder Court. The respondents must also pay the costs of this appeal.

The 28th February 1867.

Present:

Sir J. W. Colvile, Sir E. V. Williams, Sir R. T. Kindersley, and Sir L. Peel.

Regulation XI., 1796—Confiscation and Sale of property of absconded Offender.

On Appeal from the late Sudder Dewanny Adawlut of Calcutta.

Juggomohun Bukshee

versus

Roy Mothooranath Chowdry and others.

Regulation XI., 1796, being a highly penal statute, should be construed strictly. As it makes no express provision for the case of joint proprietors of land or persons jointly holding a sudder farm of land, in the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent.

A sale under this Regulation does not extinguish under-tenures or incumbrances created by the delinquent or those through whom he claims.

THE lands which are the subject of this suit are described as three separate holdings forming part of the Government khas mehal in the Twenty-four Pergunnahs. In 1855 they had been granted by the Government of Bengal to one Roy Bycauntnath Chowdry, as the sole registered tenant thereof. His tenure is said to have been in the nature of a perpetual lease; but the instrument or instruments creating it are not before us. He may be taken, however, to have been what is termed in the Regulation, which will be afterwards considered "a sudder farmer paying revenue directly to Government." Some time in 1855, being charged with an offence, he absconded in order to avoid the process of the Criminal Courts; whereupon his estate was confiscated, and these lands, as part of it, were ordered by Government to be sold under the provisions of Regulation XI. of 1796. They were put up for sale on the 27th of April 1855, and were purchased by one Thakoordoss Bonnerjea, who, on the 7th of July 1856, transferred the interest thereby acquired to the appellant. Under this title the appellant claims the entire interest in the tenures under Government of these lands.

The respondents insist that Bycauntnath was a member of a joint and undivided Hindoo family, of which they are the other members; that these tenures, though taken in the sole name of Bycauntnath as the managing member, were acquired with the funds and for the benefit of the joint-family; and that, accordingly, it was not competent to Government to confiscate or sell more than the fractional share and interest of Bycauntnath in this portion of the family-estate. They urged this objection ineffectually before the Collector some days before the sale took place; they afterwards repeated it before the Commissioner and Sudder Board of Revenue; but they are said to have made no representations to that Department of Government from which, under the Regulation, the order for the sale emanated. Certain it is that their objections were overruled, and that what was put up for sale and purchased by Thakoordoss Bonnerjea was the whole interest in the lands under the tenures created in favor of Bycauntnath. And the Collector put, as he thought, the purchaser into possession.

Before, however, the assignment to the ppellant, a dispute touching the possession f the lands arose between Thakoordoss onnerjea and one Gopeemohun Mitter, who laimed to be tenant thereof under a lease ranted to him by Roy Bycauntnath Chowry and the respondents jointly. There was ıe usual appeal to the Magistrate under Act V. of 1840. He held that Gopeemohun Iitter was, in fact, in possession, and his rder was confirmed on appeal by the Zillah udge. The result was that the appellant, aving acquired the title of Thakoordoss onnerjea, was driven to assert his right to ıe possession of the lands in the regular ivil suit, out of which this appeal has risen.

The suit was originally against Gopeeohun Mitter alone. By supplemental laint the respondents were made parties to . The material issues settled by the Judge ere, *1st*, whether the lease set up by the lefendant Gopeemohun was a *bond-fide* lease, r merely colorable and in fraud of law? nd, *2ndly*, whether the estate being joint, he plaintiff could have any claim over and bove the particular share of Bycauntnath.

The Zillah Judge, by whom the cause was ried in the first instance, held that the lease vas merely colorable and fraudulent, and that he appellant, as between him and the lessee, vas entitled to the possession of the lands. He further held that the question of title beween the appellant and the respondents could ıot be properly tried in this suit; and that the roper course for the respondents, if they ıad a good title, was to sue to set aside the ale to the extent of that title, making the Government a party to the suit.

Both the lessee and the respondents apealed against this decision, but the former lied pending his appeal, which not having een revived was struck off. The reondents prosecuted their appeal, and the Sudder Court, overruling the objection that he suit had come to an end with the lessee's nterest, on the ground that there was a disinct issue of title joined between the appelant and the respondents, made a decree in heir favor, and reduced the interest of the ppellant in the lands to the fractional share of Bycauntnath. The present appeal is gainst the last decree.

It has been candidly conceded by the learned Counsel for the respondents that the evidence in the cause may be taken as sufficient to establish that, as between Roy Bycauntnath Chowdry and the respondents, the lands in question formed part of their joint estate.

This being so, we have only to determine whether the decree of the Sudder Court is erroneous either because, upon the true construction of the Regulation and the admitted facts of the case, the sale by order of Government has given to the appellant a good title against the respondents; or because that question cannot be properly litigated and determined in the present suit.

The Regulation is a highly penal statute, and should be construed strictly. That portion of it which relates to the present case is contained in the 4th, 5th, and 6th Sections. The 4th Section provides that, after taking certain specified proceedings, the Magistrate is to order the attachment of any land or other real property held by the absentee in his jurisdiction; by requiring the Collector, if the absentee be a proprietor of land or sudder former, paying revenue immediately to Government, to hold the land or farm in attachment until further notice; and prescribes the measures to be taken by the Collector on receiving such a requisition. The 5th Section provides for the removal of the attachment on the attendance of the party; and the 6th Section enacts: "Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

In the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent. The Regulation makes no express provision for the case of joint proprietors of land, or persons jointly holding a sudder farm of land. Let it be assumed that such a joint proprietorship or joint holding is ostensible as well as real, and that

it appears on the Collector's books. Can it be doubted that in such a case the words "land or other real property held by the absentee" would be limited to his undivided share in the actual lands or farm? Again, suppose that the absentee is one of a joint family possessed of a zemindary, of which one member only is registered as owner. Their Lordships cannot think that, upon the true construction of this Regulation, the fact of such registration would either justify the confiscation of the whole zemindary if the absentee were the sole registered proprietor, or prevent the confiscation of the share of the absentee if he were not the registered proprietor. No analogy can be drawn from the doctrine of forfeiture in this country, where the doctrine is founded on tenure, and where there was a broad and marked distinction between law and equity, the Courts of Common Law taking no cognizance of equitable estates. And, if what is above stated be true of a zemindary or other real property of which the absolute interest belongs to a joint family, it is difficult to see why it should not be true of a farm enjoyed by a joint family as part of the joint estate, though taken in the name of one of its members. For the Regulation, at least in the part of it now under consideration, does not contemplate the forfeiture of the tenure, as between landlord and tenant. What it contemplates is the confiscation and sale of the tenure; and the course pursued in the particular case confirms this construction.

Again, there is no pretence for saying that a sale under this Regulation can carry with it the consequences of a sale for arrears of public revenue; that it sweeps away all sub-tenures or incumbrances created by the delinquent or those through whom he claims. The tenure in question, so far as appears on these proceedings, was alienable. It was open, therefore, to Bycauntnath to put his co-sharers in the estate into the full enjoyment of this farm, and to execute jointly with them, if they were so minded, sub-leases of the lands. No actual conveyance would, under the Hindu Law, be required for the former purpose. Their Lordships, therefore, are unable to affirm the broad proposition that, under the Regulation it was competent to Government to confiscate and sell this farm, so as to give to the purchaser a good title against the respondents. The Zillah Judge, though he declined to deal with the question in this suit, has not so decided. The Sudder Court has decided to the contrary.

It remains to be considered whether the Sudder Court was right in determining the question of title between the appellant and the respondents in this suit. The appellant had by supplemental plaint made the respondents parties to the suit, though under a kind of protest that it was unnecessary to do so; and this issue of title had been raised and joined between them. The only difficulty in the case is that the lease of Gopeemohun, who was put forward as the tenant in possession, has been pronounced by the Zillah Judge to be simply colorable, and that the Sudder Court has not dealt with his finding on that point. Considering, however, that, as between Gopeemohun and the respondents, the lease constituted the relation of landlord and tenant, and that the intervention of the landlord to defend rested on privity of title; and, further, that the effect of the proceedings in the Foujdary Courts of the 31st December 1855 and the 29th of March 1856 (at pp. 41 and 56 of the Appendix) was to determine that the appellant was out of possession, and to cast upon him the burden of recovering possession by proof of a good title, and that he has failed to do so, except to the extent admitted by the Sudder Court, their Lordships think that the decree under appeal is correct. They must, therefore, humbly recommend Her Majesty to dismiss this appeal.

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The 4th March 1867.

Present:

Master of the Rolls, Sir J. W. Colvile, Sir R. T. Kindersley, and Sir L. Peel.

Khas Mehals in the 24-Pergunnahs—Onus probandi—Possessory right of Government—Ejectment—Limitation—Evidence (Reception of—on appeal).

On Appeal from the High Court of Judicature of Calcutta.

Gunga Gobind Mundul and others

versus

The Collector of the 24-Pergunnahs, Prince Gholam Mahomed, and others.

There is no relation of landlord and tenant between the Government and the owner of khas mehals in the 24-Pergunnahs. The latter is the landlord to the ryots, and is not himself a ryot. The right and title of the Government is to the rent, but does not include a right to the possession of the lands, though such a right might arise by forfeiture or extinction of the ownership, and the *onus* is on the Government to prove its claim to the possession of the lands.

A dispute between two private owners, whether as to boundaries or lands, cannot divest the title of either to possession in favor of the Government, if the Government have merely a rent or jumma. The title to sue for dispossession of the lands belongs in such a case to the owner whose property is encroached upon. If he suffers his right to be barred by limitation, the practical effect is the extinction of his title in favor of the party in possession; but his cause of action cannot be kept alive longer than the legal period of limitation of 12 years by the expedient of inducing the Collector to make common cause with him.

The provision in the Code of Civil Procedure, which requires Judges who admit fresh evidence on an appeal to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with.

This is an appeal from a decree of the High Court of Judicature at Calcutta, which reversed a decision of the Civil Court of the 24-Pergunnahs in favor of the appellants. The suit, the decision in which gives rise to the present appeal, was brought by the Collector of the 24-Pergunnahs on behalf of the Government of India, against Gunga Gobind Mundul and Sree Mutty Rumoonee Dossee, described as defendants, and Prince Gholam Mahomed and certain other persons, members of the Mundul family, named in the plaint, and described as the occupiers of five cottahs of the disputed land, who, together with the Prince, are also described as *pro-formâ* defendants.

The Prince, though called a *pro-formâ* defendant, is really one of the persons principally interested in the subject in dispute. His title is adverse to that of the Munduls, and he is making common cause with the Collector. On what ground he is inserted as a defendant, it is not easy to discover.

The Prince had instituted three suits for the recovery of the property which is the subject of this suit against the appellants. He divided his claim into three suits, in conformity to the rules of procedure established in the Courts of the country, in consequence of the separate interests of different members of the Mundul family, in portions of his property, of which his claim embraced the whole. The suits of the Prince, numbered 43, 44, and 45 of 1857, raise precisely the same question as that which is raised in the suit of the Collector before mentioned, *viz.*, whether the lands sought to be recovered formed part of holding No. 1, and were part of that portion of Colonel Green's estate which, as the Prince contends, has passed to him by title. In all the four suits, the decision was against the plaintiff in the Civil Court. In the judgment of the High Court it is stated: "It has been admitted by the Counsel on both sides that in the Court below all parties agreed that this appeal (that is, the appeal in the Collector's suit) and appeals Nos. 122, 123, and 124 (that is, in the Prince's causes), should be heard together and treated as one consolidated case, and that all the evidence should be taken as in one cause."

In the Collector's suit alone is there any appeal? That suit, though it asks "a declaration overruling the plea of a rent-free tenure," which is not properly the subject of that jurisdiction, is properly treated in the Civil Court as an ejectment-suit, and it was admitted by Mr. Forsyth, who appears for the Collector, to be a suit in the nature of an ejectment-suit. For such a suit, which supposes that the plaintiff was put out of possession, it is necessary for him to allege and prove his title to the possession. The Collector sues for the Government, being entitled to sue to enforce their claim to the possession. It appears, however, in this suit, that both the Prince Gholam and the first and second Munduls claim derivatively from the same person, Mr. Johnson; the judgment of the High Court finds, as a fact, that "the property was originally the property of Mr. Johnson." By this word 'property' here is evidently meant absolute ownership, though it may be by a grant from the East India Company, as the zemindars of the 24-Pergunnahs. The well-known cases of Gardner *versus* Fell, and Freeman *versus* Fairlie (*see* 1 Moore's Indian Appeals, pp. 299 and 305), and the observations of Lord Lyndhurst in the latter case on the subject of pottahs, exclude any supposition that

such absolute ownership of lands by private persons could not exist at that time in that part of India, as against any claim of the Government to possession of the lands. In the latter case his Lordship terms "the rent," "a jumma or tribute," and says: "The pottah, therefore, proves no part of the title, it is the conveyance that gives parties a right to claim the pottah." The pottah is evidence of title. If there were anything in the nature of the title of the Government to lands in the 24-Pergunnahs, or any usage or custom in force there, which gave a less permanent interest to the possessors of proprietary right, some authority for, or some evidence of, such a variation from and limitation of the general law should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take these titles out of the operation of the principles established by the cases above referred to; consequently, upon the evidence in this cause, it appears that the Government had not, at the time of Johnson's possession of block No. 1, any title to the possession of these lands. If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply to the rent, the nature of which was that of a jumma or tribute; and, if the holders of these lands asserted then, or subsequently, a groundless claim to hold them free of rent as lakheraj, that claim would not destroy their proprietary right in the lands themselves, but simply subject their owners to liability to be sued in a resumption-suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure involving the measurement and assessment of the lands, and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed. If, at any period during Johnson's possession of these lands, or subsequently, a title to the possession of the lands themselves had accrued to the Government, by any act or omission on the part of the owners of the lands working a forfeiture, that title should have been alleged and proved. But, so far from this being attempted to be established, the Collector treated the lands as belonging, by title, to the holding of the Prince, and the Prince as fulfilling the ordinary obligations of the owner of the land to pay the rent or jumma of them. The title of Richard Johnson existed in 1783, and from that time downwards there is no proof of any Act entitling the Government to take possession of the lands; there is no evidence on which any reliance can be placed, that the title of the Munduls, be it what it may, commenced by violence; but, assuming that such proof existed, in what way can a dispute between two private owners, whether as to boundaries or lands, divest the title of either to possession in favor of the Government, if the latter have merely a rent or jumma? The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and, if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favor of the party in possession: *see* Sel. Rep., Vol. VI., p. 139, cited in Mr. Macpherson, 3rd Ed., p. 81. Now, in this case, the family represented by the appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred: and the effect of that bar must operate in favor of the party in possession.

The title, then, of the Prince to recover these lands as against the Munduls is extinguished; then how can the extinction of the proprietary owner's right in favor of the party in possession confer any right to possession simply on another person not having a title in remainder, if he had not a title to possession whilst the right and remedy remained? Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favor of a remainderman or a reversioner, the present case has no resemblance to that. The interest of the person in possession is not a limited, but an absolute, interest; the title to the lands is one inheritance, the title to the kheraj or rent is another. Though these lands are termed khas mehals, yet there is no proof in this case of any relation of landlord and tenant ever existing between Johnson and the Government; Johnson appears to have been the absolute owner, and no reversion to have existed in the Government. It is not the case of a lease at all, still less of a lease of temporary duration; it is the case of an absolute ownership of the lands; and the title of the Government rather resembles a seignory than that of a lessor with a reversion.

In the Civil Court the title of the Collector to sue was put upon the ground of the relation of landlord and tenant; and of the right of the landlord to sue in order to protect his tenant, and to assert his title as landlord. But such is not the real relation between the parties which the evidence discloses.

Prince Gholam took by conveyance from Brown; he states his title to have been derivative from Johnson, who conveyed to Green, who conveyed to Brown, who conveyed to the Prince, a title to the absolute ownership never interrupted.

There is no relation of landlord and tenant in such a case between the Government and the owner; the absolute owner is the landlord to the ryots, and is not himself a ryot. The Government has a title to the rent or jumma. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture or extinction of the ownership.

It is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety; but, if the party out of possession could set up a sixty years' Law of Limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is, the legal right of the Government is to its rent; the lands are owned by others: as between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time, it declares, not simply that the remedy is barred, but that the title is extinct in favor of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to jumma is not affected by a transfer of proprietary right, whether such transfer is effected simply by transfer of title or less directly by adverse occupation and the Law of Limitation.

Their Lordships are, therefore, of opinion that this dispute as to the identity of the lands, which is substantially the cause of action of the Prince alone, cannot be kept alive longer than the legal period of limitation of twelve years, by the expedient of inducing the Collector to make common cause with him. The judgment appealed against says: "If the Government recover against the defendants, the Prince substantially recovers also." But the Prince has never surrendered or intended to surrender his estate to the Government. He has simply taken a new pottah; that pottah is not the title, but the evidence of title. If the title of the Prince to possession was inconsistent with a title in the Government to the possession, and the Law of Limitation has extinguished that title of the Prince in favor of the Munduls, the defendants, their Lordships are entirely at a loss to see in the arrangement between the Collector and the Prince any ground in law or equity for making a decree which substantially restores him to what he has lost by laches, supposing the title under which he claims to have been originally good.

If, however, it were considered that the Collector could sue for the possession of the lands upon the title shown to be in the Prince, or that the Prince, by reason of the suit being in the Collector's name, could get the benefit of the sixty years' limitations, the question whether the respondents have proved a title sufficient to evict the appellants from the lands in dispute would still remain to be decided. The Collector rests on the title of the Prince. That title is derivative through mesne transfers from Johnson. The place, the Sahiban Bageecha, is said to have been the residence of European gentlemen. It seems probable that both Johnson and Green were British subjects; if they were British subjects, these lands could not have been orally conveyed by Johnson to Green. It is not shown, therefore, by the plaintiff, on whom the burden of proof lies, that the entries in the register could of themselves operate as a conveyance. They must, at the highest, amount only to evidence from which, with other matters, a conveyance might be presumed. Had the possession of the lands been enjoyed by virtue of, and consistently with, the title asserted by the plaintiffs, there would have been legal grounds for making such a presumption; but there has been a long adverse possession, and there is no sufficient proof of a contemporaneous possession consistent with the title insisted on by the plaintiffs. The presumption of a conveyance is resorted to, when such presumption is made to support a long possession; but here it would be applied to defeat a long possession. If possession be not consistent with a title which is to be supported by a presumption of a former conveyance, that very possession would furnish ground for building another presumption on the first, *viz.*, of a subsequent re-transfer or re-conveyance. In such a case, therefore, as the present, the defective link in the claimant's title cannot, in the opinion of their Lordships, be

supplied by presumption. Then, as it is not shown that these lands could have been transferred orally, and as no direct evidence exists of a conveyance, and as the state of the possession does not support a presumption of one having existed, the question which is asked by the Judge of the Civil Court as to the missing link is at once pertinent and unanswered. Again, the title from Green to Brown, the immediate vendor to the Prince, has not been traced or proved. It has been assumed that it is sufficient for the respondents to establish that the lands were part of the rent-paying lands comprised in holding No. 1. But even this fact has not, in their Lordships' opinion, been satisfactorily made out. Both parties agree that the lands in dispute lie in block No. 1, which, by the chittas of 1783, appears to have belonged to Johnson, and to have contained 46 beegahs 10 cottahs. The inference which the respondents draw from the Register book at p. 213 is that this parcel of 46 beegahs 10 cottahs was subject to a jumma of Rs. 39-13-0; that it had been transferred before 1816 from Johnson to Green; that a fresh pottah for it was then granted in the name of Green; and that it is identical with the joint holding mentioned in the terij of 1833 under the head of Pergunnah Khaspore at p. 38 of the Appendix. It is, however, clear on the face of the terij that that holding had been supposed to comprise only 30 beegahs; that on a re-measurement it had been found to comprise 42 and a fraction; and that, in consequence of the re-measurement, the jumma of Rs. 39-15 had been raised to Rs. 56-14-1. But no satisfactory or consistent explanation has been given how or why a holding, which in 1816 was taken to contain 46 beegahs 10 cottahs, and, as such, was assessed at Rs. 39-15, was at some intermediate period between that date and 1833 taken to contain only 30 beegahs; and having, on re-measurement, been found to contain 42 beegahs and 16 cottahs, was treated as subject to a higher jumma than that assessed upon it when it was supposed to be 46 beegahs 10 cottahs. Mr. Forsyth thought that there must have been two measurements, of which the first, being inaccurate, had reduced the quantity of land to 30 beegahs—and that the first estimate of 46 beegahs 10 cottahs was a conjectural one. It does not, however, seem probable that, if this original estimate had been tested by measurement, the measurement would have been so inaccurately made. Again, Sir Roundel Palmer's theory is that the original block No. 1 may have contained some 16 beegahs and 10 cottahs of rent-free lands; that the rent-paying lands were, therefore, taken to be only 30 beegahs, but were found, on re-measurement, to be 42 beegahs and 16 cottahs. This theory implies that block No. 1 contained, in fact, about 59 beegahs of land. The learned Judges of the High Court admit the difficulty, but say that it is not insuperable, and seem to incline to some such explanation as that offered by Mr. Forsyth. These hypotheses, which are not consistent, are all, in their Lordships' opinion, of too conjectural a character to be received in explanation of an admitted difficulty, in order to defeat a title founded on long possession. It may be observed, too, that not of them, and indeed the Register book itself, are not consistent with the case made by the Collector in his plaint, which is founded upon the transfer of the 46 beegahs 10 cottahs, less 3 beegahs and a fraction, from Johnson to Green. The question of the identity of these lands appears to their Lordships to be one of extreme doubt and difficulty. They are by no means prepared to say that the appellants have made out that the lands in dispute are identical with the parcel of the conveyance under which they claim title; or have proved a title under which they could recover if they were out of possession. But the burden of proof is on the respondents—it is for them to establish, by sufficient and satisfactory evidence, the identity of the lands conveyed to the Prince by Brown with those sought to be recovered from the appellants; and their Lordships are of opinion that they have failed to do so. If their Lordships had thought otherwise, and that the cause was to be determined upon proof of this identity, they would have felt it very difficult to refuse to send the cause down for a new trial. For the strength of the respondents' case is the Register book; that book was first produced in the Appellate Court under circumstances in which the appellants may have been, in some measure, taken by surprise; and they may, in the documents produced in support of their unsuccessful application for review, have the means of meeting the inferences to be drawn from that book. Objection to reception of those documents here was taken and allowed; and their Lordships have excluded them from their consideration. Upon the whole case, however, and for the reasons already given, their Lordships are satisfied that the suit of the Collector was properly dismissed by the Zillah Court, and that this judgment, notwithstanding the fresh evidence produced, ought to have been affirmed by the High Court.

Their Lordships wish it to be understood that this judgment leaves the subject of the liability of these lands to be assessed for jumma wholly untouched. All that they decide is the question of proprietary right as between the contending private owners.

It may be right to observe that, in their Lordships' opinion, the provision in the Code of Procedure, which requires the Judges who admit fresh evidence on an appeal to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with. It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of litigation, and the statement of the reasons may inspire confidence and disarm objection. Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed with costs; and that the decision of the Civil Court, so far as it dismisses the plaintiffs' suit with costs, be affirmed, and that this appeal be allowed with costs.

The 4th March 1867.

Present:

Master of the Rolls, Sir J. W. Colvile, Sir R. T. Kindersley, and Sir L. Peel.

Hindoo Law (Mitakshara) — Inheritance—Sister's Son—Hindoo widow—Suit by Reversioner.

On Appeal from the late Sudder Dewanny Adawlut at Agra.

Thakoorain Sahiba and another

versus

Mohun Lall and others.

According to the Mitakshara, a sister's son cannot inherit.

A person having only a contingent estate during the lifetime of a Hindoo widow is permitted to sue simply on the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way, *i. e.*, that he holds the character which he professes.

Their Lordships have authorized me to state that, in their opinion, the preliminary objection which has been taken to the maintenance of this suit must prevail. It unquestionably lay upon the plaintiff, Mohun Lall, one of the respondents, to show that he had a right to sue. The suit is of a peculiar nature, because it is one brought by a person who, even if his own case were true, might probably never have an interest in the property, inasmuch as he can have only a contingent estate during the lifetime of the appellant Thakoorain. Such a suit is permitted simply on the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way—in other words, that he holds the character which he professes to hold.

Now, the admissions which have been properly and candidly made at the Bar have reduced the question to a very narrow compass. As the suit was originally launched, and upon the face of the plaint there was some uncertainty as to the mode in which the parties sought to establish their title, there was apparently some confusion in the mind of the pleader whether Inderjeet or his father was what we call the "*propositus*," and whether it was not sufficient to deduce a title to inherit from the father. Before the case reached the Sudder Court, that confusion had been dispelled, and the Judges of that Court (as appears by their judgment) considered the case on the assumption that Inderjeet was, as he no doubt was, the "*propositus*," and that the respondent had to show that he was in the line of heirs to him.

The admission, however, which Mr. Piffard made at the Bar to-day, implies that the learned Judges of that Court decided in favor of the respondent upon a ground which is no longer tenable. They treated him as having an interest, on the ground that, being a sister's son, he comes within the category of the cognates or *bandhus*. That view is now abandoned, and, therefore, the question is narrowed to that raised by the very ingenious argument of Mr. Piffard, *viz.*, whether, upon the true construction of the Mitakshara, the sister's son does not come in as one of the earlier class of heirs known as Sapindas?

We think that, if this question were *res integra*, and to be determined on a construction of the Mitakshara alone, there would be considerable difficulty in coming to the conclusion to which Mr. Piffard would bring us. There is, no doubt, some foundation for the ingenious arguments which he has addressed to us. It is, perhaps, a startling anomaly that, whilst among the cognates the aunt's sons are included, the sister's sons

should be altogether excluded from the inheritance; and there is also something plausible in the argument which he has founded upon the fourth article of the fifth Section, which says that, "on failure of *the father's descendants*, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons." The difficulty, however, that occurs on the words "on failure of the father's descendants" is really not insuperable, because they may well be taken to import the failure of the father's descendants, who, according to the rules expressed in the treatise, are capable of inheriting. Indeed, unless so qualified, they would give by implication a right to inherit, not only to sister's sons, but to sisters who, *ex concessis*, are excluded from the inheritance.

Mr. Piffard's argument had, in truth, a sort of double aspect. At first he dwelt a good deal upon the authority of the author of the treatise called Vyavahara Mayukha; but afterwards he fell back upon the authority of Balambhatta and Nanda Pandita. The two authorities are not consistent. We may at once dismiss that of the Mayukha, by saying that that treatise, though received in the Bombay Presidency, appears to be of no authority in the districts the law of which has now to be applied. It is further to be observed that, if received, it would not support the contention of Mr. Piffard, because it gives the right of heirship to the sister herself, and not merely to the sister's son, and puts the sister after the paternal grandmother and between the paternal grandmother and the paternal grandfather.

The other argument, that on which Mr. Piffard finally rested his case, is shortly this: The seventh Article of the fourth Section of the second Chapter of the Mitakshara says: "On failure of brothers also, their sons share the heritage in the order of the respective fathers." Two ancient commentators, Balambhatta and Nanda Pandita, held that the words "their sons share the heritage" are to be construed so as to include the daughters, as well as the sons of brothers and the sons and daughters of sisters; and Mr. Piffard would have us adopt this construction. But the Article clearly implies that the parent, if in existence, is to take the succession. Accordingly, the two Hindoo commentators (*see* the note on Section 10, Article 1) would include sisters in the term "brothers," and give them a place in the line of succession. But Mr. Piffard is constrained to admit that sisters are excluded. In fact, it would not suit his client's case to admit them.

On the other hand, if "brothers" are to be taken simply as "brothers," and "their sons" as brothers' sons, the text of the Mitakshara is perfectly clear; and the first Clause of the fifth Section shows that on the failure of brothers' sons, Gentes share the estate, the paternal grandmother being the first person of that class of heirs who take the estate. Again, were the arguments in favor of the construction which Mr. Piffard would put upon the Mitakshara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that treatise, to run counter to that which appears to them to be the current of modern authority. To alter the Law of Succession as established by a uniform course of decisions, or even by the dicta of received treatises, by some novel interpretations of the vague and often conflicting texts of the Hindoo commentators, would be most dangerous, inasmuch as it would unsettle existing titles.

Of what may be called the modern authorities we have first the decision of the Sudder Dewanny Adawlut, at Calcutta, in 1806. It is impossible to read that case without seeing that the point was clearly raised before the Court, which at that time consisted of Judges who were considerable authorities on Hindoo Law. That decision has received the high sanction of Sir William Macnaghten; it is also cited by Sir Thomas Strange, and it has ever since been considered to be a correct exposition of the law. Nor can it be said, as was suggested by Mr. Piffard, that all the subsequent authorities rest upon this decision, which he attributed in part to the inability of English Judges fully to appreciate and apply the terms of the Hindoo treatises. For at page 85 of the second volume of Mr. Macnaghten's 'Principles and Precedents,' we have the bywusta or opinion of the Pundit of Zillah Behar, purporting to interpret the text of Jagnavulkya, and making no reference whatever to this decision of the Sudder Court. He there puts sister's sons out of the category in which Mr. Piffard would include them; although, erroneously perhaps, he puts them among the *bandhus*, or distant kindred. Again, from the MS. case produced at the Bar, we find that the Agra Court, overruling its decision in this case, has recently held that the

sister's son is not in the line of heirs at all; that the same point has been decided at Madras, and was recently decided in the High Court of Bengal. It had previously been decided in the case which is set forth in the record. Against all these concurrent authorities, we have nothing to set but the decision now under review, which, it is admitted at the Bar, cannot rest upon the ground on which the Judges put it.

Their Lordships are, therefore, of opinion that they must humbly recommend Her Majesty to reverse the decrees under appeal, and to declare that the suit ought to have been and be dismissed with costs. The respondent Mohun Lall must also pay the costs of this appeal.

The 8th March 1867.

Present:

Sir J. W. Colvile, Sir E. V. Williams, Sir R. T. Kindersley, and Sir L. Peel.

Trial (of questions of fact).

On Appeal from the High Court of Judicature of Bengal.

Meethun Bebee

versus

Busheer Khan and others.

In trying a question of fact, no Judge is justified in acting principally on his own knowledge and belief or public rumour, and without sufficient legal evidence.

THE appellant is the widow of Agha Jan Khan, a native of Caubul, who died domiciled at Cuttack in July 1857. Her father was one Burkhordar Khan, also probably a Pathan by origin, who, after carrying on some kind of business at Cuttack, is said to have gone into the Dekhan with elephants, horses, and other merchandize, and to have died there in the early part of the present century. He left a widow, Fatima, the appellant, his only daughter; and a son named Hossein Khan. The appellant married first an Afghan, named Omar Khan, who died some time in the year 1824; and, very shortly after his death, she married his near relation Agha Jan Khan. By Omar Khan she had a son, Timour Khan, who died in 1829. In the year 1831 there appeared at Cuttack one Ismail Khan, who claimed to be the brother of Omar Khan, and, as such, entitled to share in that portion of his estate which had descended to his son Timour Khan. Agha Jan Khan and the appellant compromised this claim for a sum of Rupees 300, and the release of a debt of Rupees 721. After that transaction Agha Jan Khan carried on business at Cuttack, became the registered and ostensible proprietor of the zemindary talook, which is the principal subject of dispute in this cause, and the apparent owner of the other property which the Courts below have found to have belonged to him at the time of his death.

The respondents claim to be the co-sharers and residuaries, who, according to the Mahomedan Law, are entitled to divide the estate of Agha Jan Khan with his widow. They contend that Koolee Khan, the common ancestor, had two sons, of whom Morad Khan was the father of Agha Jan Khan, and of the female respondent, Bukht Banoo; and the other, Nidda Khan, was the father of the before-mentioned Omar Khan and Ismail Khan; and that Ismail Khan was the father of the respondents, Busheer Khan and Moneer Khan, and of one Goolmer Khan, who is dead. Claiming under this title, they instituted the present suit for the recovery of their respective shares of the zemindary and other property alleged to have belonged to Agha Jan Khan at the time of his death from his widow, who was in possession of it.

The appellant has contested their title to sue; she has claimed the sum of Rupees 20,000 as due to her from the estate of Agha Jan Khan as the stipulated amount of her dainmohr, and, on the grounds which will be hereafter considered, has denied that any part of the property claimed belonged to her late husband. The first two questions may be very shortly disposed of.

Their Lordships, in the course of the argument, intimated that they considered the title of the respondents to be established.

It has been affirmed by the concurrent judgment of the two Courts below, which, the issue being one of fact, their Lordships, according to the ordinary course of this Committee, would not disturb, unless they were satisfied that it was wrong. They believe, however, that it was right. It was, no doubt, difficult for the appellant to disprove the pedigree of a family whose domicile was in Afghanistan; and the omission of Ismail Khan to mention in the petition, which is in evidence, his relationship to Agha Jan Khan, may be a circumstance of suspicion. But it was not necessary for him to state that relationship in order to make out the title, which he was then asserting, as co-heir of Omar Khan's son; and, on the other hand,

we have indisputable evidence that Agha Jan Khan received into his family, and recognized as kinsmen, first Goolmer Khan, and afterwards the respondent, Moneer Khan. The identity of that Goolmer Khan, with the Goolmer Khan of the pedigree, might be disputed; but there can be no doubt as to the identity of Moneer Khan. The persons, therefore, who are entitled to share the estate of Agha Jan Khan have been correctly ascertained. Again, both the Courts below have held that the appellant has failed to establish her claim to the dainmohr; and nothing has been urged on the present appeal which induces their Lordships to doubt the correctness of that conclusion. Therefore the only substantial question on this appeal is, to what extent, if any, is the property which is the subject of the decrees in the Courts below to be treated as the estate of Agha Jan Khan?

The respondents, relying mainly on the ostensible ownership, insist that the whole of it is to be so treated. The case of the appellant is that no part of it, in fact, belonged to her husband; that it was acquired from the proceeds of a business carried on with funds left by her father Burkhordar Khan; that those funds and that business belonged to herself, her mother, and her brother as the co-heirs of Burkhordar Khan; and that her late husband, though the 'gerent' of the business, and the ostensible purchaser and registered holder of the talook, was a mere manager and trustee for her and her family.

Of the issues recorded in the suit by the Court of first instance, the second and the fourth both related to this question of title to the property. Under the first of these, the respondents had to prove that "the whole of the disputed property was the own property of Agha Jan Khan." Under the other, the appellant had to establish that "the zemindary and other property claimed had been inherited by her from her father's, mother's, and brother's estate, and belonged to her; and that Agha Jan Khan had no right thereto."

Both the Courts below have held, and in their Lordships' opinion properly held, that the appellant has failed to prove this last issue, and to substantiate the case set up by her. She relied mainly on the oral testimony of witnesses whom both Courts have pronounced to be untrustworthy. Of their evidence, some part was directed to prove the wealth of Burkhordar Khan and of his family, and the poverty of both the husbands of the appellant and of their family; other parts went to show that the zemindary was purchased with funds supplied by Fatima, and even that she was recognized as zemindar, and received the rents. There is a failure of proof that the property of Burkhordar Khan (and it is very uncertain what was the amount of it) furnished the capital on which Agha Jan Khan traded; there is no proof that the business carried on by Burkhordar Khan was an established continuing business. His dealing in horses and elephants seems to have been something distinct and of a different nature from the money-lending business, in which, as some of the witnesses state, his widow engaged after his death. And, lastly, the case set up by the appellant and sought to be established by her witnesses is inconsistent with her acts and conduct. For, though Fatima predeceased Agha Jan Khan, Hossein Khan is stated by some of the appellant's witnesses to have survived him, and appears by the appellant's written statement to have left a daughter. Yet, on the death of her husband, the appellant claimed to be entitled to the whole of the property, and procured, by petition to the Collector, the registration of the talook in her sole name. No suggestion that either Hossein Khan or his daughter had any interest in the property was then made.

It may be said on the other hand, and probably with truth, that the oral testimony adduced by the respondents is hardly more trustworthy than that on the part of the appellant. Such as it is, it is directed to prove the poverty of Fatima and her family: and that Agha Jan Khan, at the date of his marriage, had some, though not very ample, means. The respondents are, however, entitled to rely on the presumption resulting from his ostensible ownership of the property, until that is satisfactorily rebutted. There is documentary evidence in the case which shows that other real property was bought and sold by him. Some of the proceedings which are in evidence, and the fact of his taking into the house first one cousin and then another, tend to the conclusion that he was the master of his family, and head of his own house. It is not likely that he, who was obviously the active man of business of the family, would have submitted to occupy for thirty years the dependent position which the appellant's case assigns to him. Nor is there any strong antecedent improbability in the hypothesis that he

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means of successful traffic during that period, he had been able to realize, from however small beginnings, the property of which he died ostensibly possessed. Therefore, of the two cases set up by the parties, the weight of evidence seems to be in favor of that of the respondents.

But between these two cases lies the theory adopted by the Principal Sudder Ameen. That intermediate theory is that the property was acquired from the proceeds of a trade carried on by the appellant and her husband in partnership, the original capital of the appellant being derived, not from her own family, but from the estate of her first husband, Omar Khan; and that the shares of the parties in this joint concern, being undisclosed, must be assumed to have been equal.

If this case had been established by satisfactory evidence, the Principal Sudder Ameen, in dealing with the second issue, might properly have adopted and acted upon it. It appears, however, to their Lordships, as it appeared to the High Court of Calcutta, not to be so established. The theory of a partnership, properly so called, between the appellant and her husband is not only inconsistent with her case as first launched, but has been indignantly repudiated by her throughout the proceedings in the suit, and particularly by her petition of appeal to the High Court. None of the witnesses attempt to prove it. There is, no doubt, some evidence of partnership-dealings between Omar Khan and Agha Jan Khan. But that evidence points rather to some joint adventures than to a regular partnership in a continuing and established business. Again, there is evidence that Omar Khan died worth some few thousand rupees. The sum at which the residue of his estate is estimated in the petitions of Ismail Khan is less than Rs. 4,000. But, as Mr. Pontifex argued, there is no proof that this sum, or any other property of the appellant, entered into the capital on which Agha Jan Khan traded. Had that been her case, she might have proved it by the books of the business, which are presumably in her power and custody, the evidence of gomashtas, or the like. If the Principal Sudder Ameen thought that his hypothesis was according to the truth of the case and the real rights of the parties, he should have established it by pursuing the enquiry, and by calling for the production of proper proof. Meer Dowlut's testimony falls very far short of such proof. And the conclusion of the Principal Sudder Ameen as to the partnership seems to rest principally on his own knowledge and belief, or public rumour—grounds upon which no Judge is justified in acting.

Their Lordships are, therefore, of opinion that, upon the facts alleged and proved in this case, the judgment of the High Court, which, varying the decree of the Principal Sudder Ameen, dealt with the property in dispute as wholly that of Agha Jan Khan, is right. They feel, however, considerable doubt whether that judgment, partly owing to the nature of the suit, and partly to the very unsatisfactory manner in which it has been conducted, has not failed to do complete justice between the parties. The suit is not an administration-suit, in which the assets of the deceased, and the charges and incumbrances thereon in the shape of debts or otherwise, are ascertained by proper enquiry. It is a suit for the recovery of certain shares in specified property assumed to have belonged to the deceased. Again, the excessive claim of the appellant may have prevented her from getting that to which she is really entitled. Her own property may have been mixed up with her husband's. Their Lordships do not feel at liberty to re-open the litigation in this suit. But, whilst they humbly recommend Her Majesty to dismiss this appeal with costs, they will add a recommendation that the order be without prejudice to any proceedings on the part of the appellant to establish any debt, other than her claim for dainmohr, against her husband's estate, or any lien, in respect of such debt, upon that estate.

The 3rd December 1846.

Present:

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Agreement — Compromise — Costs — Practice — Appeal—Forma pauperis.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Munni Ram Awasty

versus

Sheo Churn Awasty.

Where, during the pendency of a suit, the plaintiff, in consideration of Rupees 2,000, executed contemporaneously a *farigh-kutti*, or relinquishment of the claim made by him in the suit, and an *ikrarnama*, or engage-

ment to deliver in a *raseenama* or deed acknowledging himself to be satisfied—HELD that the *farigh-kutti* and *raseenama* amounted to a decided agreement for the settlement of the action; and that, although the plaintiff sued as a pauper, yet, as it was questionable whether he should have been allowed to sue as a pauper, and as he had failed to perform his duty according to his engagement in entering up a *raseenama*, he was liable to pay the consideration-money of the costs incurred in consequence of his unsuccessful and apparently most unjust litigation in reference to his claim which he had instituted and carried on for the purpose of freeing himself from the obligation which he entered into by this *farigh-kutti*.

Quære.—Whether the leave given by the Courts in India to a party to sue *in formâ pauperis* would enable him to prosecute the appeal to the Privy Council, without obtaining the leave of the Privy Council.

Lord Langdale.—THIS is an appeal from the Court of the Sudder Dewanny Adawlut, in a suit in which the appellant was the plaintiff, originally in the Provincial Court of Patna. He alleged himself to be one of a numerous family, which had not been divided or in any way separated. He claimed to be entitled to a certain share of what he stated to be the common and undivided property of the family. The plaint was filed so long ago as the month of January in the year 1815, and the answer put in by the defendants then, the respondents now, to that action, contained a denial of the plaintiff's right; a replication and rejoinder were filed; the parties proceeded to the examination of some witnesses, and there were, I think, two examined on the part of the plaintiff, and one witness examined on the part of the defendants. There had been directions given for the production of some documents, which, however, were not produced, in consequence of their having been, as was alleged, lost or destroyed by fire.

It was in that state of things that a proposal for a compromise seems to have been made. It does not distinctly appear from whence that first proceeded, nor is it in any degree material. It came to a conclusion in the month of April 1819. It does not appear to have been entered into with any haste or precipitation; on the contrary, sufficient time was taken for deliberation, the time which was asked for, for the plaintiff himself, in order that he might choose what he considered a lucky day for the completion of this assignment to him; but on the 26th of April he signed two documents, one of which is called a *farigh-kutti*, and the other an *ikrarnama*. In the *farigh-kutti*, after the introductions which do not appear to be material to be stated at length, he says: "I have, therefore, with "my own free will and consent, settled this "action among ourselves. By the terms "of this settlement the sum of 2,000 rupees "account mine and my brother Doorga "Awasty's eighth share, after deduc- "ing Sungun Lal's debts," and so on, "is "due to me and to my brother by the de- "fendants aforesaid, which, that is, the "sum of 2,000 sicca rupees in question, I "have taken from the defendants aforesaid "and have received, and have appropriated "and applied it to mine and my brother's "uses, and have relinquished and withdrawn "the residue of my claim in the above- "mentioned case, property, dwelling-houses, "orchards, and villages. Now, neither I nor "my brother, nor our successors, have or "shall have any right, title, claim in, or "litigation for, the property, articles, cash, "dwelling-houses, orchards, estates, or vil- "lages aforesaid, the possessions and occu- "pancies of the father of the defendants "and their own. And neither the defend- "ants aforesaid, nor their successors, have "or shall have any right, title, claim in, "or litigation for, the property, articles, "dwelling-houses, dues, or orchards, &c., "appertaining to the town of Futtoohabad, "&c., Zillah Cawnpore, the possessions and "occupancies of myself, of my brother, and "of my uncles. The costs of the Court "are agreed to be at the responsibility of "the defendants." On the same day he executed the other instrument, called an *ikrarnama*, and there he stated: "Whereas "I entered an action as a pauper in the "Patna Provincial Court for the decision "of and entry into the property and estates "belonging to the house at the town of "Shahabad *alias* Sahebgunge, Zillah Behar, "against Muddun Mohun Awasty and Shee "Churn Awasty, and, after the death of "Muddun Mohun Awasty, against "Mussamut Neeut Kooer, widow of the "said deceased, the guardian of Chintamun "Awasty and Balgovind, minor sons of the "said deceased; now I, of my free will "and consent, have taken Rupees 2,000 as "my eighth share in the dues and price "of goods sold at the time the deceased "Sungun Lal Awasty's business was carried "on," and so on; "and the sum of Rupees "1,000 has been fixed by the defendants as "the share of the widow of my brother "Sheo Ram Awasty deceased (who lives "with me, and is without issue) out of the "amount collected, account the dues, and "price of the goods sold aforesaid; I there- "fore engage and give in writing that I "will deliver in a *rasinama* in my action "conformably to the above condition, to the "Provincial Court, and will get a deed of

'*farigh-kutti* executed to the defendants 'by the widow of my brother Sheo Ram, 'deceased, within two months, and deliver 'the same to them; at which time I will 'receive the sum aforesaid; and, until I 'shall have got the said *farigh-kutti* exe-'cuted by the said Mussamut above men-'tioned, the Rupees 1,000 in question shall 'remain in deposit with the said defend-'ants."

Now, taking those two instruments (which were contemporaneous) together, they amount to a decided agreement for the settlement of this action. By that agree-ment Rupees 2,000 were to be paid to the plaintiff in that case, and he signed a receipt upon it—"I have received Rupees '2,000;" but the same instrument says, "I 'engage in writing that I will deliver in 'a *razi-nama*." Now, two things seem to be understood by this instrument: one is a relinquishment of the claim made in the suit, and the other is an engagement to deliver in a *razi-nama*, and this was in considera-tion of Rupees 2,000. The Rupees 2,000 were forthcoming from that moment, but at the time that this *farigh-kutti* was executed there was something else to be done, for both these instruments were instruments executed out of Court; they were not instruments to be delivered to the Kazi to put an end to the cause, and therefore it is stipulated that, in addition to the former instruments, the plaintiff shall give a *razi-nama* expressing his satisfaction on record. I believe I am correct in stating that, for I find in the Index which is given to us, that a *razi-nama* is stated to be "a deed 'given by a complainant or prosecutor ac-'knowledging himself to be satisfied;" and while that was pending, which it was ne-cessary to do in order to complete the business, it would not have been prudent to give the Rupees 2,000, nor would it have been prudent to give security for the pay-ment of the Rupees 2,000. That which was done, and which was a natural course of proceeding, was this: The Rupees 2,000 were not to be paid over, because the *razi-nama* had not been delivered, but the plaintiff was not to be left without some security, and therefore he had delivered to him a sort of note or bond for the execution of these instruments, leaving the *razi-nama* to be delivered on the part of the plaintiff.

Upon this matters appear to have ended, and thus it remained down to this time, when the dispute arose, because, immediately after this, this being in April, it appears that, before the month of August, a dispute had arisen, and this was the matter in dis-pute that the *razi-nama* had not been deli-vered, and that was made a sbject of litiga-tion. The plaintiff said that he was in no respect bound by this instrument, that it had been obtained by fraud, and he alleged some circumstances from which fraud was to be inferred. One of these circumstances was that it had not been properly sealed by the Kazi; there were several other things more particularly mentioned—one of them to which the greatest weight seems to have been attached is that, contemporary with these instruments of agreement, there had been another agreement entered into between these parties, that, notwithstanding the statement of a specific sum of 2,000 rupees, three times over mentioned in the *farigh-kutti* given by the plaintiff and also in the *ikrar-nama*, it was not intended that he should be bound by the sum of 2,000 rupees, but it was intended, notwithstanding that, that there should be an account taken of what might be due to him upon the foot-ing of his original claim, and this was alleged by him in the Court below as the reason why he should not be bound by the *ikrar-nama*.

Now, I have endeavored to attend to this matter with all the care I could, and to what has been stated by the learned Counsel, and I have looked through all the papers myself, and I cannot find the slightest trace of any evidence to show that there ever was any such an agreement. They cross-examined the witnesses who were examined for the plaintiff, and they wholly denied it; how-ever, so much credit was obtained for this statement that it produced a great deal of litigation, and the plaintiff even obtained a decision that this instrument was not to be considered sufficient to stop the proceedings. It appears to me that that decision certainly is of a very extraordinary nature. I should not have adverted to it at all, if the Counsel for the appellant had not done so, and with great propriety on their part, because they wish to avail themselves of everything they can. They say: "Here we have the judgment of Mr. Fleming in our favor upon this point; he did not consider at this time that this *farigh-kutti* was bind-ing."

Now, what are the reasons which he gives? He refers to the former proceed-ings and to the examination of the witnesses who had been examined; and then he says this: "As the plaintiff adduces a variety

of objections to the *farigh-kutti* above mentioned, which have been entered at length in the proceeding of the 4th of August 1819." The plaintiff adduces—there is not a word about this having been proved—" and as, exclusive of that consideration," that is, the consideration of the plaintiff adducing them, "the plaintiff has not taken the amount stated in the *farigh-kutti* aforesaid," not in the least stating the reason why he did not take it, or considering whether it might or might not have been his own fault that he had not got it, "nor delivered in a *razi-nama* and *sufi-nama* in the usual form;" he had not done that which he had not covenanted to do, "the decision of this suit on a *farigh-kutti* of that nature not carried into execution is deemed exceptionable." It amounts to this, because the plaintiff does not like it, therefore he shall not be bound to do it—he has entered into an engagement which he does not like to perform, and therefore he is not bound to perform it. I cannot see that there is much weight to be attached to a decision founded upon such reasons as those.

However, the matter went forward in consequence of this decision, and there were proceedings afterwards before Mr. John Sandford, in which the plaintiff's claim was dismissed, and he was ordered to pay the whole costs of the suit. Then afterwards there were other proceedings before Mr. Courtney Smith, who seemed to form a more favorable opinion of the validity of the instrument for the reasons which have been presented here. And then it went before Mr. Harington, and then it came before Mr. Sealy; and it strikes me as a conclusive fact in this case that Mr. Harington, after having examined all the evidence in the case, thought that the defendants had not made out any case independent of the *farigh-kutti*. It is not for us to consider that, because we think the case is concluded by the *farigh-kutti*, without referring to the evidence of Bhoop Sing, which, with great ingenuity, is shown to be erroneous; but, looking merely to the others, and considering the evidence, with the inferences which are necessarily to be drawn from it, though not distinctly expressed, it appears that, after the execution of the *farigh-kutti*, the next step to be taken ought to have been taken by the plaintiff—that he ought to have given in a *razi-nama*, and, upon giving in a *razi-nama* in performance of his own contract, there is not the slightest suggestion that he might not have had his money from the first moment—it was there ready for him, there was an act to be done to entitle himself to it, and that act he never did, and he cannot avail himself of his own conduct to dispute the right of proceeding in this case. It therefore appeared to their Lordships, on consideration of this matter, that, so far as relates to the dismissal of the plaint, the decree was perfectly correct.

There arises a question as to the costs. The *farigh-kutti* contains the clause which has been so often referred to: "The costs of the Court are agreed to be at the responsibility of the defendants." If, therefore, the plaintiff had performed his duty according to his engagement in entering up a *razi-nama*, and had then received the 2,000 rupees, he would have received those 2,000 rupees quite free from any charge of costs. The defendants would have had to pay the costs of the Court at least. I will not say whether they might have meant more than the costs of the Court. But does it follow that the defendants are to be responsible for all the costs which afterwards arose in consequence of the unsuccessful and apparently most unjust litigation in resistence to his claims which the plaintiff instituted, and carried on for the purpose of freeing himself from the obligation which he had entered into by this *farigh-kutti*? There seems to be no reason at all for that except this, that he was suing as a pauper, and therefore ought not to be subject to any costs. He was, indeed, suing as a pauper. But it cannot fail to strike us as subject to some question, looking to these proceedings, that he was allowed to sue *in forma pauperis*. It appears by this *farigh-kutti* that he had some property. It appears further that that property had been made subject to attachment, and actually laid hold of and seized; there was real property, and there was property in deposit, property which was attached after the decree was pronounced, which was to this effect: "A "conclusive order and decree is passed, that "the *fysala* of the Patna Provincial Court, "dated 26th April 1821, be modified in the "following manner: That the appellant's "claim to the amount of 2,000 rupees ad-"mitted by the respondents be awarded: "that the residue of the appellant's claim, "which has not been proved, be dismissed "and rejected; that costs proportionate to "the 2,000 rupees aforesaid be payable by the "respondents, and the remaining costs of "the parties' account, the residue of the "appellant's claim, be entered at the ap-

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"pellant's responsibility; that for the pre-
"sent, in consequence of the appellant's
"pauperism, out of the fees on the respond-
"ents' part which are deposited in the
"treasury of this Court, half be paid to the
"vakeels, and the other half on the respond-
"ents furnishing the receipt be re-paid to
"them; and that, in the event of the ap-
"pellant's property being found, the whole
"of the costs be paid therefrom."

This is not a personal order for the payment of costs, but the costs which the appellant was to pay are the costs which he has to pay out of his property, if his property is found: not any personal claim is made against him under this decree; and, with respect to costs, the question arose about costs afterwards.

There was a petition presented in January 1826, in which there was an allegation to this effect: "Although the appellant "has declared himself a pauper, he is not a "pauper in fact, and, notwithstanding he "possesses thousands of rupees' worth of "property in dwelling-houses and houses, "and has in deposit 4,000 rupees with "Tara Chund and Utna Ram, he has per-"jured himself; accordingly, after the "Provincial Court's decision, in con-"formity to a durkhast of the vakeels on "our part, the dwelling-houses, houses, or-"chards, and ponds, the acquisitions and "occupancies of the appellant, situated "in the town of Futtoohabad," that is, the plaintiff's residence, "Zillah Cawnpore, "were attached through the Judge of the "said zillah, and are under attachment to "this day."

Then they presented a subsequent petition, in which they state: "That, as the 2,000 "rupees deposited by the appellant in the "house of Rahman Sahoo, mahajun, situat-"ed in the town of Sahebgunge, Zillah "Behar, is forthcoming, and the teep thereof "filed in the *misl* of the case, and con-"formably to the *fysala* of this Court, the "said sum has been decreed to the appel-"lant. Under this circumstance, we are "hopeful that an order be passed for the "balance of our fees to be paid us out of "the said sum in deposit." The plaintiff is proved there to have 2,000 rupees; and it is shown that he has other property, because there has been an attachment issued; and, besides, there is an allegation of 4,000 rupees in deposit. The order which is made upon that is only material for the purpose of showing that in this case there was no attempt to make him personally liable to the payment of the costs, but only out of his property. The order is that the said Judge is to be careful to issue the decree of this Court, and obtain payment of the sum of 2,000 rupees entered in the *teep* aforesaid, and from Ram Pershad, mahajun. Moreover, conformably to the respondents' statement, if any other property belonging to the appellant in the town of Futtoohabad may have been attached, or may now be obtained by the respondents pointing it out, the same be sold by public sale, and therefrom paying the respondents the sum of Rupees 394-1-18-3, costs of this Court, and also the costs of the Provincial Court.

Now, that sum of 394 rupees is the sum which appears at the bottom of page 97 as coming for costs after the defendants' former amount has been paid by the arrangement pursuant to the decree which is appealed from. Whether it was intended to include the 2,000 rupees, the property in question, amongst the property out of which the 394 rupees were to be paid, does not seem at all to be material for the result at which their Lordships think they ought to arrive in this case. The costs which are ordered to be paid after this litigation are costs to be paid out of the property; therefore, we think there is no inconsistency in doing that in this particular case. Their Lordships, therefore, will report to Her Majesty that, in their opinion, this appeal must be dismissed.

There is one observation now arising upon which their Lordships are ready to hear any information which can be given to them by the Counsel. Leave was granted to appeal *in formâ pauperis*.

Lord Brougham.—By the order of the 9th of May 1827, page 161.

Lord Langdale.—It seems that, the appellant being ordered to find security, he did find security to the amount of 5,000 rupees.

Lord Brougham.—"To the satisfaction of the Court."

Lord Langdale.—Yes. It does not appear that there has been any order in this country authorizing him to sue *in formâ pauperis*. The question is, whether that makes any difference. If the learned Counsel desire to address themselves to the Court upon that subject, they are at liberty to do so.

Lord Brougham. Particularly as regards the fees here. He is by the order of the Court below allowed to sue *in formâ pauperis*, assuming that order to stand, which the order of the 9th of May does, provided he has fulfilled all the conditions imposed upon him, he was permitted to

appeal to England, and we want to hear this matter argued, or at least spoken to, whether or not there ought not to have been an order of this Court to enable him to appeal here *in formâ pauperis*. The order below was necessary to enable him to commence the proceedings preparatory to the appeal, such as the heavy expenses of obtaining the transcript; but the question is, whether there ought not to have been also an order of this Court, because we are the Court in which he is appealing, and in which he is prosecuting his appeal now. In general, when there is an order in a case for a person to be entitled to sue *in formâ pauperis*, of course the order is made in the Court in which he sues. An order allowing a man to sue in the Court of Chancery, before the Master of the Rolls, or before any Vice-Chancellor *in formâ pauperis*, would enable him to sue *in formâ pauperis* upon appeal, motion, or petition, before the Lord Chancellor, because that is all one Court in fact, and is a re-hearing in fact; it is not an appeal, properly speaking; but it would not enable him to appeal to the House of Lords; he must have a distinct order there. What do you say to that? It is clear that the respondents, if we give the costs of this appeal, which it is probable we shall, will be entitled to the costs out of the property secured by deposit; but first, ought there not to have been an order made here permitting the appellant to prosecute the appeal here *in formâ pauperis*, whereas you have only an order below? You may consider this, and speak to it another day. It is a case which has not hitherto occurred, and we must enquire into the practice.

Mr. Moore.—Will your Lordships give us till to-morrow?

Lord Brougham.—Any day, to-morrow or Saturday: Saturday we will say; but we want to avoid giving the parties the expense of another attendance if you are ready now. It is very hard that we should put them to the expense, for it is ourselves who want the information.

Lord Brougham.—Do you recollect whether we have ever had any cases of the kind before this Court?

Mr. Jackson.—I think so. I think there have been cases before.

Mr. Moore.—Your Lordships have had cases here where you have allowed the parties to sue *in formâ pauperis*.

Lord Brougham.—I am quite aware of that. The question is, whether it would be necessary that we should allow them to do so; and, if that excuses them, notwithstanding the clear liability of the party to cost from the responsibility of paying such cost if we decree them, whether it also save them from the fees. Dr. Lushington's impression is that in the Consistorial Court leave to sue *in formâ pauperis* enures as to the Court of Appeal; for instance, as to the Court of Delegates, and consequently to this Court, which perhaps is in the shoes of the Court of Delegates.

Mr. Moore.—There is a case from Jersey, I think, my Lord.

Lord Brougham.—It is possible that consistently with Dr. Lushington's impression, the party may not have been a pauper in the Court below, but may have become a pauper subsequently.

Dr. Lushington.—That I have known certainly to occur.

Lord Brougham.—That would reconcile Mr. Moore's recollection and yours probably.

Dr. Lushington.—My impression is that there have been several cases come up in which a party has been admitted to sue as a pauper in the Court below, and has continued to do so without anything being said or done.

Mr. Buller.—I think I shall be able to find some cases of that kind.

Mr. Jackson.—In Mr. Macqueen's Practice of the House of Lords, he says that the parties having been allowed to proceed *in formâ pauperis* in the Court below is a circumstance which would weigh in favor of his claim so to proceed in the Court below.

Lord Brougham.—I am perfectly certain that, in the House of Lords, he sues *in formâ pauperis* upon petition; but his having been allowed to sue *in formâ pauperis* in the Court below would be a strong argument in favor of the Court still allowing him to do so; but that shows that it is discretionary.

Mr. Jackson.—Exactly so.

Lord Brougham.—There is no doubt about the House of Lords; but Dr. Lushington's recollection would appear to be inconsistent with such orders being made here, unless it be explained and reconciled by the consideration I threw out that he might have been no pauper in the Court below, and might have become a pauper here, which would require an order; but Dr. Lushington may be quite correct in his recollection of the general practice.

Mr. Buller.—This case, your Lordships will recollect, comes on under an order of

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your Lordships, under an order in Council under the Act.

Lord Brougham.—I am aware of that. We do not think that varies it: we do not like to put the parties to expense; but the first day after to-morrow—we shall search for precedents in the meantime, and the first day after to-morrow, Mr. Moore is always here on the other side; and, if either you or Mr. Jackson happen to be here again, we will speak to you on the matter. It is to be understood that the parties are not to be put to expense. It would be a hard thing upon the parties. It is for our own information.

Mr. Buller.—It will not be in the paper.

Lord Brougham.—No, we shall take it when we see you are ready.

NOTE.—*The subject of costs was on the following day again mentioned. Their Lordships then reported to Her Majesty their opinion that the appeal should be dismissed with costs; and the usual order in Council to that effect was subsequently issued, dated 19th December 1846.*

The 19th February 1847.

Present:

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Hindoo Law—Will—Vested interest—Division—Widow—Undivided property.

On Appeal from the Sudder Dewanny Adawlut for the N.-W. Provinces.

Rewun Persad

versus

Mussamut Radha Beeby.

A Hindoo testator, after the death of his widow, gave a moiety of his property to his brother *A*, and on his death to *A's* two sons *B* and *C*. *A* died in the lifetime of the testator's widow, and a complete division of all *A's* property which was held in co-parcenery was agreed upon between *B* and *C*. *B* also died in the lifetime of the testator's widow, and, on the death of the testator's widow, *B's* widow claimed his share.

HELD that *B* and *C* took *A's* moiety under the will as tenants in common, and that each of them had a vested interest in a one-fourth share, though the actual enjoyment was postponed until the death of the widow; and that the claim of *B's* widow was not barred by the doctrine of Hindoo Law that a widow succeeding as heir to her husband cannot recover property not in the possession of her husband, which doctrine was held to be inapplicable to the case of property in which the husband had a vested interest under a will or deed, though the actual enjoyment thereof was postponed during the lifetime of another.

According to the Hindoo Law, a widow cannot claim an undivided property.

Judge of the Admiralty Court.—FOR the purpose of showing distinctly what are the questions of law and matters of fact in dispute in this appeal, it will be expedient to state, in the first instance, the circumstances respecting which there is no dispute.

Fakir Chund died in the year 1814, and for the present we will call him the testator in this cause. He, in March 1814, executed an instrument intended to regulate the disposition of his property after his death. That instrument is set out at length at page 44 of the Appendix.

Fakir Chund, the testator, was one of three brothers; his elder brother was Bhowany Persad, who is stated to have divided from his family, which was originally an undivided Hindoo family; he left two sons, Dial Das and Goonee Lal. The date of the death of Bhowany Persad is not stated, but it was before the month of March 1814. Beekhary Das was the youngest brother, and he died in 1817; he had three sons, the eldest, Koonj Behary, died in 1825, leaving a widow, Radha Beeby, the respondent in this appeal, but no male issue; Mudun Mohun, the second son, died in 1829, and he left a son, Rewun Persad, who is the present appellant; the third son died young, and there is no interest derived through him concerned in this litigation.

The property in dispute was the property of Fakir Chund, and all the parties agree that the instrument which he executed in March 1814, in triplicate, is a valid and operative instrument, and to be carried into effect. To that instrument were appended the signatures of his brother, Beekhary Das, and his nephews, Dial Das and Goonee Lal, the sons of the elder brother, Bhowany Persad, and the signatures of his nephews, Koonj Behary and Mudun Mohun, the sons of Beekhary Das.

Pursuant to the terms of that instrument on the death of Fakir Chund in 1814, his widow, Mehtaboo, succeeded to the possession and enjoyment of his property. She died in 1833, and then a litigation arose as to who were entitled, and in what shares, to take the property of the testator, subject to certain bequests in the instrument before mentioned.

It is not necessary to state the details of this litigation. In the result, Dial Das took, under the decree of the Court, one moiety, and Rewun Persad was put into possession of the other moiety, but not so

as to preclude any claim which Radha Beeby, the widow of Koonj Behary, might have to a share thereof.

Accordingly, she commenced a suit to recover a fourth share of the estate left by Fakir Chund, and for that purpose filed her plaint on the 1st of June 1835 in the Zillah Court of Mirzapore. Dial Das compromised with the plaintiff, the present respondent, and Rewun Persad in effect became the only defendant, and is now the appellant. In short, the only question now to be determined is, whether the respondent, the widow Radha Beeby, as heir to her husband Koonj Behary, is entitled to recover from the appellant, Rewun Persad, one-half of the moiety of the estate of Fakir Chund, which Rewun Persad is now in possession of.

After various proceedings, which it does not appear necessary to discuss, on the 29th of November 1837, the Judge of the Zillah Court, Mr. Thomas, pronounced a decree against the plaintiff, the present respondent. From this decree the then plaintiff and now respondent appealed to the Court of Sudder Dewanny Adawlut at Allahabad, and on the 14th of March 1838 the Judges of that Court, Mr. Turnbull and Mr. Monckton, reversed the decree of the Zillah Judge, and remitted the case back to be re-tried, being of opinion that the questions to be decided had not been properly investigated.

Accordingly, the Zillah Court again entered upon the consideration of the case, and, amongst other things, directed to be done by the decree of the Sudder Adawlut, obtained the bewusta of the Pundit of the Zillah Court of Allahabad. The decree was pronounced by the Sudder Ameen, a native Judge, on the 14th September 1838, and he dismissed the suit of the defendant, the present respondent, with costs.

An appeal against the decree was presented to the Court of the Sudder Adawlut at Allahabad, and both agreed upon a joint case to be submitted for the bewusta of the Pundit of the Sudder Court, each party stating the facts upon which they differed separately. By order of the Court, the opinion of the Pundit of the Sudder Adawlut Court at Calcutta was subsequently obtained.

Mr. Monckton, one of the Judges of the Appellate Court, on the 8th of April 1839, pronounced his opinion in favor of the respondent, and that the decree of the Zillah Court ought to be reversed. The papers in the cause having been submitted to the consideration of Mr. Taylor, another Judge in the same Court, his opinion agreed with that of Mr. Monckton, and accordingly, on the 29th of April 1839, a decree was pronounced, reversing the decree of the Zillah Court, dated the 14th of September 1838, in effect declaring that the respondent was entitled to recover one-fourth of the estate left by Fakir Chund; that the present appellant should pay to her as much as he had received beyond a fourth share of the said estate, and that Dial Das should, if there was any deficiency, make good the same.

From this decree Rewun Persad has appealed to Her Majesty in Council, and the question is whether he ought, according to the law prevailing as to Hindoo families in the district where the parties lived, to refund to the respondent so much of the estate of Fakir Chund as exceeds one-fourth thereof.

There are certain facts not in contest in this cause. All parties agree that the will or deed of Fakir Chund, whichever it may be called, is an operative instrument: that one moiety of his estate, on the death of his widow, Mehtaboo, became the property of the family of Bhowany Persad, and that one-fourth of the property belongs to the appellant, Rewun Persad, through his father, Mudun Mohun, who died before Mehtaboo, *viz.*, in 1829. Neither is it denied that the remaining fourth became part of the estate of Koonj Behary, who died in 1825, in the same manner as the one-fourth became part of the property of Mudun Mohun, presuming it to have vested in either during their lives.

Again, it is admitted that, according to the Hindoo Law of Succession, Radha Beeby, the respondent, became heir to the divided estate of Koonj Behary, he having died without male issue.

Radha Beeby, the respondent, being entitled to the estate generally of Koonj Behary, she is entitled to this one-fourth of the property of Fakir Chund, if it is become a part of the estate of Koonj Behary, unless by Hindoo Law there is some exception arising either from particular facts creating it or from the nature of the property.

The appellant alleges, and alleges truly, that the respondent cannot recover from him any property of which he is in possession unless she proves her title. She asserts that

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as heir is entitled to the whole, unless there be a special exception. The appellant alleges two grounds of exception:—

First.—That Koonj Behary and Mudun Mohun were two undivided brothers, and that this share of Fakir Chund's estate was undivided; that, by the Hindoo Law, therefore, the widow cannot claim it, though she be heir.

Secondly.—The appellant alleges that this property never was in possession of Koonj Behary; that, by the Hindoo Law, the widow, though his heir, cannot claim property not in possession of the deceased husband, and that, for this reason, her claim must fail.

Now, as to the first grounds of defence, the law is not disputed. It is not denied that a widow cannot claim an undivided property. The decision of this question, therefore, turns upon a matter of fact, namely, whether Koonj Behary and Mudun Mohun were divided brothers or not.

We think that it may be admitted that the *primâ-facie* presumption, where there are no circumstances to affect it, is that every Hindoo family of this class was an undivided family, and, consequently, this presumption must prevail, unless the circumstances of his case lead us to a contrary conclusion. We must, therefore, consider the circumstances, having, however, first directed our attention to some points of Hindoo Law which may have a bearing on the conclusion to be drawn from the facts.

First.—We apprehend it to be undisputed that a division may be effected without instrument in writing. *Secondly.*—That a division may be either total or partial. *Thirdly.*—That a separation from commensality does not, as a necessary consequence, effect a division of property, or, at least, of the whole undivided property.

The respondent alleged in her plaint, Appendix, page 4, that in the years 1818, 1819, and 1820, a separation took place between Koonj Behary and Mudun Mohun, when the one-half share of the estate of Beekhary Das was equally divided between them; that they came to a mutual settlement, and, separating, each established a distinct concern for himself.

Beekhary Das died in 1817, and, by the instrument of March 1814, called the will of Fakir Chund, a moiety of his property, on the death of his widow, is given in these words: "Let my brother, Beekhary Das "aforesaid, and, after the death of my said "brother, his sons, take one-half."

Now, we conceive that Beekhary Das, having died in 1817, in the lifetime of the widow, the tenant for life and his sons surviving him, this moiety was not a part of his estate, properly speaking, and that, therefore, *primâ facie*, it could not be divided as part of the estate of Beekhary Das.

But, perhaps, as these pleadings are not expressed with much accuracy, it may be that, by the one-half share of the estate of Beekhary Das, was meant the moiety of the estate of Fakir Chund, which would have come to him had he survived Mehtaboo, the tenant for life.

Now, assuming this to have been intended to have been expressed by the plaint, still such half share could not *de facto* have been divided between them, for the widow had still the enjoyment of the whole. But the plaint may perhaps mean to aver that there was an agreement between the two brothers, that the one-half share of Fakir Chund's property, which would have devolved on Beekhary Das had he survived Mehtaboo, should be divided, as far as was then possible, *de facto*; and, in support of this understanding of the purport of the agreement, the entries said to have been made in the books of various concerns might be evidence, provided they had reference to the property of Fakir Chund.

Before, however, prosecuting this enquiry further, it may be expedient to examine what has been done in the Court below, and to ascertain, as far as we can, on which side the weight of authority preponderates. So far as the decision of this case may be affected by the weight of authority in the Courts of India, it stands thus: In the Zillah Court of Allahahad, the Pundit of that Court was consulted, and his opinion will be found at page 63; that opinion, shortly put, is to the following effect: that, if there has been a separation between two brothers, the widow of one, becoming his heir, may cause the separation of any portion of the estate which may remain *de facto* undivided; that this doctrine does not apply when the estate of the husband's father only had been divided, to the estate of the uncle of her husband, such estate not having come into her husband's possession before his death.

It is difficult to deal with such an opinion as this with reference to the question we have to solve. If the property now sued

for was a part of the estate of Koonj Behary at the time of his death, then, according to the first part of the opinion of this Pundit, the widow's claim would be valid; but, if it formed no part of the estate of Koonj Behary, and if the division was confined to the estate of the husband's father, then the widow would not be entitled, because the property never was in the husband's possession. We think that the opinion of this Pundit renders very little assistance to the solution of the difficulties arising in this case. For, *first*, this Pundit is silent as to whether this property ever was part of the estate of Koonj Behary or not; *secondly*, he assumes that the only property divided was that which came from Koonj Behary's father; and, *thirdly*, he omits all mention of the will or deed of 1814.

The judgment of the Principal Sudder Ameen (pages 68 and 69) throws no further light upon the matter, for he merely recites the bewusta, and rejects the widow's claim, without attempting to show how the bewusta applied to it.

The opinion of the Pundit of the Sudder Adawlut of Allahabad was taken on a case submitted by both parties. It will be found at page 80. His answer is partly in favor of the widow's claim. He considers that Mudun Mohun had no claim to the disputed property at all, because it never came into possession until after the two brothers had separated, and was never held in co-parcenary by them, and that, therefore, Rewun Persad, as the son of Mudun Mohun, has no claim at all to it. He considers the disputed property as undivided property, but if a part of the estate of Fakir Chund, that neither of the present parties could claim by inheritance, but that both are entitled under the will or deed. He affirms that the heirs of Mudun Mohun and Koonj Behary derive their only title from the deed.

The answer, however, to the third question at page 80 would seem to place the right of the widow entirely on the question whether a division of the paternal property of Beekhary Das had taken place before the death of Koonj Behary and Mudun Mohun.

It is not easy to reconcile these two opinions.

The Pundit of the Sudder Adawlut of Calcutta gave in his bewusta, which will be found at page 81.

The opinion of this Pundit supports the claim of the widow, whether there had or had not been a division of Beekhary Das's estate between his two sons.

Upon a careful consideration of this opinion, and the authorities cited in support of it, the grounds of it would seem to be that the widow is the heir of Koonj Behary, and that she is in such character entitled to all his property which was not held in coparcenary with his brother; that the disputed property passed by the deed of 1814, which was signed both by Koonj Behary and Mudun Mohun, to them in moieties on the death of their father; that by force of the deed it was divided into moieties and taken by them or their heirs; no separate and divided property coming by gift from Fakir Chund.

The decision of Mr. Monckton, the Judge of the Sudder Adawlut of Allahabad, before whom the cause first came, is in favor of the widow (page 86).

He appears to be of opinion that the disputed property was in every point of view divided property. That a complete division took place between the two brothers; and that, had Mehtaboo died in their lifetime, this property would have been divided between them *agreeably to the deed*, and that Koonj Behary's share would have descended to the widow as his heir, and must consequently do so now. In the opinion Mr. Taylor, another Judge of the same Court, concurred.

The true question, then, before us, is whether we are convinced by the arguments of the appellant that this decision is erroneous; for, if not so convinced, it must be affirmed.

We find it impossible to reconcile the whole of the reasonings of the Pundits and of the Court together, and to render them entirely consistent. The conclusions in the main agree, but the reasons assigned do not do so altogether.

We think, on a consideration of all the circumstances, that a complete division of all the property of Beekhary Das which was held in coparcenary was agreed upon between the brothers, and we think so from a consideration of all these papers.

First.—Such division is very distinctly alleged in the plaint at page 4. In the petition of Rewun Persad, at page 7, which is an answer to the plaint, a separation from

ommensality is admitted, though a division as to the property is denied.

In the supplementary plaint, at page 20, he division is again pleaded, with this addition that, what could not be immediately ealized remained in coparcenary till a realzation could take place as loans and debts lue to the joint concerns, and the property oming under the deed of Mehtaboo during ier life.

The answer of Rewun Persad, at page 23, admits a division, but denies it to be complete, not stating, however, what were the limitations, and then seeks to avoid the effect of a division by alleging that no division could affect the property during the lifetime of Mehtaboo, it being during that time in joint partnership.

The respondent, at pages 23, 24, re-asserts the division, and alleges that the disputed property stood on the same footing as the balances due on accounts in joint-partnership to be divided as they accrued.

The rejoinder, at page 25, raises this distinction that the division of the outstanding debts was subject to no contingency, Beekhary Dass being dead, but that the disputed property was subject to the life-estate of Mehtaboo.

So stands the case upon the pleadings. A division is admitted, and no particular exception alleged. The objection of Rewun Persad is not that there was a special exception of the disputed property, but that, from the nature of the property, it was necessarily excepted.

We do not think that there is anything in the nature of the disputed property which should except it from a general division. It is not contended that there are any peculiar rules of construction in India applicable to the instrument called a will or deed. The testator, after the death of his widow, gives his property to his brother, Beekhary Dass. On his death it becomes divisible into two parts, one moiety to the sons of Beekhary Dass. We apprehend that they would take as tenants in common—in fact, that they had each of them a vested interest in one-fourth share not to come into actual enjoyment till the death of the widow. But here was no contingency, as contended for by the appellant. The only uncertainty was the period of enjoyment.

If, however, the will could be construed so as to read the bequest to the brothers as a joint tenancy, even in that case we do not see any cogent reason why they should not agree to divide the property in severalty when the period of enjoyment occurred.

We are inclined, indeed, to the opinion that this property was not properly the subject of any division at all, but that the division was effected by the deed or will, and that each brother took one-fourth as a divided property.

But to look to the evidence in the Zillah Court as to a division. It is not of a definite kind, nor are we quite certain how far the Court below made use of it. At page 27 will be found the deposition of the vakeel of the widow. He declares that he has a chitta written by Mudun Mohun to Koonj Behary, undertaking to produce the deed of Fakir Chund, and a deed of sale whereon is indorsed a sale by Mudun Mohun of his share to Koonj Behary.

Now, supposing those documents produced, the utmost effect which could be given to them is that Mudun Mohun, through whom Rewun Persad claims, acknowledged some interest in the deed or will of Fakir Chund to belong to Koonj Behary; and as to the sale of the part-share of the house, that possibly it may be inferred from it that it was a part-execution of an agreed division.

Some documentary evidence was produced at page 28; proceedings in suits between other persons to show the law. Those, we think, do not require comment; they are produced only for the purpose of introducing the bewustas of Pundits on what are assumed to be similar questions of Hindoo Law; in fact, they are not similar in many essential particulars.

The same observation applies to the bewusta produced on behalf of the appellant, Rewun Persad, at page 40. The law, as laid down, may be true, but it does not govern this case, nor do the proceedings in the other suits apply to this case.

In the Sudder Adawlut, however, much more important evidence was produced, *viz.*, the proceedings in an action brought by Mudun Mohun in 1825. In that suit Mudun Mohun pleaded division of the paternal estate, and the separation from his brother, Koonj Behary.

We think that this averment by Mudun Mohun, and which was supported by evidence, is strong proof against Rewun Persad, who claims through him, that a division and separation had taken place; and further

that it was a complete and entire division, for no limitation is alleged.

And herein we agree with Mr. Monckton that the fact of Rewun Persad not having specified any exceptions to the partition being of the whole of the paternal property is evidence that there were no exceptions.

We think that, upon a consideration of these premises, we are justified in concluding, if such conclusion be necessary for the decision of this case, that a complete division and separation did take place between Koonj Behary and Mudun Mohun.

It may be well here to notice another argument which was strongly pressed on behalf of the appellant. It was said that the widow, as heir, could not claim any property of her husband which was not in possession at the time of his death; that the disputed property was, at that period and for years afterwards, in the possession of Mehtaboo, and that, consequently, Radha Beeby can have no claim to it.

The first observation which strikes us as to this argument is that it was never distinctly urged in the Courts below, though it is true that the Pundit of the Zillah Court of Allahabad makes it the principal foundation of his opinion (page 63).

There is not the least reference to it in the opinion of the Pundit of the Sudder Adawlut of Allahabad, nor in that of the Pundit of the Sudder Adawlut of Calcutta, nor in the judgment of Mr. Monckton, in which Mr. Taylor concurred. We think that it would be impossible, under such circumstances, for us to reverse the decree of the Court below on that ground. Indeed, this averment of the law is not even one of the grounds of appeal.

We have no intention whatever to disturb the doctrine of Hindoo Law that a widow, succeeding as heir to her husband, cannot recover property not in possession of her husband. But we think that it has not been shown in this case that the disputed property was not in possession according to the meaning of that term in Hindoo Law, nor that the doctrine applies to a property where the husband had a vested interest under a will or deed, and the actual enjoyment thereof was postponed during the lifetime of another.

We proceed, then, to determine this case on the assumption that there was a complete division between the two brothers, and that the law, as to possession by the husband, does not, under the existing circumstances, bar the widow's claim.

Now, if this be so, we think that the judgment of the Court below must be affirmed in every view of the case. It is admitted on all hands that Radha Beeby is the heir of Koonj Behary, and that she is entitled, as such, to all the property which was not held in coparcenary with Mudun Mohun. The disputed property was derived from Fakir Chund, and whatever rights Beekhary Dass had in it are founded upon his deed or will. The same observation applies to any rights which belonged to Koonj Behary and Mudun Mohun. If the disputed property be deemed to be property given or bequeathed to Koonj Behary and Mudun Mohun by the deed or will, then we think that it was divided property, and never held by them in coparcenary, and in that view the widow is entitled as the heir to the divided property of Koonj Behary.

If the property be considered as the property of Beekhary Dass (a supposition very difficult to be made), then we think that, on his death, it was held in coparcenary by the two brothers, it was divided and became separate by the division made between the two brothers.

We do not think that this property was bequeathed to the two brothers as joint tenants. But, even if it were, we should incline to the opinion that the division extended to it. We therefore come to the conclusion that, either the disputed property was never held in joint tenancy, or that, if so held, it was divided, and consequently we affirm the judgment, on the grounds taken by the Pundits in the Sudder Adawlut, and adopted by the two Judges of that Court, and it must be affirmed with costs.

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The 30th June 1847.

Present:

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir A. Johnston, and Sir E. Ryan.

Hindoo Law—Succession.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Rany Padmavati

versus

Baboo Doolar Sing and others.

The question being whether the succession in this case was regulated by the Bengal or Mithila Law—HELD, in accordance with the Court below, after an examination of the whole evidence, that the Mithila Law was applicable.

The Chancellor of the Duchy of Cornwall (T. P. Leigh).—IT appears to their Lordships in this case that the mode in which the respondents have stated their case at the Bar makes it quite unnecessary to enter into any consideration of the several questions which were opened to the Court on the part of the appellant. The respondents now rest their claim to this estate entirely as the heirs of Rung Lal Sing. They say that Rung Lal Sing died intestate, and that they, the respondents, are his heirs. They brought forward that claim immediately upon the death of Rung Lal Sing, that is, they claimed the property immediately upon the death of Rung Lal Sing; and all question therefore upon the Statute of Limitations appears to us to be out of the case, so far as applies to the title they set up as heirs of Rung Lal Sing.

So, again, all question as to the property being ancestral or not ancestral, and as to the family being divided or undivided, must be put out of consideration. The only two questions appear to us to be: *first*, did Rung Lal Sing die intestate? and, *secondly*, if he died intestate, are the respondents his heirs?

With respect to the first question, when the case was originally opened to us, the factum of the will appeared to have been proved in the cause, and not to have been disputed by any cross-examination of those witnesses who appeared on the part of the appellant or otherwise. Under these circumstances, it did appear to us to be somewhat singular that, merely upon a general presumption of fraud, the question as to the validity of the will should have been decided against them; but it turns out now that no proper evidence was ever given in the suit, upon the fact of that will being or not being genuine. On the death of Rung Lal Sing, certain depositions were taken, not however in this suit, but long before the institution of this suit; and it appears that they were taken for an entirely distinct purpose, namely, in one case, for the purpose of the proceedings going on in the Civil Court, and, in the other case, for the purpose of the proceeding before the Collector. The object of the proceeding in the Civil Court was to substitute the name of the appellant for the name of Rung Lal Sing in all proceedings with respect to the zemindary in the Civil Court.

The object of the proceeding before the Collector was to have the name of the appellant registered, instead of the name of Rung Lal Sing, as proprietor of the zemindary. Now, it seems that the Collector acted upon the will, and that then the Civil Court acted upon the decision of the Collector. The decision of the Collector, of course, was not a proceeding in any Court of Justice at all; it was not a judicial proceeding, and, by the Regulation VIII. of 1800, it is expressly provided that the entry of the Collector shall not in any degree "affect the "rights of any party whose name may be "registered therein as the ostensible proprie-"tor of the land, or whose name may not "have been registered as the proprietor, "but who may establish a right of property "in the Dewanny Adawlut or otherwise." I do not think it very distinctly appears whether the respondents had or had not an opportunity of cross-examining the witnesses.

It does not appear that they had, I think; but they themselves presented a petition, alleging that this will was a fabrication, and praying that certain witnesses, whose names they mentioned, might be examined to prove the fact of that fabrication. What was done upon this, I think, does not distinctly appear; but, at all events, it was a distinct notice to the appellants that the respondents alleged that will to be a forgery.

When the suit was brought, the intestacy was alleged, and in this state of things certainly it was incumbent upon the appellant, if she relied upon that which was thus disputed, to produce clear and conclusive evidence in favor of that instrument. But, in fact, she produced no evidence whatever, that is to say, no evidence which a Court of Justice could in this country receive, nor

any evidence which could have much weight, I think, in any Court of Justice whatever. It was, however, received below, and therefore I do not apprehend that we can treat it as not being evidence in the cause. But still it is evidence of such a character that it appears to us impossible for any Court to rely upon it.

Now, the Sudder Court were of opinion that the will must be disregarded, and, on the 9th of May 1833, they pronounced an order, in which, after stating "that the will "produced by the respondents is not correct "or credible, and by the legal opinion of the "Hindoo Law Officer of this Court, it appears "that the estate of Rung Lal Sing descends "to the plaintiffs (appellants) by the "Hindoo Law current in the country of "Mithila, and that Pudmavati is entitled "to the expenses of her support and reli- "gious ceremonies according to the usage of "the family," the Court directed certain enquiries with respect to that law.

It is said that that order, which was made on the 9th of May 1833, was founded upon the assumption of the invalidity of that will, and that, that order not having been appealed from, the question on the validity of the will is not now open. Now, it does not appear to us to be necessary to decide that point, because we are clearly of opinion that there was no evidence before the Court upon which they could properly have acted to affirm the validity of that will.

Then, the fact of the will being out of the case, of course it becomes unnecessary to consider whether, by the Mithila Law, there was a power of devising or not; and therefore the very able argument addressed to the Court on behalf of the appellant, it is not necessary for us to deal with.

The whole question therefore is, Does the Mithila Law prevail in this family to govern the descent of its property; and, if it does, are the respondents by law the heirs? Now, the pedigree is not disputed, and we have the opinion of all the law-officers, that, according to that pedigree, the respondents are, by the Mithila Law, the heirs in this case; and there is nothing appearing in the cause against that.

Now, how does the Mithila Law govern this case? Upon this point there appears to have been a most careful enquiry in the Court below.

The decree of the Moorshedabad Court assumed that the Bengal Law prevailed, and upon this the respondent appealed to the Sudder Court, which, upon hearing the cause, decided that the Mithila Law prevailed. Now, this fact that the Mithila La was to prevail, does not at that time appe to have been disputed, for at page 164 w find the matter thus stated by the Judg Mr. Walpole :—

"It appears by the papers that the re "claim of the plaintiffs is for the estate "Rung Lal Sing, and that the estate "Ghureeb Das and others is stated only "trace the connection of the ancest "The allegation of the appellants that "Mithila Law is followed in their fam "appears to be correct, and is not den "by the respondents. It is, therefore, nec "sary in this case to ascertain which of t "two and the third parties is entitled to "estate of Rung Lal Sing, who died unm "ried and without issue, by the Mith "Law." On the 26th December 1833 t decree was made, directing the enquiry to who, according to the Mithila Law, entitled to succeed, which law was to p vail; and on the 3rd of April 1833 an nion in favor of the respondents was giv which is stated at pages 164 and 165.

Upon this the appellant presented a p tion, alleging that the Mithila Law did prevail in her family; and that was, as as I understand it, the first occasion on wh that representation was made.

Thereupon, on the 9th of May 1833, the decree which is stated in page 64. Court of Sudder remitted the case to Provincial Court, treating the will as valid, and directing an enquiry into the fac which law prevailed in this family. A g deal of evidence was gone into, when case came before the Poornea Court, wh had succeeded the Moorshedabad Court, they decided that the Bengal Law gover the possession.

Against this decree there was an appeal the Sudder Court, and, on the 15th of Ja ary 1838, the cause came before Mr. Ha ing, one of the Judges of that Court. W then took place is stated at page 195. sets forth that, "in consideration of "dispute and statements of both parties, a "the nature of the case, it is necessary "ascertain, before the decision, what w "the customs and rites of marriages a "funerals deposed to by the witnesses "both parties; whether they were acco "ing to law or not; the pleaders of b "parties were therefore questioned, and t "consented to refer the matter to the Hi "doo Law Officer of this Court. Order "therefore, that a copy of this proceedi "be sent, with the depositions of the witne

es of both parties to him, with an order to make a full report, in two weeks from the date of receiving it, after giving full consideration to the depositions, whether the marriage and funeral customs and rites of the Mithila Law, stated by the witnesses of the plaintiffs to be observed in the family of both parties, can be understood also of the Nuddea Law; and whether similarly the customs and rites, stated by the witnesses of the defendant to be according to the Nuddea Law, can be understood of the Mithila Law."

On the 17th of May 1838, the officer made his report in favor of the respondents, which is stated in page 228. The appellant was dissatisfied with this report, which was merely a short statement of the officer's opinion being in favor of the respondents, without going into particulars; and, on the 26th of June 1838, the case came before Mr. Halhed, another Judge, and he directed further questions to be prepared, in order further to elucidate this matter.

A further opinion was then given by the Hindoo Law Officers, and that opinion also was in favor of the respondents.

Upon this the Judge of the Sudder Court, before whom the case originally came, was of opinion against the opinion of the Court below, and it became necessary, as I understand the practice is, to go to a second Judge of the Sudder Court; and accordingly it did go to a second Judge. And then it appears that he made a still further enquiry upon this subject, after having called the pleaders of both parties (who appear in this case both to have been Europeans), and he settled the question, it appears, in their presence, and it says: "After which the pleaders and agents of both parties said that they had nothing further to represent." And they must, therefore, be taken to have both agreed upon those questions.

The questions in this case were originally prepared for the opinions of the Hindoo Law Officers, and it seems to have been considered, justly perhaps, that, after all that had passed, the Hindoo Law Officers having given their opinions several times, it would be proper to take the opinion of the officer of the Tirhoot Court, where this law prevailed.

Those questions were prepared, and the officer of the Court of Tirhoot gave his answers upon all those questions, and it then came again before the Judge who had sent those questions for his information upon the subject.

Now, those questions were framed with a view of enabling the Court to judge, by the answers to the particular questions put by him, whether, according to the evidence which was before him of what appeared to have been the ceremonies used in this family, the Mithila Law or the Bengal Law prevailed; and he was clearly of opinion that the Mithila Law prevailed, and confirmed the opinion of the first Judge, and the decision was finally pronounced.

Now, it is admitted that it is utterly impossible for any European Court to weigh very nicely the effect of evidence of this kind as to particular ceremonies, and the weight which is to be due to those particular ceremonies as establishing the fact of one law prevailing or the other; and therefore the learned Counsel at the Bar have very naturally and very properly abstained from going into any minute examination of the evidence upon this point. The question, therefore, for us is: Is there evidence stated before us which shows that the opinion which was come to, after repeated investigation and after taking the opinions of the various law-officers of the Courts, all of them concurring in the same conclusion, is an opinion by which we should be guided?

Now, certainly, so far from there being anything in the facts before us which is inconsistent with this, the most important fact appears to us to be consistent with it, and only consistent with it.

On the death of Sobhe Sing, Pohput Sing and Rung Lal Sing, being his sons, became joint proprietors, and entered into possession of this estate. Pohput Sing died, leaving a widow, and according to the Bengal law, as I understand it, the widow of Pohput Sing would have been entitled, under those circumstances, to succeed to the share of Pohput Sing, her deceased husband, for her life. And accordingly, certainly, it was understood, from the original statement of the case, that, upon the death of Pohput Sing, she did so succeed to her husband's share, and that she came into possession of the other half of the estate upon the death of Rung Lal Sing.

But the evidence, upon examination, turns out to be quite the reverse; for it is clear that Rung Lal Sing, upon the death of Pohput Sing, presented a petition, stating his title as a title to the whole estate, and that he was let into possession of it, and that she was entitled to maintenance out of it according to the Mithila Law, and that that maintenance was preserved to her.

Again, upon the death of Rung Lal Sing, the appellant herself presented a petition, and she claimed, as successor under the will, the whole of the property of Rung Lal Sing. It seems, therefore, clear that, upon the death of Pohput Sing and upon the death of Rung Lal Sing, the succession was regulated by the Mithila Law, and not by the Bengal Law. That was entirely in accordance with the result, to which, after an examination of the whole of the evidence, the Court below has come; and we are of opinion that that decree is perfectly right, and, therefore, that it must be affirmed, and affirmed with costs.

Lord Brougham—It is impossible to praise too highly the great care which the Court below appear to have taken in obtaining the best possible information upon the subject—a somewhat nice and intricate subject—of the customs and ceremonies governing this case. There were three or four separate enquiries, giving the parties the fullest opportunity of suggesting questions, and directing further enquiry when the reports were not sufficiently decisive; and it was found that the parties were quite satisfied with the nature of the questions that were laid before the authorities. I never saw a case better sifted than the present, and it certainly affords the Court great confidence in coming to the decision which it has now pronounced.

Decree affirmed with costs.

The 16th December 1847.

Present:

Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Hindoo Law—Succession.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Rany Srimuty Dibeah

versus

Rany Koond Luta, Rany Rung Luta, and others.

The question being whether the descent in the family in this case was to be regulated by the Dyabhaga or the Mitakshara—HELD, upon the evidence, that the Dyabhaga applied to the decision of the cause.

Lord Langdale.—THIS is an appeal from a decree of the Court of Sudder Dewanny Adawlut of Calcutta, dismissing the suit of Kundurp Sing, deceased, for the recovery of a zemindary of four pergunnahs in the Zillah of Midnapore from Mohun Lal Khan, deceased.

The appeal is prosecuted by the widow and representative of Kundurp Sing, against the two widows and representatives of Mohun Lal Khan and others. The case is as follows:—

On the 1st of July 1800, the Rany Sevroomany, being the sole possessor of the zemindary in question as the surviving widow and heir of her deceased husband Raja Ajeet Sing, who died in 1754, executed a deed purporting to be a deed of gift of the zemindary to Anund Lal Khan.

The gift was opposed by Shamanund Gujraj, Roop Churn, and Ram Churn, who claimed to be the heirs of Raja Ajeet Sing. They presented a durkhast in support of their opposition. But the durkhast was rejected, and the donation was registered and proclaimed.

The Rany was herself a party to this proceeding, and, in her answer to the opposition, admitted the gift which she had made. But some time afterwards she complained of and disputed the deed, and in 1806 she commenced a proceeding of her own to recover possession of the zemindary from Anund Lal Khan. In this proceeding she was non-suited, but by leave of the Court she commenced a proceeding to set aside the gift on two grounds: *first*, that it had been obtained from her by fraud; and *secondly*, that it had been executed without the consent of the heirs of Raja Ajeet Sing, her husband, and of her guardians.

In the course of these proceedings, it was held that the male heirs of the Raja Ajeet Sing were the guardians or protectors of the widow, but that the mother's brother's sons of Raja Ajeet Sing were the heirs expectant or presumptive to the zemindary. And by the decree of the Sudder Dewanny Adawlut, dated the 31st of August 1812, on the appeal from the decree of the first Judge of the Calcutta Provincial Court, dated the 30th of March 1811, it was stated that it could not be ascertained whether the deed of gift was obtained from the Rany by deceit as she alleged; but that it appeared by a bewusta of a pundit of the Court, and the text of the sastras cited therein, also from the tenor of the 11th Chapter of Dyabhaga, which was the most reputable of all the pothees in use in Bengal which are observed in the families of the litigating parties, that, after the death of Raja Ajeet Sing, his relatives descended in the male line who

were living and capable of taking care of the Rany, were Pirbhoo, that is, her guardians or protectors, and that, without their advice and consent, she had not, according to the sastras, the power of making a gift to any one of the zemindary left by her husband. It was further stated that, although, agreeably to the sastras in use in Bengal, the persons who claimed to be male heirs of Raja Ajeet Sing could not be considered his heirs when opposed to his mother's brothers' sons, and although Mohun Lal (claiming under Anund Lal, and then defendant) had produced deeds purporting to have been executed in his favor by some of the persons who represented mother's brothers' sons of Raja Ajeet Sing, yet there was not proof either of the permission of his relatives, descended in the male line, or of the approbation of all the relatives descended from the mother's brothers' sons; and the deed itself did not show that any one of them had approved at the time of the execution; and for these reasons it was held that the deed was not valid.

From this decision Mohun Lal appealed to England.

There being no question as to the sastras in use in the family, the opinion of the Judge that the deed was not valid without the consent of the relatives descended in the male line as guardians, and that the concurrence of the heirs (the descendants of mother's brothers' sons), at the time of executing the deed, was necessary to the validity of the deed, were the principal points upon which the decision, adverse to Mohun Lal, was founded, and must have been the grounds of the appeal.

The appeal was not prosecuted, and the death of the Rany (which soon afterwards took place) gave rise to a new claim in new circumstances.

The estate was in the possession of the Collector of Midnapore, or of the Court of Wards.

Independently of any deed of gift, the descent was cast upon the heirs of Raja Ajeet Sing, which, according to the Dayabhaga and the sastras in use in Bengal, were the descendants of the mother's brothers' sons, but which, according to the Mitakshara, were the male descendants of a distant ancestor of Raja Ajeet Sing.

The Rany died on the 17th September 1812. Immediately afterwards, Kundurp Sing, who is now represented by the appellants, alleged that, on the day before her death, she had executed to him a deed of gift of the zemindary; and he, as donee under that deed, and also alleging himself to be the heir of Raja Ajeet Sing, claimed to be entitled to the possession of the zemindary. Mohun Lal Khan also claimed to be entitled to the possession, founding his claim on the deed of gift to him, and the confirmation of it before that time by all the persons whom he alleged to be the heirs of Raja Ajeet Sing.

On the 25th of September 1812, it was ordered by the Court of Zillah Midnapore that Mohun Lal Khan and Kundurp Sing, and any other persons having claims to the possession of the zemindary, either by inheritance or any other right, should present petitions to the Judge of the Zillah.

Mohun Lal and Kundurp Singh and others, having accordingly presented their petitions, the Judge proceeded to a summary trial thereof, and, on the 24th of December 1813, recorded his opinion as follows:—

First, that the deed under which Kundurp claimed was fabricated after the death of the Rany, and that the right of Kundurp to the property was not proved or established, either by the deed or by hereditary right, according to the sastras.

Secondly, that, according to the bewusta entered in the decree of the 31st of August 1812, the sons of the brothers of the mother of Raja Ajeet Sing were his heirs, and after the demise of the Rany entitled to the zemindary.

Thirdly, that those heirs had transferred their hereditary rights in the property to Mohun Lal. But, *fourthly*, notwithstanding these circumstances, the appeal of Mohun Lal to England being pending, the Judge thought it proper that the zemindary should remain in the custody of the Court of Wards until the appeal to England should be decided.

But this proceeding being transmitted to the Court of Sudder Dewanny Adawlut for information and orders, that Court, on the 14th of February 1814, after noticing the reasons for not prosecuting the appeal, and that the authority of the Court of Wards had ceased, considered it to be right and proper that the Judge of the Zillah Court should give effect to his summary decision; and if, on consideration of the particulars set forth in his proceedings of the 24th of December 1813, he conceived Mohun Lal to be the person entitled to, and the malik of, the zemindary, and if Mohun Lal were able to give security for conforming to the decrees of the Court on other claims, the Judge might with-

draw the zemindary from the custody of the Court of Wards, and put it into the possession of Mohun Lal.

Mohun Lal obtained possession in the result of these proceedings. Kundurp appealed to the Court of Sudder Dewanny Adawlut, and, continuing to claim both as donee under this deed and also as heir of Ajeet Sing, prayed a review of the judgment against him. But the Chief Judge of the Court of Sudder Dewanny Adawlut, on the 12th of September 1815, considered that as, in the summary decision given in the cause, permission was granted to any person who had, according to the sastras, claim to the zemindary left by Raja Ajeet Sing, to sue for the same in the Provincial Court, in order that, after a full and final enquiry, ascertaining at the same time the rule observed in the family and the sastras that are in force, the right be awarded to the rightful owner, it was not necessary or useful to make any further investigation in the summary cause. And the petition of the appellant, praying for a review of the decision, was not allowed.

In consequence of this decision, Kundurp, in November 1815, commenced his action against Mohun Lal and others, in the Provincial Court of Calcutta, to recover possession of the zemindary.

He claimed, as before, to be entitled under the deed of gift of the 16th of September 1812, and also as heir by descent in the male line. He admitted that he had four uncles who were more nearly related than himself, but alleged that they were satisfied with his being proprietor of the zemindary, and had relinquished and consigned to him all their rights to the zemindary.

Mohun Lal, by his answer, alleged that the deed of gift, under which Kundurp, the plaintiff, claimed, was a forgery, and that, according to the sastras, the plaintiff could not in any way be entitled to the zemindary; and he insisted in substance that the sastras in use in Bengal, and not the Mitakshara, were the authority according to which the persons who were the heirs of Raja Ajeet Sing were to be determined.

The suit was the subject of great litigation; many witnesses were examined, and the reports or opinions of several pundits were obtained and considered.

The decree of Mr. Turnbull, in the Provincial Court, was pronounced on the 21st of February 1826. He determined that the claim of the plaintiff, founded on the deed of gift, could not be supported; and that, if it had been genuine, it could have no effect for want of the consent and concurrence of heirs. And, considering the plaintiff's claim in the character of heir of Raja Ajeet Sing, he stated it to be clear that, if in this case the Dyabhaga and other sastras current in Bengal were the test, there was no doubt as to the right of the defendants. But that, on the other hand, if the judgment were conducted with reference to the Mitakshara sastra and other books subordinate thereto, the right of the plaintiff preponderates over that of the defendants.

And, on a consideration of the whole case, the Judge expressed his opinion that the alleged rights of the plaintiff had not in any way been proved or established; and he ordered that the plaintiff's suit be dismissed with costs.

From this decree the plaintiff appealed to the Court of Sudder Dewanny Adawlut. The appeal was heard before Mr. Ross, and on the 30th of October 1830 he pronounced his decree, and thereby, after referring to the evidence and the bewustas of the pundits, he dismissed the appeal of the plaintiff, and affirmed the decree of the Provincial Court dismissing the bill. From that decree the present appeal is presented.

There were three questions in the case: *first*, was the plaintiff's deed of gift genuine? *secondly*, if genuine, was it valid? *thirdly*, if genuine, and not valid, was the plaintiff entitled as heir?

But, as the validity of the deed, even if it was genuine, depends on the concurrence of the heirs, the two last questions depend upon the single question, who were the heirs? and, if the persons alleged by the plaintiff to be heirs were not heirs, the deed, even if genuine, would not be valid. For this reason it is not strictly necessary for us to give any opinion upon the question whether the deed was genuine.

But, considering the circumstances in which the deed is alleged to have been executed by the Rany on the day before her death, the witnesses stated to have been then present, the length of time during which Kundurp, though often called upon, neglected to produce the deed, and the whole of the evidence in the cause, we think it right to state our concurrence in the opinion which has been entertained by every Judge who had considered the case, that the deed is not genuine but a forgery, and consequently that the plaintiff could establish no claim under it.

The question whether the descent in this family is to be regulated by the Dyabhaga and the sastras in use in Bengal, or by the Mitakshara, is really the only one to be considered.

Now, in the long litigation in which the Ranee Seeroomany, under whom Kundurp claimed as donee, was engaged with Mohun Lal, it was, without any objection on her part, allowed by her vakeels, and assumed and held by the Court, that the descent of this zemindary was regulated by the sastras in use in Bengal. The whole proceeding was conducted on that footing, and the decision in favor of the Rany was founded expressly on the ground that the deed then in question was executed without the concurrence of the descendants in the male line, who (though they were not heirs) were guardians or protectors of the widow.

After the death of the Rany, Kundurp himself alleged that the suit between Mohun Lal and the Rany had been decided in her favor agreeably to the sastras and the customs of the family; and in the present case it was shown that decisions affecting lands in Midnapore were founded on the sastras in use in Bengal. Several bewustas in other cases were produced; and from the bewustas obtained in this cause, and the other evidence on behalf of the defendants, we think that, although the evidence is in some respects inconsistent, there is, on the whole, quite sufficient reason to conclude that the Dyabhaga, and not the Mitakshara sastras, ought to be applied to the decision of this cause. And we shall therefore report to Her Majesty that, in our opinion, the appeal ought to be dismissed, and the decree of the Sudder Dewanny Adawlut affirmed with costs.

Decree affirmed with costs.

The 17th December 1847.

Present:

Lord Langdale, Lord Campbell, Dr. Lushington, T. P. Leigh, Sir A. Johnston, and Sir E. Ryan.

Confiscation (Regulation XI., 1796)—Joint Hindoo Family—Ancestral Property—Widow.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Mussamut Golab Koonwar and others

versus

The Collector of Benares.

Under Regulation XI., 1796, the Governor-General in Council could pronounce an order of confiscation in cases of persons charged with offences of a criminal nature who should abscond or conceal themselves so as not to be found upon process issued against them. After the issuing of the attachment by the Court and the subsequent declaration of forfeiture, everything previous to the attachment must be presumed to have been regularly and legally done unless such presumption were rebutted by sufficient evidence.

Where a forfeiture was declared against three of four brothers constituting a joint undivided Hindoo family—HELD that the forfeiture did not enure for the benefit of the fourth brother, nor did it affect the rights of the fourth brother who was entitled to his fourth share in all the ancestral property of the family, and that the widow of the ancestor was also entitled to maintenance.

The Chancellor of the Duchy of Cornwall (T. P. Leigh).—THE suit in this case was brought for the recovery of large estates in the province of Benares which had been seized by the East India Company on the ground of a forfeiture alleged to have been committed by the owners.

The appellants, who claim the estates, are the widow and three surviving sons of Ujaib Sing. The respondents are the Collector of Benares, defending the suit on behalf of the Company, and Rajah Oodit Narain Sing, to whom a part of the confiscated property has been granted.

Ujaib Sing appears to have held, under different grants from the Rajah of Benares, very extensive estates. These estates, or a great part of them, were in his lifetime re-granted to his eldest son Sheo Pursan Sing. In 1786 Ujaib Sing died, leaving the appellant Mussamut Golab Koonwar his widow, and Sheo Pursan Singh, and the appellants Sheo Ruttun, Sheo Ummur, and Kampta Persad Sing, his four sons, surviving him. In 1799 an insurrection broke out in Benares, in which the three eldest sons of Ujaib Sing were accused of being implicated, the fourth, Kampta Persad, being then a minor. The supposed delinquents were summoned to appear and answer the charge against them, but they absconded, and could

not be found. After certain proceedings had taken place, the regularity of which is disputed by the appellants, an order was pronounced by the Governor-General in Council on the 30th of January 1800, declaring the estates of the Baboos Sheo Pursan Sing, Sheo Ruttun Sing, and Sheo Ummur Sing, to be forfeited, and directing the Collector of Benares to hold them subject to the disposal of the Government.

Under this order all the estates held in the name of Sheo Pursan Sing were confiscated. A portion, consisting of the Pergunna of Kole Usla, was granted to the Rany Golab Koonwar for her life, subject to a heavy mortgage made by Sheo Pursan Sing; and on the death of the Rany, in 1805, this part of the property was granted on the same terms to her son, the respondent Rajah Oodit Narain Sing.

In 1803 the appellant Mussamut Golab Koonwar presented a petition to the Governor-General for a restoration to her of the confiscated estates, which she alleged to be her hereditary property; she was referred by the Governor-General to the Courts of Law for the establishment of any claim which she might have.

In 1810, with the sanction of the East India Company, she filed in the Provincial Court of Benares the plaint which is the foundation of the present proceedings. This plaint states the whole of the confiscated property to have been the ancestral property of her late husband, Ujaib Sing, though transferred into the name of Sheo Pursan Sing, his eldest son, and to have been enjoyed after the death of Ujaib by the plaintiff and her sons, and prayed that it might be restored to the plaintiff.

It does not appear that the other appellants ever became personally parties to this suit, though they seem from time to time to have concurred with the plaintiff in presenting petitions to the Court in incidental matters.

The defendants relied upon their title under the order of confiscation, and, after a variety of proceedings not necessary to be stated, the case came, on the 15th of August 1816, to be heard before Mr. Courtney Smith.

Mr. Courtney Smith appears to have considered that the confiscation was founded on acts of rebellion supposed to have been committed by the sons of Ujaib Sing; and, as no proof of any such acts was to be found, he was of opinion that the confiscation was entirely illegal. He held that the whole property was to be considered as belonging to the widow and sons of Ujaib Sing, and he decreed that it should be reserved to them accordingly.

It is obvious that at this time the real nature of the case was not understood. The confiscation was not founded on any supposed act of rebellion, but on the failure of parties, summoned to appear, to come in under the summons, and which failure was alleged to empower the Government, under the terms of the Regulation, after stated, to declare a forfeiture.

It may be observed that, even if the foundation of the decree had been sound, it was very singular in form. For, supposing the property to have belonged to the sons of Ujaib, not one of them was a party to the suit. It did not appear whether Pursan Sing was alive or dead, and the decree was made at the instance of a party who had no title in favor of persons who, if they had a title, were not parties.

We advert to the form of the proceedings, not because our judgment will at all turn upon it, but because it will be found material with reference to one of the points urged before us at the hearing.

From this decree there was an appeal to the Sudder Court both by the Collector and by the Rajah. The Collector in his petition of appeal did not object to the decree so far as it restored to Kampta Persad any property belonging to him, but it required only that what did properly belong to him should be ascertained.

Although the three sons of Ujaib were not parties to the original suit, they became parties to both appeals, and put in joint answers with their mother Mussamut Golab Koonwar. In both these documents, all the property in dispute is claimed as ancestral property which has come from Ujaib Sing.

In the course of the proceedings in the appeal, the grounds on which the confiscation had proceeded were further investigated. Additional evidence was produced, and the nature of the title, under which the various portions of the disputed property had been held at the time of the confiscation, was examined, and on the 9th of November 1819 the decree of the Sudder Court, now appealed from, was pronounced.

By this decree the Court reversed the judgment of the inferior Court, and, holding the confiscation to be valid, decided that it took effect as to all the estate and interest which Sheo Pursan Sing and Sheo Ruttun and Sheo Ummur Sing had in the property;

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and it then proceeded to declare in what parts of the property Kampta Persad was to be held to have an interest, and directed such property to be restored to him. But it took no notice of any right of Mussamut Golab Koonwar to maintenance, a right which does not appear from the proceedings to have been adverted to.

From this decree the present appeal is brought. It has been contended before us by the appellant: *First*, that the Government had no authority to pronounce a sentence of forfeiture in this case, even if all necessary forms had been observed. *Secondly*, that all necessary forms were not observed. *Thirdly*, that, if the sentence were valid, the forfeiture would enure for the benefit, not of the Government, but of Kampta Persad. *Fourthly*, that all the property in the name of Sheo Pursan ought to have been treated as ancestral property. *Fifthly*, that, if not, the four brothers constituted an undivided family, and that all the acquisitions of Sheo Pursan would be part of the joint stock. And, *lastly*, that, at all events, Mussamut Golab Koonwar was entitled to maintenance out of the whole of the property of Ujaib.

The first question depends on the Regulation XI. of 1796, printed in the Supplemental Appendix. That Regulation provides for two cases:—

First, resistance to process of the Courts. *Secondly*, for cases of persons charged with offences of a criminal nature, who shall abscond or conceal themselves, so that, upon process issued against them, they cannot be found.

The present case comes within the second class. The provisions are, in substance, that in such cases proclamations shall be issued by the Magistrate, requiring the absent party to appear to answer the charge within a period not less than a month. In default of appearance, if the absentee be a proprietor paying revenue immediately to the Government, the Magistrate is to order the attachment of any lands of the absentee within his jurisdiction by issuing his precept to the Collector of the District, directing him to attach the lands, and hold them till further notice.

Then follows the sixth and last Clause, which is in these words: "Should the absentee neglect to attend for a period of six "months after the lands have been ordered "under attachment, the Magistrate is to report the case to the Governor-General in "Council, who will pass such order upon it "and upon the future disposal of the lands "as he may judge proper."

No words can be more general and extensive than these. But it was agreed that they could not be intended to include a forfeiture or confiscation of the lands, because in the other case provided for by the Regulation, namely, that of resistance to process, forfeiture of the lands is expressly enacted.

The two cases are obviously very different. But it will be found on examination that the terms of the enactment applicable to the first case confirm the construction which we put upon the Clause now in question.

In case of resistance to process, the Magistrate is to declare the forfeiture; but that sentence is to be reviewed by the Nizamut Adawlut, which may either confirm or modify it. If confirmed, the proceedings are to be transmitted, before the sentence is carried into execution, to the Governor-General in Council, "who will finally determine whether the sentence of forfeiture "shall be put in force, or commuted to a "fine, or otherwise; and who, whenever he "may order the land or lease of the offender "to be forfeited to Government, will at the "same time cause the necessary instructions "for the future disposal of the land to be "conveyed to the Collector through the "Board of Revenue." These words are substantially the same as those of the 6th Section. We have no doubt, therefore, of the right of the Governor-General in Council to pronounce an order of confiscation in such cases as the present.

But it is said that the proceedings were irregular. Now, it is not disputed that process was issued against the parties, that they absconded, that their lands were attached by the Collector under an order from the Magistrate, that six months elapsed without their appearance, that the case was reported to the Governor-General in Council, and that a sentence of forfeiture was pronounced. But it is contended that the attachment ought only to have issued after certain proclamations had been made in a particular form and with certain ceremonies, and that there is no evidence that those forms and ceremonies were strictly observed. We are of opinion that, after the issuing of the attachment by the Court and the subsequent declaration of forfeiture, we must presume all things previous to the attachment to have been regularly and legally done, and that there is no sufficient evidence to rebut that presumption. It is unnecessary, therefore, to consider what

might have been the effect of any such irregularity if it had been proved to exist.

The next proposition of the appellants was a very singular one, namely, that the forfeiture declared against three of the brothers was to enure for the benefit of the fourth, in direct opposition both to the letter and spirit of the Regulation, which declares that the forfeited lands shall be at the disposal of the Governor-General in Council: neither principle nor authority was advanced in support of such a proposition, and it is obvious that it cannot be maintained.

An opposite view of the subject appears to have been suggested by the Commissioners of Forfeited Estates in the course of these proceedings, namely, that when the Government has made grants to individuals, as in this case to Sheo Pursan Sing, the whole property granted to him by the Government ought to be held forfeited by his delinquency, without regard to the rights of participation in the property which might belong to members of his family. No such question, however, has been raised in the course of these proceedings. On the contrary, the decree affirming the rights of Kampta Persad, as far as his share is concerned, is not objected to. That question, therefore, is not before us.

The next point for consideration is whether the decree has given to Kampta Persad all that he was entitled to, assuming his interests to be unaffected by the forfeiture.

The decree proceeds on the principle of giving him all that appears to have been held in his own name, and the fourth of all that the Court considered to have been the ancestral property of the family—to have come, in short, from Ujaib Sing.

It is said that he ought to have had one-fourth of all that was held in the name of Sheo Pursan—*first*, because all should have been treated as ancestral—*secondly*, because, at all events, the brothers constituted an undivided family, and therefore he was entitled to a share of the whole, whether ancestral or not.

Upon the second point it may be sufficient to observe that no such case is made in any part of the proceedings. The suit in which the present appeal is brought was instituted by Mussamut Golab Koonwar alone, claiming the property which had belonged to Ujaib Sing, and that case is adopted by the other appellants when they became parties to the proceedings. No other title is set up, and Kampta Persad takes under this decree the whole of the estate held by him in his own name.

The question, then, is whether the decree ought to have treated as ancestral property the whole of what was granted to Sheo Pursan, or a larger portion of it than is actually so treated.

These are questions on which it is scarcely possible for this Court to come to a very satisfactory conclusion, for it depends upon the usages prevalent in the country and the inferences to be drawn from documents, naturally informal, and in which it is very difficult to trace the identity of the property. In some of these documents the grant is made to Ujaib Sing, in others to Ujaib Sing and his children, or with other words indicating a continuance of the estate in his family after his death. In some of them, property is granted to Sheo Pursan, or Sheo Pursan and his children, which never appears to have been held by Ujaib at all.

The grant being in the name of Sheo Pursan (who appears alone so far to have dealt with a large portion of it, Pergunna Kole Usla, as to mortgage it in his own sole name), it is for Kampta Persad to make out his title to a share of any portion which he claims. The Court below appears to have held that the mere circumstance of property which had been held by Ujaib, and, in some instances, by preceding members of his family, being afterwards transferred by a renewed grant in his lifetime to Sheo Pursan, was not sufficient to evidence an hereditary interest, especially when the jumma or rent reserved to the Government, had from time to time varied, but that, where the grant originally to Ujaib Sing was in terms which showed that it was to continue in his family after his death, the property must be treated as ancestral.

We are not prepared to say that this principle is erroneous, and we have carefully looked through the whole of the evidence in this case in order to see whether it appeared in any instance to have been misapplied. The judgment in this case has been delayed in order to afford us the opportunity of making this examination, and not from any doubt which we entertained, at the hearing, on the points of law.

There is one portion of property, and one only, which, upon this investigation, it appears to us, ought to have been included in

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the ancestral estate, namely Futtehpore. The case appears to stand thus: The title depends upon two documents nearly contemporaneous—one a sunnud from the Rajah of Benares, dated the 17th July 1785, which will be found in page 38 of the Appendix, the provisions of which are: "Be it 'known to the present and the future 'mutsuddies for the affairs of the amla 'of Pergunna Kole, situate in Sircar 'Jaunpore," and so on, "that, as Mouza 'Futtehpore, appertaining to the aforesaid 'pergunna (kharij-jumma) with the ex-'ception of the revenues of the sircar, 'together with the sayer, is in the name of 'Thakoor Burriar Sing, mâhf of old, there-'fore, upon the former rule, the same has 'been rendered mâhf in favor of my friend 'Baboo Ujaib Sing; you are desired not 'to molest the said Baboo in any way 'whatever as respects the afore-mentioned 'mouza, but to leave it to the enjoyment 'of the said Baboo, and you shall not de-'mand a fresh sunnud for him annually."

The other document is a sunnud from the Collector of Benares dated the 16th of September 1785, which is found at page 64 of the Appendix, and it is in these words, that, "as the village of Futtehpore in the above pergunna has been formerly granted as mâhfy to the deceased Thakoor Burriar Sing, considering, therefore, the rights of Baboo Ujaib Sing, as heir to the above Thakoor, the above village is to be continued, as formerly, mâhfy to the above Baboo, his heirs and descendants for ever."

As against the East India Company and those claiming under them, we think these documents are quite sufficient to establish that this property was hereditary in the family of Ujaib Sing.

The only other question is the right of Bussamut Golab Koonwar to maintenance out the whole of the property held to be ancestral. Nothing was urged at the Bar against is right, and it appears that, on the principle of the decree, it ought to have been recognized before.

We shall, therefore, report to Her Majesty ir opinion that, upon the whole, the decree mplained of should be varied by declaring at the village of Futtehpore ought to have en treated as ancestral property, and included as such in the estates, of which one-urth part is by the decree allotted to ampta Persad, and that Mussamut Golab oonwar ought to have been declared entitled to maintenance out of the whole of the ancestral property, and that the case should be remitted to the Court below, with directions to give effect to the above declarations, and that the decree complained of should, in other respects, be affirmed without costs.

The 24th February 1848.

Present:

Lord Langdale, Lord Campbell, Dr. Lushington, T. P. Leigh, Sir A. Johnston, and Sir E. Ryan.

Lease—Surety—Ejectment—Damages.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Rajah Burroda Kant Roy

versus

Ram Tunnoo Bose and others.

Where a person became surety for the due performance by the lessee of the obligations contained in a lease for a term of years, and afterwards became a partner with the lessee, and the lessor evicted the lessee before the expiration of the lease—HELD that a suit would lie by the surety for damages arising from the illegal ejectment, although the surety was not a party to the original contract with the lessor.

Explanation of the principle of assessing the damages.

The Chancellor of the Duchy of Cornwall (T. P. Leigh).—THIS was an action brought by the respondents against the appellant to recover damages for the loss alleged to have been sustained by the former, through the wrongful act of the appellant. The wrong complained of was the ouster of the respondents from certain leases in which they allege themselves to have been interested under a grant made by the ancestors of the appellant.

In 1816 the father and uncle of the appellant held the Pergunna of Syedpoor, in the District of Jessore, as zemindars, subject to the payment to the Government of an annual revenue of 43,296 rupees.

The revenue had fallen into arrear, the zemindars were involved in debt to a large amount; and, in order to raise a sum of 54,000 rupees, they agreed to grant a lease to a person named Narayun Sing, of the Pergunna of Syedpoor, he undertaking to raise the required loan, and to pay the amount by instalments out of the rent of the pergunna.

Narayun Sing appears to have been connected with a family of the name of Bose; one of this family, Ram Dhun Bose, was a

banker, and from him and his partner this loan was intended to be raised.

The first document connected with this transaction is dated 30th March 1816. It is a memorandum signed by Narayun Sing, and addressed to the Rajahs. The effect of it is that Narayun Sing is to receive the rents of the pergunna, of which the profits payable to the lessees, after discharging the revenue to Government, are stated to amount to 13,100 rupees, and of this 7,000 rupees per annum are to be paid to the bankers, leaving 6,100 rupees for the Rajahs. Out of this sum 105 rupees are to be deducted by way of allowance to Narayun Sing, leaving 5,995 rupees for the Rajahs. If anything further can be received from the ryots, one-half is to be paid to the Rajahs. If, on examination of the roll and papers and enquiry in the district, the rent is found to be less than it is rated at by the parties, an allowance is to be made to Narayun Sing.

On the 9th April a corresponding document is signed by the Rajahs, and addressed to Narayun Sing. On the same day a grant is made by the Rajahs to Narayun Sing, of the pergunna in question for a period of ten years, which is obviously intended to be in conformity with the agreement of the same date.

On the 12th of April a corresponding document, or, as we should call it, a counterpart of the lease, is signed by Narayun Sing. That is stated at page 48 of the Appendix, and the material portion of it is in these terms: "This engagement has been writ-"ten by Narayun Sing in the year 1222. "You have given me a lease of the entire "Pergunna of Syedpoor, your zemindary, "upon my application, from the year 1223 to "the end of 1232, for a term of 10 years. "I do hereby voluntarily give this engage-"ment of my own accord; that I shall "have possession in the district, and pay the "annual rent according to the roll, after "deducting the expenses of management "and servants' allowances at Chaneda in the "sum of 56,397 sicca rupees, of which I "shall pay the revenue of the pergunna, "fixed in the Collectorate, the sum of "43,296 rupees 3 annas 10 gundas and 2 "kowries, according to the instalments "monthly into the Collector's treasury, and "deliver to you receipts under the seal and "signature of the Collector, and receive re-"ceipts from you." It then provides for the payment of 7,000 rupees to the bankers, and the 6,100 rupees to the Rajahs, omitting the allowance of 105 rupees, which was provided to be made by the agreement with Narayun Sing.

From these documents the mode in which the rent is estimated sufficiently appears. Discarding from consideration for the present the sum of 11,792 rupees, to which we shall afterwards advert, the produce of the estate is calculated, after deductions, at 58,[illegible] rupees. From this is allowed for expenses of management 2,295 rupees, leaving for actual rent 56,397 rupees, omitting the smaller denominations of coin.

Ram Nursing Bose became surety for the due performance of the engagement of Narayun Sing.

On the 29th of April 1816, a memorandum is made between Ram Nursing Bose, Ram Dhun Bose, and Narayun Sing, by which their interests as partners with him in the lease are recognized, Ram Nursing Bose having a 4-anna share.

In the end of the year 1816, it was represented by Narayun Sing that the income of the estate was less than it had been represented according to the roll, and that, after deducting the sums allowed for management and also a sum of 105 rupees (which had been mentioned in the agreement which preceded the lease, but had been omitted in the lease itself), the net rent, instead of 56,397 rupees, would be only 54,981 rupees. Thereupon this memorandum is signed by Narayun Sing, and Ram Nursing Bose, as surety, is a party to it, which agreement is simply to reduce the rent in the manner pointed out in this memorandum.

It is clear that at this time there was no profit upon the lease, that is, no recognized or legitimate profit beyond that which might arise from the large allowances for management.

Previously to the year 1819, by the death of one of the Rajahs, and a transfer of his interest by the other, the pergunna in question became vested in the appellant. The new owner being a minor, the property came under the care of the Court of Wards, a Court which appears to have a double jurisdiction, the guardianship of infants' estates, and the protection of the public revenue.

In July 1820 the Collector of the District, where this property was situate, examined into the circumstances of the minor's property and the conditions of this lease. It appeared to him, not perhaps very unnaturally, that this lease was most detrimental to the infant, and he considered that it contained such evidence of fraud and oppression practised by the lessee towards the lessor

hat in a letter addressed by him to the Court of Wards on the 1st of July 1820, ie advised that the Court, as of their own uthority, should annul the transaction, and nake a new lease of the property.

The Court of Wards, however, considered hat this proceeding would not be justifiable. ınd that the existing arrangement could only ɔe set aside by a suit instituted by the minor or that purpose. They wrote a letter to this effect to the Collector on the 11th of July 1820, recommending that, if a new arrangement can be made with the assent of the lessees, it should be done. They conclude their letter with this paragraph: "As the "Court are of opinion that the settlement of "Syedpoor, formed by the late Rajah, can-"not be disturbed, it will be necessary to "require the farmers to give security for the "fulfilment of the existing engagements, or "those which they may assent to under the "preceding instructions; at all events, the "regular liquidation of the Government "revenue must be secured."

In November 1820, the Government consented to advance two lacs of rupees to the Court of Wards, to enable them to pay off the incumbrances on the minor's estate.

On the 2nd of February, the Collector wrote to Narayun Sing, and required him to come to a settlement upon fair terms for the property which he held, giving him notice that, if he refused to do so, the money due on the mortgage should be paid off, and the lease annulled. What was done upon this does not appear further than that Narayun Sing did not consent to make any new arrangement.

The Bengal year 1227 terminated in the month of April 1821, and the only evidence we have of what took place is a statement in a letter of the Collector to the Court of Wards of the 5th July. From this it appears that, in the beginning of the year 1228, which would mean in April or May 1821, he called upon Narayun Sing to give the security required by the last paragraph of the letter of the 11th July 1820, and at the same time issued a proclamation to the ryots, prohibiting them from paying any revenue to the farmers until such security should be tendered and accepted.

Now, this seems a somewhat harsh proceeding; in February the Collector is insisting on the lease being set aside. In April or May, without any further communication with the lessee as far as appears, he for the first time requires security for performance of the condition of the lease, and prohibits any payment by the ryots until it is tendered and accepted.

It is said that at this time the revenue was in arrear. The Judges in the Court below appear to have considered that this was not the fact. There does appear there to be evidence that about two months' revenue was unpaid at the end of the year 1227. No demand, however, seems to have been made for payment, and it is not at all referred to as the ground on which security was required, or on which the lease was to be attached.

On the 20th of June 1821, notice is given to Narayun Sing that, unless he furnishes security, the lease would be attached; several persons were accordingly proposed as sureties by Narayun Sing, amongst others a person named Bunmally Bose. They were all, however, rejected by the Collector, who, on the 5th of July 1821, communicated what he had done to the Court of Wards in the following letter: "It appearing that "the farmers of Pergunna Syedpoor have "never furnished the security required by "the last paragraph of your predecessor's "letter of the 11th July last, I beg leave "to acquaint you that, previously to allow-"ing them to commence the collections of "the present year, and with the view of "securing the regular payment of the re-"venue of the Government, I called upon "them to furnish the security required, and "at the same time I issued a proclamation "to the ryots prohibiting them from paying "revenue to the farmers until such security "should be tendered and accepted. Narayun "Sing, the recorded farmer of Syedpoor, "has offered as his security the five persons "noted in the margin, but, as they are all "sharers with him in the farm, I have re-"jected their security. The security of "Bishonath and Bunmally Bose is besides "inadmissible for other reasons, as the form-"er is security to a large amount for the "treasurer of this office, and also for one of "the record-keepers." Then it mentions the objections to other parties; then he says: "A period of 15 days having elapsed since "the issuing of the above order, and no "other security having been tendered by "the farmer, I beg leave to propose that, as "the collections of the year are at stand, the "pergunna be immediately attached."

On the 6th of July, the day after this letter, he serves a further notice on Narayun Sing, in these terms: "Be it known to "Narayun Sing, farmer of the Pergunna of "Syedpoor, that you have been often required

"to furnish good security; you have not yet "furnished it; if you intend to furnish good "security, you are to attend at ten o'clock "to-morrow with good security. Consider "this as peremptory."

On the 17th of July the Court of Wards wrote as follows to the Collector: "I am "directed to acknowledge the receipt of "your letter of the 5th instant. Unless "the farmers of the pergunna above named "are in balance, the Court consider the "measure pursued by you, as contained in "the first paragraph of your letter, pre-"mature, and should not have been adopted "without a previous report to the Court. "With reference to the last paragraph of "your letter, the Court desire that, if, when "you receive these orders, the farmer has "not tendered responsible security, you "will attach the estate, and, after the "prescribed manner, issue advertisements "inviting proposals for the farm for the "unexpired period of the minority."

The Collector appears to have discovered that the objection which he had made to Bunmally Bose as a surety, *viz.*, that he was interested in the lease, was unfounded, and he therefore withdrew that objection, but he considered that he was not a sufficient security, and required some additional security to be provided. Narayun Sing did not provide such additional security, but he offered to deposit Rupees 10,000 until the security-bond should be executed by Bunmally Bose. This offer was rejected, and, in the month of August 1821, the Collector attached the estate, and entered into receipt of the rents. On the 15th of August 1821, he wrote to the Court of Wards, informing them of which he had done, and on the 17th of August the Court returned an answer approving of what had been done, but directing that advertisements should be issued for the re-letting the property according to the regulations (which seem to have required an interval of 12 months), and directing that, if, in the meantime, good security was afforded, the farmer should be restored to possession.

In September 1821, Narayun Sing appears to have petitioned the Zillah Court for relief. The Court refused to interfere, a decision which was confirmed by the Sudder Court on appeal in June 1822. In the meantime, the estate was let by the Collector for a large increased rent of Rupees 81,026. This arrangement was communicated by the Collector to the Court of Wards on the 18th of February 1822, and confirmed by the Court of Wards on the 11th of June 1822.

Ram Nursing Bose having died, leaving the present respondents his representatives, a suit was instituted, in July 1826, by them, together with Narayun Sing, against the appellant, to recover damages for the loss which they had sustained by being turned out of possession under the lease. Narayun Sing afterwards withdrew his claim, and the suit was continued by the respondents.

After much litigation in the Courts below, and much difference of opinion amongst the Judges, on the 4th of April 1837, final judgment was pronounced for the plaintiffs, awarding to them a sum of Rupees 38,531, together with interest upon part from the time of their expulsion, and upon the whole for the end of the term of 10 years in the lease.

Against this judgment the present appeal is brought, and the ingenuity of Counsel has suggested a great many objections, some of which do not appear to us of much weight:—

First.—It is said that the respondents were not parties to the contract with the Rajahs, and therefore could not sue for any breach of it. The answer is obvious, that the suit is not founded in contract, but in a wrong alleged to have been done by the appellant in depriving the respondents of property in which they had a valuable interest.

Secondly.—It is said that Ram Nursing Bose could not have any interest in the lease, because he was a surety for the due performance of the obligations contained in it by the lessee. A passage was cited from "Colebrooke's Digest" to support this objection. It does not, however, appear to us to have any bearing on the case, and we have no doubt that Ram Nursing Bose had an interest for any injury to which he was entitled to compensation.

Thirdly.—It was said that this was a mere mortgage-transaction, which the mortgagors had a right to terminate by payment of the mortgage-money. This does not appear to us to be the exact nature of the transaction. Narayun Sing engaged to procure a loan in consideration of having a beneficial lease for ten years; he did procure the loan, and his interest could not be defeated by paying off what was due to the lenders.

Fourthly.—It was next said that the revenue was in arrear at the time when the lease was attached, and that there was power under the lease in that case to resume possession of the estate. If this had been the ground on which the attachment took

place, it would have been necessary to examine very particularly into the evidence in order to see whether anything had occurred which enabled the lessor to take advantage of a forfeiture; but, in fact, it is quite clear that no proceeding was ever taken upon any such ground, and that the lease was annulled, because the lessee had failed to provide the security required by the Court of Wards on behalf of the appellant.

The only substantial questions in the case are: *First*, was that Court justified in annulling the lease upon this ground? *Secondly*, if not, have the damages done to the respondents been assessed upon a reasonable principle?

It is clear from the documents already referred to that the security required was for the performance of the engagements contained in the original lease, and not merely for the payment of the revenue to the Government. If any doubt could exist on this point, it would be removed by reference to the security-bond proposed by the Collector for execution by Bunmally Bose, which is stated in the Supplemental Appendix, page 4.

Then, was there any right in the Court of Wards, acting for the minor, to require this security? The original lease, with a surety whom the lessor considered sufficient, had been granted by the ancestors of the minor. That surety was still alive, and no change is shown to have taken place in his circumstances. It would be singular if the circumstance of the estate devolving on a minor could enable the Court of Wards on his behalf to interfere with, and alter the terms of, a contract made by those through whom he claims. No authority of any kind has been produced to show the existence of so extraordinary a power, and we must, therefore, assume that no such authority exists. If this be so, the dispossession was clearly wrongful, and the respondents were, in our opinion, entitled to maintain their action.

But there remains a question hardly less important, upon which we find it quite impossible to concur in opinion with the Court below, *viz.*, the principle upon which they have assessed the damages. In the first place, they have given damages to the respondents as being entitled to a 12-anna share, or twelve-sixteenths of the lease.

Now, the only evidence in the case of Ram Nursing Bose having any interest at all is found in the agreement of the 29th April 1816, already referred to, by which Ram Nursing Bose would be entitled to a 4-anna share, and the answer of the appellant in this suit according to which he would be entitled to a 5-anna share.

A suit was referred to by Mr. Wigram, from which he argued that it was to be inferred that Narayun Sing and Ram Nursing Bose were the partners, and the only partners in the lease. But, upon examining that suit, it does not even show that Ram Nursing Bose had any interest whatever in the lease; he is treated merely as a surety. How, then, is it possible to hold, as the Court below has done, that Ram Nursing Bose had a 12-anna share?

Again, with respect to the computation of the loss, the Court appears to us to have adopted a very erroneous principle. They have held that, under the original lease, the lessee had a clear profit-rent of 12,843 rupees, and, holding the respondents entitled to three-fourths of that sum, they consider them to have had a profit-rent of 9,632 rupees per annum, and they give them that sum for 4 years, amounting to above 38,500 rupees.

The profit-rent is thus made out. They treat the sum of 11,792 rupees suspended in the original lease as a profit-rent intended to be kept by the lessee. They then say that it appears that in the Bengal year 1227, that is to say, in the last year of their holding, the lessee had increased the rents of two portions of the property by the sum of 2,097 rupees; to one-half of this increase the lessees would be entitled, and, adding this sum (1,048 rupees) to 11,792 rupees, the amount will correspond with the sum stated in the judgment.

The question then is, ought the sum of 11,792 rupees to be treated as a profit-rent to the lessees? In other words, was it intended that the lessee, as a consideration for procuring a loan of 54,000 rupees, should have not only all the other advantages secured by the lease, but a gratuity of 1,17,920 rupees? for this would be the sum which he would receive during the ten years' term.

If anything so monstrous was intended, it should have been expressed in the most distinct terms. But, so far is this from

being the case, that the engagement of Narayun Sing is distinct to pay the annual rent according to the roll; and none of the Counsel on either side at the hearing could explain the item from which this extraordinary inference is drawn. The natural interpretation to be put upon it, as we think, is that, from the gross sum appearing upon the roll, a deduction of 11,792 rupees was made in respect of sums which, for some reason or other, would not be received during the lease.

This construction is quite consistent with the agreement which preceded the lease, with the subsequent reduction of rent in consequence of the deficiency in the roll, and with the whole conduct of the parties.

In a letter of the Collector of Jessore of the 1st of July 1820, already referred to, this sum is spoken of as a sum suspended without any assigned cause. In the answer of the Court of Wards, it is suggested that this suspension could hardly have been made without some sufficient or at least ostensible cause, and that they could not assume that the parties were fraudulently withholding so considerable a portion of the revenue.

We are satisfied, therefore, that this was not a sum in which the lessee was intended to take any interest. The profit which he was to derive from the lease was, however, considerable. *First*, he was allowed between 2,000 and 3,000 rupees for the expenses of management; *secondly*, he was to have 5 per cent. on balances; *thirdly*, he was to have one-half of any increased rent which might be derived from the property through new arrangements, which it was contemplated might be made with the ryots, by a new settlement and re-measurement of the property. If he derived any profit beyond this, such profit would not have been according to his agreement, but in fraud of it, and we think it cannot be allowed.

We agree with the Court below in thinking that the respondents could not claim a share of the profits made by the new lease, because such profits were not made, and it does not appear that they could have been made by the original lessees; nor have we any means of judging whether any, or if any, what profits could have been made or would have been made, by them.

In strictness, the proper order would be to vary the decision of the Court below by declaring that the respondents, instead of twelve-sixteenths, were entitled only to five-sixteenths of the whole value of the lease at the time of eviction; that, in computing the value of such lease, no allowance ought to be made for the supposed profit-rent of 11,792 rupees, but that allowance ought to be made for one-half of any increased rent which has been secured by the lessee before the eviction, and also for any excess of the sum allowed to the lessor for expenses of management, beyond the necessary expenses of collection; and that regard ought also to be had to the chance of any increase of rent which the lessee might have fairly expected to receive.

It is obvious, however, that the Judges below could have little better means of fixing a fair amount of damages than we have, and we propose, after declaring the principle on which we proceed, to name a gross sum by way of damages, and thus put an end to all further litigation. Taking the damages for the whole period of five years, we think a sum of 10,000 rupees is proper to be allowed as of the date of our judgment, with interest at 6 per cent. from the date of our judgment till payment. We shall leave the costs below unaltered, and give no costs of the appeal.

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The 29th February 1848.

Present:

The Duke of Buccleuch, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Hindoo Law—Adoption—Acquiescence—Ancestral Property—Division—Partition.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Rungama (widow), for herself and on behalf of Lutchmeputty Naidoo,

versus

Atchama (widow), Ramanadha Baboo, and Puttoory Cally Doss.

Atchama (widow)

versus

Ramanadha Baboo.

According to Hindoo Law, a second adoption (the first adopted son still existing and remaining in possession of his character of a son) is invalid. The acquiescence of the first adopted son, after he came of age, in the division of property made by the adopting father between his two adopted sons, was not equivalent to a previous consent (binding on the first adopted son) to the disposition of the ancestral property by the father, but was binding on the first adopted son with regard to other property of which the father had the power of disposing by an act *inter vivos* without the consent of the first adopted son.

The Right Hon'ble T. Pemberton Leigh (Chancellor of the Duchy of Cornwall).—THE question in these appeals relates to a very large property in the Northern Sircars, which in the year 1798 belonged to a zemindar named Vencatadry.

Vencatadry, being childless, on the 2nd of April 1798, adopted as his son a boy named Jaganadha. On this occasion he signed a paper, bearing date the 7th April 1798. In this paper, after reciting the adoption, he proceeds to say: "Therefore, "be it believed that I have executed this, "my Tutelar Deity bearing witness, that "Jaganadha Naidoo is *huckdar* or heir to "my zemindary *mirasy*, to my wealth and "debts; and that I have it not in my "power, on any account whatever, to make "over (the same) to any other person be-"sides him (Jaganadha Naidoo)."

Of the fact, or of the validity of this adoption, no question is made. He afterwards became desirous of adopting another boy, named Ramanadha, and of dividing his property between them. It is said by the appellant, and many witnesses have sworn, that he consulted certain Pundits as to the validity of a second adoption, and was advised by them that a second adoption could not be legally made.

It was contended by the appellant that, upon the whole evidence, it was to be inferred that, in consequence of this opinion, although he brought up Ramanadha as his son, he never adopted him with those religious ceremonies which were necessary in order to constitute a valid adoption according to the Hindoo Law. We have no doubt, however, that he did whatever was necessary to constitute a valid adoption, if such second adoption could, by the Hindoo Law, be valid. This last adoption took place in 1807. Various steps seem to have been taken by Vencatadry during the minority of both these boys with a view to divide his property between them. In 1815, Jaganadha attained the age of eighteen, when by Hindoo Law he came of age. After this, in 1816, Vencatadry made a new division between his two sons, Ramanadha being still under age, as it seems, about nine years old. Jaganadha took possession of the property so allotted to him, and Vencatadry seems to have remained in possession of what was allotted to Ramanadha. In the course of the year 1816 Vencatadry died. Jaganadha claimed the whole of the property of Vencatadry, alleging that the adoption of Ramanadha was invalid, and at all events did not constitute him a co-heir.

Much dispute took place upon this subject, and various proceedings were had before the Board of Revenue, which had seized a large portion of the property for payment of arrears of revenue. Suits were instituted for the purpose of determining the rights of the parties, into the particulars of which it is not necessary to enter.

The first of the suits now in controversy began in 1820, being a suit instituted by Ramanadha against Jaganadha, to establish his right to that portion of the property which had been allotted to him in his character of adopted son by Vencatadry. This suit was still pending when Jaganadha died. In 1824 a decision was pronounced against Ramanadha, from which, however, he appealed; and before the appeal had been heard, and on the 28th of February 1825, Jaganadha died. He left no natural-born issue, but two wives, Rungama and Atchama, and a boy, who had been brought up in his house, and who is said to be his adopted son, named Lutchmeputty.

The question then arose, who was entitled to succeed to the estate of Jaganadha; the

question of what the estate of Jaganadha consisted, that is whether he was entitled to the whole or only half of the estate of Vencatadry, still remaining unsettled. With respect to the right of succession to Jaganadha, it is not disputed that, if he left a son, whether natural-born or legally adopted, such son would be entitled to succeed—that, if he left no son, but an undivided brother, such brother would be entitled to succeed—that, if he left no son, nor undivided brother, the widows, or one of the widows, would be entitled to succeed.

On the death of Jaganadha, Ramanadha set up a title to the whole estate of Vencatadry, alleging (not very consistently with his former claim) that he and Jaganadha were undivided brothers, and that Jaganadha had left no issue, natural-born or adopted.

Rungama at first acquiesced in the claim of Ramanadha, it being alleged by her that she was deceived by Ramanadha, who got authority to act for her, while it is alleged by other of the parties that she colluded with him.

Lutchmeputty was a child of about six years old, and no claim was brought forward on his behalf. Atchama, however, instituted a suit claiming the whole of the estate of Jaganadha, and insisted that she was entitled to inherit. Afterwards, Ramanadha and Rungama having quarrelled, the claim of Lutchmeputty was advanced. After long litigation with various fortune in the Indian Courts, the Sudder Adawlut decided that Jaganadha and Ramanadha were undivided brothers, and that Lutchmeputty was not the adopted son of Jaganadha; that, consequently, Ramanadha was entitled to the whole inheritance which had come from Vencatadry; and against this decree the present appeals are brought.

The questions for our decision relate, *first*, to the estate of Vencatadry; and, *secondly*, to the succession to Jaganadha. The conflicting parties are—*First*, Lutchmeputty, who claims the whole inheritance which came from Vencatadry, on the ground that Jaganadha was the only adopted son of Vencatadry; and that he, Lutchmeputty, is the adopted son of Jaganadha. *Secondly*, Atchama, who insists that Lutchmeputty was not well adopted, and that she, as eldest widow, is entitled to succeed to the inheritance of Jaganadha. *Thirdly*, Rungama, who maintains the case of Lutchmeputty, but insists that, if he is not the adopted son, she is entitled to share with Atchama in the succession of Jaganadha. *Lastly*, Ramanadha, who maintains the decree as it stands.

A further question is made, in which all the other parties concur in contending against Ramanadha, that, if he was well adopted, and therefore a brother of Jaganadha, they were divided, and not undivided brothers, and therefore, though Ramanadha might be entitled to his share of Vencatadry property, he can have no right of succession to Jaganadha.

As far as concerns Ramanadha, his whole title depends on the validity of his adoption. If he was not well adopted, he was neither a co-heir with Jaganadha nor heir to Jaganadha.

The first question, therefore, is as to the validity of a second adoption; the first adopted son still existing, and remaining in possession of his character of a son. This appears to have been long a point of great doubt in Hindoo Law, and it is stated by the Judges in this case to be unsettled.

Three classes of authority have been referred to: *first*, the opinions of the Pundits appearing in the course of the proceedings; *secondly*, the native authorities as found in the Hindoo treatises; and *thirdly*, the European authorities.

First, as to the Pundits. There is considerable difference of opinion amongst them. If the appellant's evidence is to be believed, a number of Pundits and learned men gave their opinion against the validity of the adoption to Vencatadry in his time; and this at a period when their bias would probably be to favor the wishes of the powerful Raja who consulted them.

On the death of Vencatadry, there is a certificate signed by 140 Brahmins, that the adoption of Ramanadha was invalid. But as this was an opinion procured by Jaganadha, then in possession of the estate, but little weight probably is due to it.

On the other hand, in 1818, before the institution of suit by Ramanadha, the Northern Provincial Court took the opinion of their own Pundit, and of the Pundits of the Centre and Southern Division of the Court on these questions: *First*, is a person, having conjointly with a wife adopted a son, and thereafter being displeased with her, and marrying a second wife, authorized by Hindoo Law, conjointly with her, the second wife, to adopt a son? *Secondly*, a person adopting a son, having

for any reason adopted a second son, is the former or the latter heir to the estate of the person adopting, or are both sons entitled to share the same?

These Pundits being at a distance from each other, giving separate opinions at some intervals of time, without, as it appears, any communication between them, all agreed in holding that the second adoption is good, and that both sons are equally entitled to inherit. These opinions seem to be as free as any opinion can be from suspicion of undue influence.

When the case came before the Sudder Court, two of the Pundits consulted were in favor of the adoption, and one against it. The reasoning of the two Pundits in favor of the adoption is certainly very unsatisfactory; but still, as far as the law is to be collected from the opinion of the Pundits to be found in this case, the preponderance is in favor of the adoption. These opinions, however, are by no means conclusive. And the appellants contend that the native authorities upon which they are founded are strongly against the validity of a second adoption. These authorities, like the opinions of the Pundits, are not reconcileable with each other. In the Digest of Hindoo Law on Contracts and Successions, with a Commentary by *Jagannatha* translated by Mr. Colebrooke, the question is discussed and treated as one on which a difference of opinion prevailed. The most material passages of the treatise are found in pages 386, 389, 395, 397. The author holds the better opinion to be that an adoption is valid, although a previously-adopted son, or even a natural-born son, be already in existence. The main foundation of that opinion being an ancient text, "That many sons are to be desired, in order that one may travel to Gaya."

It was attempted, in a most ingenious and able argument on behalf of the appellants, to reconcile this authority with others, apparently of a different tendency, by showing that the author intended, not that many sons of the same description might be adopted, but that he referred to sons of different descriptions, of which there were twelve recognized in the remote ages of Hindoo antiquity, though only two are now allowed—the son given and the legitimate son. Another suggestion was that the author intended only that the second adopted son may have the rights of a son in the event of the failure of the existing issue, natural or adopted.

We find great difficulty in adopting either of these suggestions: at the same time it must be owned that the doctrine is not very clearly stated, nor very easily to be reconciled with some of the authorities to which it refers; and with respect to the right of inheritance of the second son, we rather collect the author's opinion to be that the second son would succeed, as in the case of a son well adopted by one having no issue, to whom a son is afterwards born, namely, to one-third only of his father's estate.

What, however, may be the effect of this practice, its authority is far outweighed by two other Hindoo works expressly on the subject of adoption—the *Dattaka Mimamsa* and the *Dattaka Chandrika*. The *first* passage, sec. 1, plac. 3, in the former of these works, is the citation of a text of an ancient sage *Atri*, in these words: "By a man destitute of a son only, must a substitute for the same always be adopted." This, perhaps, standing alone, might be held to mean that upon such an one only was it incumbent to adopt a son. The Commentary, however, excludes this construction, for it says, sec. 1, plac. 6: "'By a man "destitute of a son only'—the incompetency "of one having male issue is signified by the "term 'only' in this passage." The author then, after quoting a text from *Menu* much to the same effect with that cited from *Atri*, observes that the instances of adoption by certain illustrious persons of sons, although they already had male issue, must be considered as exceptional cases, and not as generally authorizing the act. In the next paragraph (12), the author seems to concede that a second son may be adopted with the sanction of the existing issue.

The *Dattaka Chandrika*, sec. 1, plac. 3, cites the same text from *Atri* and *Menu*, and puts the same construction on them as the *Dattaka Mimamsa*.

We think that these treatises are more distinct than the work of *Jagannatha*—they are written on the particular subject of adoption. They enjoy, as we understand, the highest reputation throughout India, and their weight is strong against a second adoption. In the ordinances of *Menu*, translated by Sir William Jones, we find this passage in page 315: "He, whom his father or "mother, with her husband's assent, gives "to another as his son, provided that the

"donee have no issue, is considered as a son "given."

In the *Viva Darnava Setu*, translated by Mr. Halhed, chap. 21, sec. 9, the proposition is distinctly stated: "He who has no son, "or grandson, or grandson's son, or brother's "son, shall adopt a son; and, while he has "one adopted son, he shall not adopt a "second."

If we are to form our opinion of the law from the effect of these authorities, we can have no hesitation in coming to a conclusion adverse to the validity of a second adoption.

At the same time, it is quite impossible for us to feel any confidence in our opinion upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindoos, with which we cannot be familiar.

It is satisfactory, therefore, to find that, under the third head to which we have adverted, the European authorities, there is much assistance to be derived from the labors of those who have investigated this subject, with all those advantages of familiarity with the laws and languages of Hindoostan in which we are necessarily deficient. Here, unfortunately, as everywhere else, there is some discrepancy in the authorities.

Sir Thomas Strange, in his Elements of Hindoo Law, Volume I., page 78, second edition, expresses himself as follow: "In gene- "ral, it is in default of male issue that the right "is exercised; *issue* here including a grand- "son or great-grandson. But, as there exists "nothing to prevent two successive adop- "tions, the first having failed, whether effect- "ed by a man himself, or by his widow or "widows after his death duly authorized, so, "even where the first subsists, a second may "take place, such having been the pleasure "and will of husband, upon the principle of "many sons being desirable, that some one of "them may travel to Gaya, a pilgrimage con- "sidered to be particularly efficacious in "forwarding departed spirits beyond their "destined place of torture." In support of those propositions, he refers to two cases in Mr. Macnaghten's Reports—*Shamchunder* v. *Narayni Dibeh* (1 Ben. Sud. Dew. Rep. 209), which was decided in 1807; and *Goureepershaud Rai* v. *Mussamut Jamala* (2 Ben. Sud. Dew. Rep. 136), which was decided in 1814.

Now, the first of these cases decided only that a second adoption is valid where the first adopted son has died without issue, a point of law which is not disputed.

In the second case, a man having two wives gave authority to each of them to adopt a son; one of them made the adoption. He himself, together with the other wife, afterwards made an adoption, and it was finally held that the two sons were entitled equally to inherit to the husband.

This was a very peculiar case—it certainly seems to assume the validity of a double adoption; but the doubts in the case seem to have been rather as to the effect of the second adoption by the husband himself in revoking the authority given to the wife, than on the validity of a second adoption while a first adopted son is living.

This decision was stated by the Court to be in conformity with the preceding case of *Shamchunder* v. *Narayni Dibeh*, which in truth, for the reason already mentioned, in no degree supports it.

These, we believe, are the only European authorities referred to on behalf of Ramnadha. With reference to these cases, it may be observed that they have never been considered as settling the law upon this subject. In a note to the case of *Narayn Dibeh* v. *Hirkishor Rai* (1 Ben. Sud. Dew. Rep. 42), which it seems was supplied to the Reporter by Mr. Colebrooke, the translator of *Jagannatha's* Digest, he states the point as one of doubt, and in which, although the authority of *Jagannatha* was in favor of the adoption, the weighty authority of *Dattaka Chandrika* was the other way. Every European, without any exception, as far as we have any information, who has since examined the subject, has come to a conclusion adverse to the second adoption. In a Note to Strange's Elements of Hindoo Law, Vol. II., page 85, second edition, the law is thus stated by Mr. Sutherland, a very high authority: "A Hindoo can- "not have legally adopted *children;* a "son legitimate or adopted existing, any "subsequent adoption would be invalid; "at least the son so adopted would not "inherit."

In Mr. Sutherland's Synopsis of the Hindoo Law of Adoption, page 212, he thus expresses himself: "The primary "reason for the affiliation of a son being

he obligatory necessity of providing for he performance of the exequial rites cele-rated by a son for his deceased father, on which the salvation of a Hindoo is supposed o depend, it is necessary that the person proceeding to adopt should be destitute of male issue capable of performing those rites. By the term 'issue,' the son's son and grandson are included. It may be inferred that, if such male issue, although existing, were disqualified by any legal impediment (such as loss of caste) from performing the rites in question, the affiliation of a son might legally take place."

In Mr. Steele's Synopsis of the Law of Hindoo Castes, he states, page 48: "An adoption can take place only where no begotten son or grandson exists, or where the begotten son has lost caste." gain, at page 52: "In the case of he death of an adopted son (and total loss of caste is considered equivalent to death), another may be selected and given in the same manner; but a man, after adopting one boy, cannot adopt another at the desire of a second wife, &c. Only one adopted son can subsist at one time." It is true that the Treatise purports relate to the customs of the provinces Bombay, but we are not aware of a difference between the different provinces on this oint, though there appear to be some inor differences on other points of the w of adoption, and for this the last ection of the *Mitakshara* is referred to. he last paragraph in this page seems to be e statement of different opinions collected om different quarters, and, as might be pected, not very well agreeing with each her. But by far the most important uthority is Mr. William Macnaghten, whose rinciples and Precedents of Hindoo Law ere composed, as appears from the preface, ter collecting all the information that ould be procured from all quarters, and ter a careful examination of all the origiit authorities and of all the opinions of undits recorded in the Supreme Court for series of years.

This work was published after his report f the two cases already referred to, and f course he could not but be acquainted ith them; indeed, he refers to one of em.

Now, Mr. Macnaghten states the law as e considers it to be, without the slightest oubt or hesitation. He says, Vol. I., page o: "It is clear that a man having "adopted a boy, and that boy being alive, "he cannot adopt another;" and he examines the text that "many sons are to "be desired, in order that one may travel "to Gaya;" and says that it applies only to natural-born sons. We are informed by our very learned Assessor, Sir Edward Ryan, that this work of Mr. Macnaghten is constantly referred to in the Supreme Court as all but decisive of any point of Hindoo Law contained in it, and that much more respect would be paid to it by the Judges there than to the opinions of Pundits. Upon the particular point in question, Sir Edward adds all the weight of his own high authority, concurring, as he does, entirely in the law as stated in Macnaghten.

The Judges in the Sudder Court state that they are aware that this has been long considered a doubtful point, and they seem to proceed entirely on the opinion of the Pundits who favor the second adoption.

On examining the reasons assigned by those Pundits, they rest upon two main points: *first*, the text that "many sons are to be desired, in order that one may travel to Gaya;" *second*, upon the doctrine that "he who has only one son is to be considered childless."

Now, the first of these texts is entirely out of the case, if Mr. Macnaghten's explanation be correct; and, as to the second, in referring to the passages on which the Pundits rest, they manifestly relate, not to a person who receives a child, but to one who gives a child in adoption.

Upon the whole, therefore, for these reasons (which, as the point is of great general importance, we have thought it advisable to explain very fully), we have come to the conclusion that the adoption of Ramanadha was not valid, and that the judgment of the Sudder Court upon that point must be reversed.

If he had come to a different conclusion on this subject, it would have been necessary for us to examine into the effect of the deed alleged to have been executed by Vencatadry on the adoption of Jaganadha, and upon which one of the Courts below held that the subsequent adoption was invalid, as far as regarded the right of inheritance; but our view of the first point makes this unnecessary, and also removes all questions as to the alleged division between the supposed brothers. Feeling the hardship of

great family like this, some written communication would most probably be made, either on the occasion of the adoption itself, or on some subsequent occasion. And we find, accordingly, that communications were made to the Government by Vencatadry with respect to the adoption both of Jaganadha and Ramanadha, and that he endeavoured to have their titles recognized. The absence of any such communications in the case of Lutchmeputty is, therefore, important. There are, however, circumstances in evidence by which the weight of the objection is very considerably diminished. The adoption was resolved upon in April 1819; Amravati was in the Collectorship of Guntoor, and, at this time, Jaganadha was at law with the Collector of Guntoor, who refused to deliver up possession of some portions of the property of Vencatadry claimed by Jaganadha.

It is not, perhaps, very unnatural to suppose that, under such circumstances, Jaganadha would not willingly have any communications with the Collector, not absolutely necessary. But there were other disputes at this time between Jaganadha and the Government authorities. Atchama, or her brother on her behalf, had complained to the Civil Magistrate of the conduct of Jaganadha towards her, and he had been fined. From some of the documents there seem to have been other differences subsisting between them. That, at a subsequent time, there was some written communication to the Collector of Masulipatam, in which district a portion of this large estate was situated, there is much reason to believe. A most important letter upon this subject purports to be a letter from Jaganadha to his wife, and has much internal evidence of authenticity. It is dated 13th of July 1819, and is in these words: "As Puntooloo has sent "me a letter enclosing a foul arzee to the "authority on the subject of our adoption "of a boy, I caused it to be copied fair, "and despatched it this day through the "vakeel, because I thought it is proper; and "the said arzee was received by the junior "gentleman who is vested with the author-"ity of Magistrate. There was enmity "before between us and certain persons in "this place owing to one's malevolence "against us; and it has now occasioned "enmity between us and another man as well "as between us and the authorities of this "place in consequence of the authorities of "the Circuit Court having been pleased to "expose the calumny used by the persons in "this place against us; consequently, there "will happen obstacles to our affair, but I "am not uneasy, as there does not appear "anything that can be supported by the said "persons regarding the circumstance which "is now intimated to us. I herewith send "the copy of the said arzee, and will inform "you the remaining circumstances on my "arrival at that place." If this letter be genuine, it is almost conclusive. I observe that one of the Judges below states that the handwriting of this letter is not proved; but that, at all events, it is of no consequence, because, in fact, it is before the adoption and could not prove that the adoption had taken place. In the enormous mass of documents and parol evidence to be found in this case, far exceeding anything which, in our experience, has been brought before this Committee, it may be difficult to say whether it is or not regularly proved; but it seems to have been produced in evidence without any objection being made to its authenticity.

The objection which is made to it by the Judge, certainly, is not well founded. The transaction of the adoption might not have been completed at the date of the letter, because the usual ceremonies had not been performed, which are represented to have taken place in the following August; but the transaction was inchoate—the child had been given in adoption, and received in adoption, in the preceding April; and the terms of the letter are, therefore, perfectly applicable to the state of circumstances which existed at the date.

Upon this state of the evidence, the probability of the adoption, certainly of a child being brought up in the family, and introduced to the European authorities, with the same state and pomp as if he were an adopted son, with documents and witnesses in great numbers confirming the account, which documents and witnesses are open to no other suspicion than attaches to all Hindoo evidence, we should have had no hesitation in affirming the fact of adoption, if the case had come before us as an original cause.

We have been pressed, however, and very properly pressed, with the argument that this is a mere question of fact to be proved by evidence; that all the Judges before whom the case has come have disbelieved the evidence; that they had some advantage in coming to a conclusion which we have not; and that their judgments are to be

considered as verdicts of a Jury which ought not to be disturbed, except upon very strong grounds.

It is impossible not to feel that there is great weight in these observations; and they have occasioned one of the principal difficulties which we have felt in this most difficult case. We have, however, the same evidence which was in the Court below; we have had the advantage of a most full and able discussion at the Bar; and this Court is more accustomed to the examination of evidence than the Civil Servants of the East India Company, who preside in the native Courts, can be supposed to be. We have, further, the great advantage of having the grounds on which these judgments proceeded. We cannot say that they are at all satisfactory to our minds. By far the most important evidence in the case, the evidence of Mr. Roberts, is disposed of by assuming that this gentleman in his deposition, and in a communication which he made to the Board of Revenue entirely in the same sense, immediately on the death of Jaganadha, lay under a misconception of what had passed in a conversation in a language which was not vernacular to either party.

This appears to us a purely gratuitous assumption. It would have been a strong assumption if Mr. Roberts' opinion had been formed from a single conversation; but he states that he had frequent communications with Jaganadha upon the subject; that the boy was brought to him by Jaganadha four or five times, was treated by the Raja as his son, and was brought, as he considered, in order that his title as such might be known and recognized. His opinion is founded, not merely on what he heard, but what he saw, not on one, but on several occasions.

Supposing the facts of adoption to be proved, some objections were made to its validity in point of law; but they do not appear to us to be of any value.

Upon the whole, after very long and anxious consideration of the subject, we feel ourselves called upon to differ upon this point also, with respect to the adoption, from the judgment of the Court below, and to hold that Lutchmeputty was well adopted, and is entitled to succeed to the whole estate of Jaganadha, subject to such maintenance as his widows may by law be entitled to.

Our report to Her Majesty will be that, as to Puttoory Caly Doss (who seems to have been very improperly made a party to the proceedings), the appeal ought to be dismissed with costs; that the decree of the Court below ought, in other respects, to be reversed; that it should be declared that the adoption of Ramanadha was invalid, and that he was not entitled to be considered as a co-heir with Jaganadha to Vencatadry; but that, under the circumstances appearing in evidence, he was entitled to such property included in the gift made by Vencatadry after Jaganadha came of age, as Vencatadry had the power to dispose of; that Ramanadha was entitled to retain those portions of such property which came into his possession, and to have restored to him such portions thereof as came into the possession of Jaganadha, or to have compensation made for them out of the estate of Jaganadha; that the adoption of Lutchmeputty by Jaganadha was well proved; and that Lutchmeputty was entitled to succeed to the whole estate of Jaganadha; that with these declarations the cause should be remitted to the Court below, with directions to do what may be necessary for giving them effect; that no costs ought to be given in these appeals, or in the suits below, except to Puttoory Caly Doss.

Mr. Wigram.—In the Minutes, as stated by your Lordship, there is no allusion to the widows. I do not know whether that may be necessary.

The Chancellor of the Duchy of Cornwall.—That will be unnecessary.

Mr. Wigram.—Every other point is mentioned.

The Chancellor of the Duchy of Cornwall.—I have mentioned in the Minutes that the succession would be subject to any such right of maintenance as the widows might have.

The 27th June 1848.

Present:

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir A. Johnston.

Mortgage—Foreclosure—Service of notice.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Rasmonee Debea

versus

Pran Kishen Das.

According to Section 8, Regulation XVII., 1806, where mortgaged property is situate in two districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district.

The order of foreclosure having been served on the widow of the deceased mortgagor who had a life-interest, and also was the guardian of the minor adopted son and legal representative of the deceased, the service was held to be sufficient.

Lord Langdale.—This appeal is presented from a decree of the Sudder Dewanny Court of Calcutta, of the 21st December 1839, that decree having affirmed a decision of the Principal Sudder Ameen of the Civil Court of Moorshedabad, and this was done in a suit instituted by the respondent as plaintiff against the appellant and others; which suit was founded upon a certain order of foreclosure, which was made in the Court of Moorshedabad upon a mortgage-deed set forth in these papers.

It is alleged that the order of foreclosure was irregular, and ought not to be held operative, on the ground that it was granted contrary to Section 8 of Regulation XVII. of 1806, of which it is only necessary to state so much as directs that a petition for such an order is to be presented to the Judge of the zillah or city, in which the mortgaged lands or other property may be situated, and it provides that the Judge, on receiving the application, should cause the mortgagor or his legal representative to be furnished with a copy of it.

It is alleged here that the land was not situated in the district of the Court where the order was made, and that a copy of the petition was not served on the proper party.

Now, with respect to the first, we observe that the mortgage-deed expressly describes the land to be in the District of Moorshedabad. "I have possessed and enjoyed my paternal "talook in the district of Moorshedabad, "the Pergunna of Sumskar Bhedurpoor, "&c., without the participation of any "other."

That was, undoubtedly, therefore, the Court in which it might, *primâ facie*, be supposed an application for such an order as that ought to be made.

Now, in the plaint it is stated that the land is situate within the Moorshedabad Collectorate; but, in the answer of the Collector, it is expressly stated "that an order for "foreclosure was issued by the Court to his "widow Rasmonee Debea after the expiration "of the term of the conditional sale, and that, "on the expiration of the term of the order for "foreclosure, the property sold became the "right of the plaintiff; but by the proceeding "of the City Court, dated the 12th July "1837, it is clear that the order of foreclosure "was issued by the Moorshedabad Court, and "also that the estate of Sumskar Bhedurpoor "is under the jurisdiction of the Civil Court "of Beerbhoom. The order, therefore, for "the foreclosure issued by the Court of this "district is contrary to the provisions of "Section 8, Regulation XVII. of 1806, which "have not been at all observed."

To that it was replied that the land in question was within the two districts, and, that being the case, the order might be obtained in either of them.

Now, it does not appear that any rejoinder was filed to that replication, which was the allegation on which the cause proceeded.

It then appears that, afterwards, it is stated here, there was some application made to the Court of the Sudder Ameen. It certainly is somewhat singular that no description of the circumstances is given under which that application was made; but an application was made to the Court for something or other, and in consequence of that application an order was made by which the question which arose in the cause was to be tried in the Court of Moorshedabad. It related to the cause; it did not relate to the order

of foreclosure. But what is there to show in the whole course of these proceedings that these lands were not situated partly in one district and partly in the other district; and what is there to show in the course of the proceedings that, if that were the case, an order made in the Court of either district would not be a proper order?

We think there is nothing in this case to show that the order was not made in the proper Court.

The next objection made to the order is that there was no service on the proper party. Now, the parties who are interested in this case are the parties who are interested in what is called here the permission to adopt, by which an interest is given to the wife, who is now the appellant, for her life, with a species of power—a power to appoint an heir, which heir, when appointed, would have a right to the inheritance in certain estates; and we are of opinion the service upon this lady, the guardian, was quite sufficient service.

The only other objection which was made to the decree, not the order, is that there was a refusal to examine witnesses, the examination having been prayed for at the time the hearing was going on. Now, certainly it does seem as extravagant an application as ever was made to any Court, to ask, in the midst of the hearing, that there should be a permission to examine witnesses over again, those witnesses having been ascertained long before, subpœnas having been issued to compel them to come in and give their evidence, those subpœnas not having been served because they were then about to leave the place; but they might have been served immediately afterwards; and certainly it is not an application that ought to have been made to the Court. Their Lordships, therefore, are of opinion that that is no ground for this appeal, and the appeal must consequently be dismissed with costs.

Appeal dismissed.

The 7th July 1848.

Present:

Lord Brougham, Lord Langdale, Doctor Lushington, T. P. Leigh, Sir A. Johnston, and Sir E. Ryan.

Alluvial Land.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Mussamut Imam Bandi and Wajid Ali Khan

versus

Hur Gobind Ghose.

The owner of land before it is inundated remains the owner of it while it is covered with water and after it becomes dry.

The Right Hon'ble T. P. Leigh.—The suit in this case is brought to recover certain land containing something more than 612 beegas lying near the city of Patna. It is claimed by the appellants as part of a mouza belonging to them, called Akbarpoor. The respondent alleges that it is part of a mouza called Raipoor Hussun, which belongs to him; but he insists that, however this may be, he is in possession, and that it lies upon the appellants to make out their title. This is, no doubt, true, and the whole question in the case is, merely, is or not the land in dispute shown to be part of the Mouza Akbarpoor?

Upon a question of this description, very great weight would, at first sight, appear to be due to the judgment of the Court below. There are circumstances, however, here, which go far to destroy the authority of the judgment.

The Judge in the Provincial Court was in favor of the appellants. In the Sudder the Judges were divided in opinion; and, though three against one concurred in the decision, one of the three decided upon a ground which was repudiated by the other two, and those two unfortunately mistook the nature of the question which they had to try. They conceived that the question was as to alluvial land in the sense of land gradually gained from the river, and which, having no other owner, would belong, by way of accretion, to the lands of the adjoining proprietor. Whereas the ownership of the adjoining land, though essential in the consideration of a title founded on accretion, was of little or no value in the issue actually joined between these parties.

To consider, then, the real question. Some evidence has been received in the

Court below which, by the rules of English Law, would not have been admissible, and some has been given in a different form from that which those rules would have rendered necessary. But we are here dealing with the law as administered in Indian Courts by unprofessional Judges, and we must look at the evidence which they have received, and consider the effect which it ought to have produced.

Some points seem to be agreed upon between the parties. The whole of the district adjoining the land in dispute, as well as that land itself, is flat, and is very liable to be covered or washed away by the waters of the Ganges, which frequently changes its channel. The land in dispute was inundated about the year 1787; it remained covered with water till about 1801; it then became partially dry, till, in the year 1814, it was again inundated. After this period it once again re-appeared above the surface of the water, and by the year 1820 had become very valuable land.

The question, then, is, to whom did this land belong before the inundation? Whoever was the owner of the land then remained the owner while it was covered with water, and after it became dry.

The tract in dispute, together with something more than 187 beegas already recovered by the appellants, is alleged by them to form the Mouza of Akbarpoor. They allege it to be bounded on the west by the Koocha of Oodha Das, on the east by the Coocha of Kinoo, on the south by Mehrampoor, Moradpoor, and Afzulpoor, and on the north by Raipoor Hussun. This description places Akbarpoor to the south of the Ganges.

The respondent alleges that the whole of the land in dispute is part of Raipoor Hussun, and that, in fact, the whole of the appellant's talook is to the north of the Ganges.

The appellants found their title on a grant by the Emperor Aurungzebe, in the year 1679, to their ancestor, of the Talook of Subulpoor, which is there described as containing 6,756 beegas 12 biswas, and to consist of 11 mouzas, four under the name of Subulpoor, and one named Akbarpoor. This talook was to be held Maddad-i-mash, or free from tribute; and as the same exemption from payment of rent to the Government continued after the country came under the dominion of the East India Company, they had a material interest in having the extent of those lands clearly ascertained and preserved distinct from the lands liable to assessment.

The particular extent of Akbarpoor does not appear by the original grant: but in an Afrad-Tablak, of 1779, it is stated to contain 800 beegas, or about 1,600 English acres.

We have evidence, then, of the existence of the Mouza of Akbarpoor, and of its extent. The question is, where was it situate?

A number of witnesses produced by the appellants state that its site agrees with the boundaries alleged by them. An equal, or perhaps larger, number of witnesses, produced by the respondent, swear that these boundaries include, not Akbarpoor, but Raipoor Hussun.

In this contradiction of oral testimony, which occurs in almost every Indian case, we must look to the documentary evidence, in order to see on which side the truth lies; and it appears to us to leave no doubt upon the question.

The first document produced by the appellants purports to be a measurement made about the year 1784, in a dispute between the owner of the Talook of Subulpoor and the owner of some adjoining lands. In this document, the Mouza of Akbarpoor is stated to contain 800 beegas, and to extend east and west from Pahleza to Kotabpoor, north and south from Mehrampoor to Raipoor Hussun. These boundaries, according to all the maps, would include the property in dispute.

It is said, however, that no account is given of his document in the evidence, that it appears from a note of the translator to be full of inaccuracies, and that no weight was given to it by any of the Judges below. The other evidence in the case makes it unnecessary to place any reliance on this document, though there appears no reason to suspect that it is not genuine.

The next document produced is a measurement, made about the same period, and which seems to have been prepared for the purpose of distinguishing the lands which were exempt from tribute to the Government. It is very minute and particular, and there is no impeachment of its accuracy.

The 19th Article describes Akbarpoor Dakhili of Subulpoor as extending from the south opposite Bara Bungla to Raipoor on the north, and on the north-east from the limits of Kotabpoor, opposite to the Ghat of

Kinoo to the limits of Zahidpoor on the west.

Upon examination of the maps, it will be found that this description, though in different language, quite agrees with the preceding document.

We have next a report made by a public officer in the year 1787 upon a question of boundaries, which had arisen between the proprietor of Subulpoor and the proprietor of Govindpoor, about the time when the inundation began. In this report the boundary of Akbarpoor on the west is stated to extend to the Koocha of Oodha Das, and on the east to the Ghat of Kinoo; and it is described as lying south-west of Raipoor.

We have, then, three documents, all describing the same land by boundaries in substance the same, although the difference of the points referred to, and of the language used in the several descriptions, show them to have been the result of independent surveys.

Upon the main point, however, which, in truth, is decisive of the case, that Akbarpoor lay to the south of Raipoor, and not to the north, there is further evidence.

We have first a survey made by a Government officer in the year 1810, on the alluvial lands of Afzulpoor. In this Akbarpoor is stated to be to the south of Raipoor, and between Raipoor and Afzulpoor.

We have then a map prepared by Moonga Ram in 1812, in a dispute as to boundaries between persons having no connection with this suit, and here again Akbarpoor is placed to the south of Raipoor.

This is the material documentary evidence produced by the appellants, and against it none whatever is offered by the respondent. He does not even produce the description contained in his own title-deed, alleging that, for some reason, the bill of sale to him was not forthcoming.

He relies, however, upon certain suits which have taken place with respect to Akbarpoor, and upon evidence which has been given, and decisions which have been pronounced, in those suits. They appear to have been of two distinct classes: *first*, between the appellants, or their ancestors, and the Government; and, *secondly*, between those parties and the respondent. As the parties to those suits whom the appellants represent varied from time to time, but their interests and title are now vested in the appellants, we shall speak of the parties under the general term of the appellants in order to avoid the detail which would be necessary to explain the various changes and transmissions of interest. We will first consider the controversy with the Government. Soon after the time when the district now insisted to form Akbarpoor became dry, a part of it, marked No. 18 in Map F, was claimed and taken possession of by the Government as being alluvial, and being subject to revenue. The appellants claiming it as part of Subulpoor, an inquiry was directed by the Government; and the Collector, on the 13th of December 1828, reported in favor of the appellants, finding that the land in question was part of Akbarpoor, and adopting the boundaries of Akbarpoor stated in the documents already referred to.

The Government was dissatisfied with this decision, and brought the case before the Court of Special Commissioners of Patna, who, on the 15th of September 1829, confirmed the decision of the Collector, and an order was given to the Ameen to ascertain the boundaries of Akbarpoor, and the portion of it in possession of the Government.

In the execution of this order it was found that a large portion of the alleged district of Akbarpoor was in possession of the respondent Hurgovind Ghose, who objected to having it measured, and accordingly that portion only which was in the possession of the Government was measured, and found to amount to something more than 187 beegas. The remainder of the land, amounting to rather more than 612 beegas, was stated in the reports to be in the possession of Hurgovind Ghose.

In pursuance of these proceedings, the appellants, or their ancestors, were put in possession of the 187 beegas, and have since remained in possession.

It is very truly said on behalf of the respondent that he was no party to these proceedings, and cannot be bound by them. But, when it was contended at the Bar that the land thus given up to the appellants will satisfy the description of Akbarpoor contained in the preceding documents, the quantity of land contained in Akbarpoor and of the eastern boundaries were both forgotten. Neither of these important conditions is satisfied by limiting the appellants' rights in the manner proposed.

We now come to the disputes between the appellants and the respondent. It seems that, in the year 1813, both Raipoor Hussun and Subulpoor having been devastated by the Ganges, a portion of land which had become dry was claimed by the servants of the appellants as part of Subulpoor, and by the servants of the respondent as part of Rai-

poor, and quarrels leading to a breach of the peace took place between them. In consequence of this, the matter came before the Foujdari Court, which, on the 5th of May 1813, after observing very justly that the rights of the parties could only be decided in the Civil Court, ordered that, in the meantime, the appellants should be confined to the north bank of the Ganges, and the respondent to the south.

It is obvious that this decision involved no determination at all as to the right of boundaries. Accordingly, for the purpose of settling those boundaries, a suit was instituted in the Civil Court of Patna, and, on the 18th of February 1816, an order was made, which, if taken strictly, would exclude both parties from the land in dispute, inasmuch as it fixes the southern limit of Raipoor Hussun in a manner which would exclude it, and confines Subulpoor to the north bank of the Ganges. But the boundaries, as they affect the land now in dispute, were not in question, and the order, therefore, may be laid out of the case.

In 1819 another suit was instituted by the appellants against the respondent, in which the controversy was as to the boundaries of Raipoor and Subulpoor in lands lying to the north of the first sota.

This suit is relied on by the respondent for two reasons: *first*, because in the course of it a map was prepared by Hookum Chund, in which the land now in dispute was described as part of Raipoor Hussun; and, *secondly*, because, as it is said, if that land was not embraced in that suit, it might have been embraced in it, and therefore it is evidence to show that the plaintiff did not consider this land as belonging to him.

That this suit did not embrace the land in question is perfectly clear; and Hookum Chund, being examined as a witness, states that, when the map in question was prepared, he described the land now disputed as part of Raipoor Hussun upon the statement of the respondent's agent, the appellants or their agents not attending, the question being immaterial, inasmuch as the rights of Akbarpoor were to be determined in another suit to be presently mentioned. These circumstances appear to us to destroy the weight of the first argument.

As to the second argument, it is answered by the fact that, almost immediately after the institution of the suit just mentioned, *viz.*, in 1820, a suit was instituted by the appellants against the respondent and several other parties, claiming the land in question as part of Akbarpoor, but not setting forth with sufficient distinctness the lands which he claimed, or the quantities which he demanded from the several defendants.

Upon this ground his suit was dismissed in 1827, and in 1830 the present suit was instituted against the respondent.

It is not necessary to go through the several proceedings which have taken place in it. The evidence has already been referred to, and, after the most careful examination and enquiry, the Judge of the Patna Court, Sir James Harington, who resided close to the disputed land, which immediately adjoins the Court House, having the opportunity of examining the site and the different fixed points, and of applying the description given by documents and the oral testimony to the lands to which they refer, ultimately came to a decision in favor of the appellants, and expressed his opinion in a well-considered and well-reasoned judgment on the 14th of March 1834.

From this judgment there was an appeal to the Sudder, when, unfortunately, the judgment was reversed, upon the grounds which we have already adverted to, which destroy all the authority of the final decree.

We can entertain no doubt that the conclusion to which Sir James Harington came on the evidence was the right conclusion, and that the Court ought to have found that the land in dispute was shown to be part of Akbarpoor.

Two of the Judges relied on another objection to the appellants' claim, *viz.*, that it was barred by length of time. It is very doubtful upon the facts, as they now appear, whether such an objection, if it had been raised by the respondent, could have prevailed; but it is sufficient to say that the objection was not raised, and that the appellants, therefore, had no opportunity of meeting it by evidence.

Upon the whole, we have no difficulty in coming to a conclusion that the decree complained of ought to be reversed, and that the appellants ought to be put into possession of the land in dispute, and that they ought to be paid by the respondent the amount of the annual value of the land from the time of the institution of the suit in 1830, together with costs in the Court below, and that of this appeal each party should bear their own costs. And we shall humbly report our opinion to Her Majesty accordingly.

The 25th June 1849.

Present:

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Hindoo Law—Adoption.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Hurradhun Mookerjee

versus

Mothooranath Mookerjee and others.

An adoption may be made either by a man in his lifetime, or by one of his wives after his death under a power conferred upon her for that purpose by her husband.

Rt. Hon'ble T. P. Leigh.—THE suit in this case was instituted by the appellant against Goluk Chunder Mookerjee, Rushanund Mookerjee, and Unoop Narain Mookerjee. The appellant alleged that he was the adopted son of Ghunsam Mookerjee, the deceased brother of the defendants, and he prayed to be put into possession of the property of Ghunsam. Neither Rushanund nor Unoop Narain appear to have put in any answer to this demand in the Provincial Court. Goluk Chunder, however, put in an answer by which he denied the adoption of the appellant, insisted that he had never been separated either in property or board from Ghunsam, and alleged that Ghunsam had, immediately before his death, made a deed of gift of all his property to him, Goluk.

The Provincial Judge, before whom the case first came, was of opinion that the adoption was not proved, and that the deed of gift to Goluk was proved, and he decreed accordingly.

The Sudder Court, on appeal, agreed in opinion that the adoption was not proved, but they disbelieved or doubted the genuineness of the deed of gift to Goluk, and they varied in that respect the decree of the Court below, dismissing the appellant's suit without prejudice to this question. From this decree of dismissal the present appeal is brought. Several witnesses on the part of the appellant have sworn to the different facts necessary to prove the adoption. On the other hand, the respondents have produced witnesses who swear to facts inconsistent with such adoption. In such circumstances, much must depend upon the probabilities of the case to be collected from those facts as to which both parties are agreed.

The adoption of the appellant is alleged to have been completed in the autumn of 1824. At this time it is clear that Ghunsam was advanced in years—about sixty-seven years old; that he had two wives, to whom he had been long married, by neither of whom he had ever had issue, and both of whom were of such an age as to make it in the highest degree improbable that he should ever have by them a son of his body. One is stated by the respondent's witnesses to have been about 57, and the other about 36 or 37. He seems, long before this period, to have despaired of having such issue, for eighteen years before he had adopted a boy named Banee Madho, the son of his brother, the respondent Goluk Chunder. In April 1824, Banee Madho had died without issue. These are facts as to which there is no controversy.

According to the religious tenets of the Hindoos, a man's state after death, his deliverance from a place of suffering called *Put* (the expression used in the translation of the documents before us is "his salvation"), depends upon his leaving a son to perform certain rites and ceremonies after his death. That these opinions were shared by Ghunsam is clear from the evidence produced on both sides, and he had acted in conformity with them by the adoption of Banee Madho. Is it then more probable that, on Banee Madho's death, he should supply his place by the adoption of another son, or that he should deliberately and purposely incur the penalties which, according to his opinions, would attend the omission to discharge this duty? The former proposition is that on which the appellant relies; the latter must be maintained by the respondent.

An adoption may be made either by a man in his lifetime or by one of his wives after his death, under a power conferred upon her for that purpose by her husband; and the case of the appellant is that Ghunsam had at first, in a fit of sickness, provided for the adoption in the latter form, but that, afterwards, having recovered, he made the adoption himself.

The facts establishing these propositions are sworn to by several witnesses, and documents are produced confirmatory of their statement; and, with an exception to which we shall presently advert, neither the witnesses nor the documents appear to be open to any imputation beyond that which applies to all Hindoo testimony, *viz.*, the facility with which false witnesses are procured, and false documents fabricated.

The probability in favor of an adoption of some child being very strong, is there any improbability that the appellant should be the object of selection? Upon the evidence he would appear to be the most likely to be chosen; he was a nephew of Ghunsam, the son of the respondent Rushanund; he was of a proper age, living in his house, and a great favorite with Ghunsam's sister; and Goluk appears to have had no other son of an age which would admit of adoption.

On Ghunsam's death, which took place on 30th January 1825, both his wives became suttees. There is evidence that his funeral ceremonies were performed by the appellant; and, on the 25th February 1825, the nazir of the Collectorate, within which Ghunsam held property, reported to the Collector the death of Ghunsam, and that he had left an adopted son, a minor, named Huradhun Mookerjee.

Ghunsam seems to have left surviving him, besides the three brothers already named —Goluk, Unoop Narain, and Rushanund—a half-brother, Beer Eshur. On the death of Ghunsam, Goluk, either under the alleged deed of gift, or as an undivided brother with him, claimed the whole of Ghunsam's property. In consequence of these claims of Goluk, disputes arose; and, on the 23rd April 1825, a petition was presented by Beer Eshur to the Collector of Nuddea, in which the appellant is mentioned as the adopted son of Ghunsam; and, on the 16th May 1825, a petition was presented to one of the Provincial Courts by Unoop Narain, in which the fact of the appellant's adoption is distinctly stated; and the same statement is repeated by Unoop in an answer put in by him in a late stage of the proceedings in this cause.

These disputes having led to some breach of the peace, the case was brought before the Foujdary Court; an order was made, by which Goluk was continued in possession of the property, until the right should be determined in the Civil Court; and, in October 1825, the plaint was filed in this cause.

The evidence of the appellant being such as we have stated, the objections made to it by the respondents, and the counter-evidence brought forward by them, are to be considered.

It is first said that the appellant's witnesses, who depose to the facts constituting the adoption, are, for the most part, in a low station of life, and likely to be influenced by the appellant. But it is sufficient to in answer that these witnesses depo the presence, on the principal occasio which they refer, of many other indivi whom they name, any one of whom have been called by the respondents, a not one single witness is examined fo purpose. One of the witnesses for the lant is the priest who performed the rel ceremonies of adoption. The fact o adoption is recognized by two membe the family immediately upon the dea Ghunsam, and, as far as appears by thing produced to us, is not denied by body but Goluk and his sons, who, h succeeded to his interest, are respond upon this appeal.

It was then said that several of the witnesses, who have sworn to the adop swear also that their names are writte witnesses to the *unumati pattra*, or in ment by which power to adopt was give Ghunsam to one of his wives, and tha referring to the transcript of the proceedi no names of witnesses appear. The orig document, however, was before the C below, and successively before se Judges, who, on other grounds, discred the witnesses; and, if so palpable an ob tion to their testimony had really exis we cannot suppose that by all those Jud it would have been overlooked.

The evidence for the respondents con ed mainly of the deed of gift to Goluk, of a report made by the police of the exa nation of the widows of Ghunsam on occasion of their becoming suttees, and alleged conversations with Ghunsam, in wh he is stated to have declared that he nei had adopted, nor would adopt, another after the death of Banee Madho.

As to the first document, the deed gift, we expressed in the course of the ar ment a clear opinion that it was a forg and the Counsel for the respondents ha attempted to maintain its genuineness.

The other document deserves more att tion. It contains the examination, by police-officers, of the widows previously their being burned with the corpse of th husband, and they are then stated to h declared that they had no son nor daugh which, it is said, would not be true, if appellant had been the adopted son of th husband.

On referring to the Regulations, howe under which the official examination t place, as well as to the nature of the exa nation itself, we think that the question d

only to the natural-born children, and t appears from the answer of the wi- in this case that they so understood it, ir words are: "We have no son nor ter; we are barren." The parole ony for the respondents is open to the ation that nearly all their witnesses e either to the execution of the deed to Goluk, or to conversations with sam, in which an intention to make the expressed. Now, that deed is palpably re fabrication.

this state of the evidence, if the case come originally before us, we could have o hesitation in holding that the appel- ad established his case; and the ques- is, whether we are to attribute so much t to the judgments already pronounced abstain from giving effect to our own ion. On examining those judgments, annot say that the reasons assigned by Judges are such as to add authority to decision. The Judge of the Provincial t appears to have considered that many umstances were necessary to the validity n adoption, which (whether usual or not) ainly are not required by law, and to e so far miscarried in examining the evi- ce or estimating its value as to be of nion "that there rests no doubt on the uthenticity of the deed of gift of Goluk hunder."

n the Sudder Court the same error ap- rs to have existed with respect to the law adoption as prevailed in the inferior Court, d no additional reasons are assigned for believing the appellant's evidence.

Upon the whole, we must advise Her jesty that the judgment complained of ht to be reversed; that it should be de- red that the appellant has made out his as the adopted son of Ghunsam Moo- jee, and that the case should be remitted the Court below, with this declaration, with directions, to give that effect to the ellant's claims in this suit which may be sequential upon that declaration.

The 12th February 1850.

Present:

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Practice—Presumption—Mesne-profits—Native Evidence.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Modhoosoodun Sandial

versus

Soroop Chunder Sircar Chowdhry.

Considering the advantages which the Judges in India generally possess of forming a correct opinion of the probability of a transaction, and in some cases of the credit due to the witnesses, the fact that the Courts below have decided against the validity of an instrument affords a strong presumption of the correctness of their decisions, but does not and ought not to relieve the Privy Council, as the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case.

A presumption arises against a claim for mesne-profits from non-claim for 7 years.

With reference to the lamentable disregard of truth prevailing amongst the natives of India, the Privy Council held that it would be very dangerous for the Court altogether to discredit witnesses deposing *viva voce* by reason of the necessity imposed on the Court to sift the evidence of such witnesses with great minuteness and care.

The Right Hon'ble the Judge of the Admiralty Court (Dr. Lushington).—THIS is an appeal from the Sudder Dewanny Court of Bengal, and the subject-matter of the suit is the mesne-profits of an estate in the pergunna Ookrah, claimed by the present respondent, in whose favor both the Zillah Court of Nuddea and the Sudder Dewanny pronounced decrees.

In the course of these proceedings, the appellant, who was the defendant in the Court below, pleaded an agreement contained in an instrument bearing date the 12th of February 1819, and the whole case turned upon the question whether this agreement was a genuine and valid deed, or, as contended by the respondent, a forged instrument.

Both the Courts below have decided against the validity of the instrument, a fact which, considering the advantages the Judges in India generally possess of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favor of the correctness of

their decision, but does not and ought not to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case.

We proceed, then, to a consideration of the evidence, and an investigation of the reasons assigned by the Judges in the Courts below for their decision. But, before commencing this task, a very brief statement of the facts of the case will be necessary.

The Board of Revenue, on the 29th December 1813, sold a property situate in Zillah Nuddea for arrears of revenue. That property consisted of 271 mouzas, of which 62 constituted dihi Bydnathpore, and 18 turruf Sookhsagur. By two purchases the appellant became the proprietor of one-half of this property, the other half was owned by persons of the name of Bundoojia. For some time joint possession was held of the whole estate, excepting dihi Bydnathpore and turruf Sookhsagur. These two districts the occupants held adversely, and against them suits to obtain possession were brought by the purchasers.

On the 8th of February 1819, these suits being still undetermined, the appellant, who held an eight-anna share, sold a two-anna share to the respondent. These facts are common to both parties, but, with respect to the payment of the purchase-money, there is much dispute; it will be necessary hereafter to advert to this circumstance, but it is more convenient at present to proceed with a statement of the facts which do not appear to be disputed.

On the 23rd of November 1819, the appellant and his co-owners obtained possession of dihi Bydnathpore under a decree of the Court. On the 27th of June 1822, the property was divided under the orders of the Collector, and to the respondent was allotted seven and three-quarter mouzahs in dihi Bydnathpore. In July 1826, the appellant sold the whole of his share of this property, excepting his share in turruf Sookhsagur and three and-a-half villages in another turruf, to a Mr. Harris. With Mr. Harris the respondent had disputes as to his share of this property; a litigation followed, which terminated by compromise on the 3rd of April 1832.

The plaint in the present suit was filed on the 8th of July 1833. By that plaint the respondent demands Rs. 49,999 as mesne-profits from the 19th of January 1819, to the 11th of April 1826, interest included. It is certainly somewhat singular that such a demand as this, if well founded, should have been so long delayed, no less than seven years having elapsed from the period when the claim ended before the commencement of a suit to recover what is alleged to have been due, yearly at least, if not half-yearly, for seven successive years from 1819. This is surely a circumstance which requires a very satisfactory explanation, for necessarily, after the lapse of so many years, there must be great difficulty in ascertaining the truth of such a demand, not to mention the presumption against it from non-claim for so long a time. It appears, however, from the plaint, and also from other proceedings in this cause, that the respondent, in 1824, instituted a suit against the appellant, in which he claimed mesne-profits between the 12th of April 1819, and the 14th of December 1823, of this same dihi Bydnathpore. In defence to this suit, the appellant pleaded two agreements: one an agreement dated the 12th of February 1819, and the other an agreement dated the 15th of May 1822. The respondent, in reply, admitted the execution of this latter agreement, and denied the former altogether; various documents are produced, amongst others the two agreements; and the signatures attached to each were compared with each other, but from this comparison no result was obtained. No evidence as to the execution of the disputed agreement was, so far as appears, produced.

The decree of the Court, bearing date the 10th of January 1826, was to this effect, that the respondent should be non-suited, with leave to correct his plaint, and bring a fresh suit.

From this period, January 1826, to April 1833, no proceedings were adopted by the respondent to recover any part of these mesne-profits. He states himself (for another purpose indeed) to have been a man of wealth and substance; he enters into litigation with Mr. Harris, who purchased from the appellant, but he never, till April 1833, attempts to recover either the mesne-profits due, as alleged, at the commencement of the suit of 1824, nor those subsequently accruing till 1826, when Mr. Harris made his purchase. There is nothing in the course of these proceedings that we can discover, which can in any way satisfactorily account for this delay, if the respondent had really and truly a *bonâ-fide* claim to

these mesne-profits. He was warned by the Judge in 1826 of the errors contained in his plaint according to the conception of the Judge, namely, that, being in possession of the property, he claimed for the mesne-profits. Whether or not that was a real error, we need not decide; but this is clear that he was at liberty to bring a new suit, and to shape his plaint as he might be advised.

But this is not all. He was distinctly apprised of the nature of the main defence to his action, namely, that his claim was precluded by the agreement of the 12th of February 1819; that the Judge expressed his opinion that the appellant, in some part of his defence, was attempting to deceive the Court, and yet for seven years the appellant does nothing. Surely it affords no weak presumption against a claim so long delayed, that the respondent, with full knowledge of all the facts, and the nature of the defence, should so long neglect his own interest, with ample means of protecting it.

But to resume the narrative. The answer to this plaint, which is at page 7 of the Appendix of 1833, is substantially, though a great deal of argument is mixed up with the real defence, that the respondent executed, on the 12th of February 1819, the deed produced in the former suit, and that, by the tenor of that deed, the respondent is precluded from maintaining this suit.

This agreement of the 12th of February 1819 is to be found at page 92. It will be expedient to state concisely the contents of that agreement, and then to consider whether such contents are consistent with the proved circumstances of the case, and whether the execution of such a deed is, on the whole, probable or improbable. This deed is, in the name of the respondent, addressed to the appellant. It states that a bill of sale and a receipt of the amount value had been executed by the appellant; that the respondent, awaiting the entry of his name in the Collectorate records, had not paid the money, but had executed a bond for it that, five days after recording the name in the records, the money should be paid. The first part of this recital, so far as relates to the bill of sale, is admitted to be true; but in this agreement the receipt is said to bear even date with the bill of sale, *viz.*, February the 8th, whereas, on inspecting it, the date is the same as that of the agreement itself, namely, the 12th of February. This circumstance naturally gives rise to some suspicion; nor is that suspicion cleared away by the explanation offered that the receipt was written on the 8th, but dated afterwards on the 12th, when the bond for payment of the purchase-money is said to have been given.

The agreement then states that the purchase-money was not paid, but that a bond was given for it, conditioned for payment of the money five days after the respondent's name should be recorded in the Collectorate. The bond was, during the interval, not to carry interest, and no claim was to be made for principal during that time. Though at first sight it may appear strange that, instead of natural payment, a bond should be taken, yet there are circumstances which tend to reconcile this arrangement with probability, which is the only reason for examining it, as no dissent exists as to the payment itself, whensoever or howsoever made.

The vendor himself was not in possession of a part of the property purported to be sold. Suits at his instance were depending for the recovery of that property, and the results of such suits must, in some degree, have been uncertain. It was impossible, therefore, for the vendor to give possession of all the property purported to be sold, and consequently not improbable that the purchaser should decline to pay the purchase-money until put in possession. The respondent avers that he paid the money at the time, and that the bill of sale and receipt were duly registered, and so they appear to have been; but surely it was or ought to have been (had not his own delay prevented it) in the power of the respondent to have proved the payment—the sum purported to be paid is Rs. 77,500 in cash, current coin, and before three witnesses. The sum total is between Rs. 7,000 and Rs. 8,000; could it be a matter of difficulty to have proved so large a payment in money, and was it not a most important fact in the cause, as it would have falsified a very material averment in this most important instrument? Yet no attempt is made to establish a fact of this importance. We cannot, therefore, say that this statement in the agreement is wholly improbable, and certainly it is not refuted by the respondent. It is right, however, on the other hand, to observe that there is no proof of the execution of this alleged bond, nor of any payment made under it according to the agreement, omissions which justly give rise to some suspicion. There is nothing contrary to justice in the provision contained in the agreement that, during the period before the entry of the

purchaser's name in the books of the Collectorate, no interest should run upon the bond, and, on the other hand, no part of the profits be payable to the respondent.

The agreement then provides that possession shall not be given to the respondent of dihi Bydnathpore until, in the event of the pending suit terminating favorably to the then owners of the property, that part of the estate lying in dihi Bydnathpore had been partitioned off, and possession given; that in the meantime the purchaser should pay the Government revenue, but should have no claim to the profits, the vendor, the present appellant, paying the embankment and other expenses belonging to the pergunnah, and also the costs of the pending suits. If the suit should not be successful, then the rents collected at the joint management office are to be applied to pay the expenses.

It was contended that this arrangement was so unjust and inequitable, so injurious to the interests of the respondent, that the execution of such an instrument by him was grossly improbable; and of such opinion were the Judges of the Zillah and Sudder Adawlut; but it does not appear to us that the conditions contained in this instrument are plainly so absurdly unjust as to lead to the conclusion that, on that account alone, the deed should be considered a forgery. Whether those conditions were unjust or not, depends on many facts of which we have no evidence or means of judging, on the result of contingencies the probability of which it is impossible for us to measure; and even the Courts below, though possessed of local knowledge, could not have adequate legitimate means to accomplish such a task.

We do not think it necessary to follow in detail the remaining contents of this instrument; an arrangement somewhat similar is made as to Sookhsagur, but this suit has no reference to this property. It was urged against the validity of this agreement-deed that it had not been registered, and, though it does not appear that registration was essential to confer upon it legal force, yet certainly the absence of registration is a circumstance for consideration. The deed of May 1822 was not registered also.

It is now necessary to consider the evidence as to the execution of this agreement-deed, which deed, it must be remembered, was deposited in Court in the suit of 1824. There are five attesting witnesses. The first witness who speaks to the deed is Nushee Ram Ghose, and his name as an attesting witness to the agree February 12th; and, if these pa correct, he was produced by the the respondent. He deposes to cution of the agreement, and iden it is very difficult to say that this so produced, is entitled to any cre no observation is made by either Judges upon his testimony. We able to concur with the Judge in th Court, that the circumstances to w refers destroy the credit of the wi we cannot forget that they are e seventeen years after the date of th ment.

Nubeen Chunder, page 122, anc testing witness, also proves the e and identity of the instrument, so al Koomar Dey, and their testimony is ed by the evidence of Kamula Ka Ram Mohun.

It is quite true that such is the able disregard of truth prevailing the native inhabitants of Hindust all oral evidence is necessarily receiv great suspicion, and, when opposed strong improbability of the transac which they depose, or weakened mode in which they speak, it may little avail. But we must be careful carry this caution to an extreme nor utterly to discard oral evidence because it is oral, or unless the imp or discrediting circumstances are found to exist. It would be very da to exercise the judicial function as credit could necessarily be given to v es deposing *vivâ voce*, how necessary it may be always to sift such evidenc great minuteness and care. It is a r able fact in this case that *the existe* an agreement, bearing date Februa 12th, 1819, is admitted. There is p ed a deed undisputed, bearing date the 15th, 1822, consequently, long the first suit was commenced, whic pressly recognizes an agreement-deed, February the 12th, 1819. It is sai there was a deed of that date, bu it was of a different tenor. Of this averment we do not find the slightest there is no evidence of any other of that date. This defence was n far as appears, set up in the forme of 1829, and surely the presumptio the absence of all proof to the co is that this deed of 1822 referred t

ed of February 12th, 1819, produced in
e cause, and produced as early as 1824,
hen it was not even alleged that there
as another deed of the same date of a
fferent tenor. Under these circumstances,
e consider that the agreement of 1822
fords a strong confirmation of the deed of
ebruary the 12th, produced by the ap-
ellant.

There is another observation made by
e Judge of the Zillah Court, which we
ink should be adverted to. The Judge
gues that the non-production of this deed
a suit as to Sookhsagur, though it was
alled for, is an argument against the valid-
y of the deed. We do not sufficiently
now the circumstances of that suit to
nable us to form any accurate opinion as
o the necessity of producing it; but, as
his very deed, long before that suit com-
menced, was deposited in Court in a prior
uit, and placed among its records, it is
difficult to conclude, as it was accessible to
both parties, that the non-production in that
cause is a proof of its being a forgery.
Besides, the deed of 1819 was no defence
to that claim. Among those papers are to
be found numerous extracts from the pro-
ceedings in various other suits, relating to
some parts of the estate originally sold in
1813. We do not think that any conclu-
sion, as to the main issue in this case, can
be safely drawn from those extracts. It
is very difficult from such extracts, only
to understand accurately such a series of
complicated litigation, and still more diffi-
cult and dangerous to rely upon isolated
parts of former proceedings between dif-
ferent parties, and for different purposes, as
applicable to the question in this case. We
do not find that the Judges in the Courts
below imported them into their reasons for
the conclusions to which they arrived,
except for the purpose of fixing the amount
of the mesne-profits. We, therefore, do
not deem it necessary to notice them more
particularly.

On the whole, we are of opinion that the agreement of the 12th of February 1819 is established by the evidence produced, and that it must be carried into effect. Consequently, the claim for mesne-profits of dihi Bydnathpore cannot be maintained for the period antecedent to possession on the dihi being completely partitioned off. And we do not find that it was completely partitioned off, and possession taken by the respondent at any time during the period for which mesne-profits are claimed by this action.

We are, therefore, under the necessity of reversing the judgment of the Court below, and of the two inferior Courts, and pronouncing that the respondent has failed in establishing his claim. There will be costs in the Courts below, but no costs here.

Lord Brougham.—We dismiss the suit in both Courts below, the Zillah and the Sudder Adawlut Court, with the costs below, but no costs here.

Mr. Turner.—Your Lordships will recollect that there were two appeals; the other appeal will, I suppose, follow the same fate as this; it raised substantially the same question.

The Judge of the Admiralty Court.—That appeal was not argued; it was agreed that the decision upon that appeal should follow the decision upon this.

Mr. Turner.—I think it was, my Lord.

Mr. Forsyth.—My learned friend, Mr. Loftus Wigram, said that he would not consent to the other appeal following the fate of this without saying something upon it, and he said a few words to your Lordships upon that second appeal.

Lord Brougham.—We thought that both appeals should be subject to the same fate, but there was a doubt whether Mr. Loftus Wigram should be heard then upon the other appeal, or whether we should decide this first, and we thought it better to take both at once. Judgment was given in both cases below.

The Chancellor of the Duchy of Cornwall.—Are the Counsel on the other side here?

Mr. Turner.—No, my Lord; my lea friend, Mr. Loftus Wigram, is not her present.

Mr. Moore.—My learned friend, Loftus Wigram, begged me to ask Lordships to be good enough to hear upon it when he came.

Lord Brougham.—Do not you recol that that happened which Mr. Forsyth sa I recollect it, and you would recollec much more, that we had a doubt whet we should not wait to hear the second app till after we had arrived at this stage, and was thought better to take both togeth and Mr. Loftus Wigram was heard upon t second appeal, and the other side did not a to be heard.

Mr. Moore.—It is very true, my Lord.

Lord Campbell.—We had better wait t Mr. Wigram comes before we decide th second case.

Mr. Moore.—I would take the liber of suggesting to your Lordships that th judgment which has been pronounced migh be taken as the judgment in both case unless my learned friend, Mr. Loftu Wigram, wishes to address your Lordship upon it.

Lord Brougham.—Very well.

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